

Book III

Obligations and corresponding rights

Chapter 5:

Change of parties

Section 1:

Assignment of rights

Sub-section 1:

General

III. – 5:101: Scope of section

- (1) This Section applies to the assignment, by a contract or other juridical act, of a right to performance of an obligation.
- (2) It does not apply to the transfer of a financial instrument or investment security where such transfer is required to be by entry in a register maintained by or for the issuer or where there are other requirements for transfer or restrictions on transfer.

Comments

A. The topics covered by the Chapter

The Chapter covers three topics – an assignment of the right to performance to a person who becomes the new creditor; a change of debtor by the substitution of a new debtor for the existing debtor; and the transfer to another person of the entire contractual position, rights and obligations, of one party to a contract. These topics are related to each other; they all involve a change in the parties to a legal relationship; but they are also different in important respects.

An assignment of a right to performance, often a right to the payment of money, does not involve any transfer of the assignor's obligations. The debtor's own rights continue to lie solely against the assignor. Since an assignment does not involve the release of either of the parties to a contract, it does not require the consent of the debtor unless the underlying contract so provides. Assignment is therefore to be distinguished from the situation where a third party is substituted for the debtor, who is released from liability completely or incompletely, an arrangement requiring the assent of all three parties (see Section 2 of this Chapter. It is also to be distinguished from the situation where a third party is substituted completely for one of the contracting parties, taking over both rights and

obligations. This also requires the assent of all three parties (see Section 3 of this Chapter).

B. The topics covered by Section 1

Section 1 applies only to assignments by a contract or other juridical act. It does not apply to transfers of rights by operation of law – for example, on death or bankruptcy. It is common to find statutory provisions to the effect that on the amalgamation or re-organisation of certain organisations or bodies, or on the transfer of businesses, rights and obligations are transferred by operation of law to the new entity. The Section does not apply to such cases. Nor does it apply to the transfer of rights by mere delivery of a document of title or other such document.

The Section applies only to assignments of rights to performance of an obligation. This covers contractual and non-contractual rights to performance, such as rights to payment under a unilateral undertaking, or rights to the payment of damages for non-performance of a contract, or rights under the law on unjustified enrichment to have an enrichment reversed by the payment of money or transfer of property. In practice, rights of various types are often intermingled and it would be inconvenient and unjustifiable to have one set of rules applying to the assignment of rights to performance of obligations under a contract and other rules applying to the assignment of other closely related rights to performance.

Rights to performance include rights to the payment of debts already payable or becoming payable in the future and rights to non-monetary performance such as the construction of buildings, the delivery of goods, and the provision of services. Rights to the performance of negative obligations, such as obligations not to compete within a certain area for a certain time, are also covered. However, the general limitations on the intended scope of these rules must be kept in mind. They are not intended to apply to public law rights and obligations. For example, the law conferring a right to certain social security payments may well provide that the right to the payments is not transferable. Nor is the Section intended to apply to family law rights and obligations.

C. Financial instruments and investment securities

Although the holder of a bond or stock in the nature of a registered financial instrument or investment security will have a right to payment against the issuer, such instruments or securities differ in important respects from ordinary rights governed by the law of obligations. Their transfer will be governed by special rules, generally involving an entry in the issuer's register. They are therefore excluded from the scope of this Chapter.

D. Negotiable instruments

Under the general provisions on the scope of these rules (I. – 1:101 (Intended field of application)) bills of exchange and other negotiable instruments are excluded. This is of particular relevance in the present context. Although a bill of exchange or other negotiable instrument may set up a series of contractual relationships, the transfer of rights under a negotiable instrument is usually effected by delivery, with any necessary endorsement, not by assignment. Since the obligation of the party or parties liable on the instrument is to pay the current holder, who may not be the original payee, there is no requirement of notice of the transfer as there would be for an assignment; and a debtor who pays an assignee who is not the holder of the instrument remains liable to the holder. Moreover, negotiable instruments are by their nature governed by distinct rules which in various respects differ sharply from those applicable to assignments. For example, a person taking a negotiable instrument for value and without notice of any defect in the transferor's title is not affected by such a defect or by defences that would have been available against the transferor, whereas an assignee takes subject to these matters.

While negotiable instruments as such are outside the scope of these rules, this does not necessarily preclude an assignment of the underlying right to payment. This is most likely to occur in a global assignment of assets which does not involve the delivery of negotiable instruments. Where a right to payment embodied in a negotiable instrument is assigned, negotiable instruments law will usually give the holder of the instrument priority over the assignee. This also is a matter not covered by the present Chapter.

E. Importance of assignment

Rights to payment or other performance of obligations represent a major tradable asset. They can be sold outright, as in the typical factoring transaction, or assigned by way of security for a loan or other obligation. The purpose of Section 1 of this Chapter is to set out principles and rules which are designed to facilitate the assignment of rights, whether individually or in bulk, whilst at the same time ensuring that the debtor's rights are not prejudiced by the assignment.

Notes

1. This Section covers the assignment of both monetary and non-monetary rights. It is therefore somewhat broader than the UN Convention on the Assignment of Receivables in International Trade (hereafter the UN Convention), which by its nature is confined to certain rights to the payment of money (art. 2).
2. It is common for the transfer of financial and negotiable instruments to be governed by special rules. For example, in SLOVAKIA the contractual assignment of monetary and non-monetary claims is governed by CC §§ 524 et seq., whereas the transfer of financial and negotiable instruments is regulated separately (cf. Act no. 566/2001 §§ 19 et seq. as amended – Securities Act). Similarly, in SPANISH law, the regulations on the transfer of financial instruments are excluded from the general assignment provisions in the CC

and contained in the Securities Market Law and the different Company Laws. GERMAN law provides for a subsidiary application to such transfers, see CC § 413.

III. – 5:102: Definitions

- (1) An “assignment” of a right is the transfer of the right from one person (the “assignor”) to another person (the “assignee”).
- (2) An “act of assignment” is a contract or other juridical act which is intended to effect a transfer of the right.
- (3) Where part of a right is assigned, any reference in this Section to a right includes a reference to the assigned part of the right.

Comments

Definitions

This Article introduces the key terms of “assignment”, “act of assignment”, “assignor”, and “assignee”.

An “assignment” of a right is defined as a transfer of the right from one person to another person. The preceding Article has already made it clear, however, that the rules in this Section are limited to voluntary transfers – that is, transfers by a contract or other juridical act. They do not apply to the transfer of rights by operation of law (for example by way of legal subrogation). The purpose of the transfer does not matter. It may be to give effect to an agreement to sell. It may be to give effect to a legal obligation to assign arising from some other source, such as a statute. It may be gratuitous. It may be for purposes of security or a trust. However, in the last two cases there are special rules elsewhere in these rules which have priority. The present Section will apply only subsidiarily in so far as a matter is not regulated by those special rules. See the following Article.

The “assignor” is the creditor who transfers the right. The “assignee” is the person to whom it is transferred.

An “act of assignment” is defined as a contract or other juridical act which is intended to effect a transfer of the right. In many cases the contract or other juridical act will actually effect the transfer. But there can be situations where, for one reason or another, the contract or other juridical act fails to achieve its purpose. For example, the right may be non-assignable by law. Or the person purporting to assign the right may not be the creditor. This is why it is defined in terms of what is intended rather than in terms of what is achieved.

The “act of assignment” (i.e. the contract or other juridical act which is intended to effect the transfer and which may actually effect the transfer) must be distinguished from the assignment itself – the transfer of the right from the assignor to the assignee – the result of an effective act of assignment. The act of assignment must also be distinguished from the

underlying obligation to assign, if there is one. An act of assignment will often derive from an agreement to assign. In some cases an agreement to assign is separate from and prior to the act of assignment and governs the wider business transaction or relationship of which the assignment will form part. In such cases the act of assignment may be a very simple unilateral act which contains no express undertakings or supplementary provisions at all. In other cases the agreement and the act of assignment may be embodied in a single contract document. The formation and validity of acts of assignment are governed by the general provisions on contracts and other juridical acts and not by this Chapter.

In these rules a valid agreement for an immediate assignment (or equivalent juridical act) suffices to effect the assignment if the other requirements of III. – 5:104 (Basic requirements) are met, and (unlike in some of the Member States' laws) there is no principle of abstraction. Thus if the agreement to assign (or juridical act) is invalid, there will not be an effective assignment.

“Right” includes part of right. In some cases, but not in all, a right can be assigned in part (See III. – 5:107 (Assignability in part)). Paragraph (3) is inserted purely for drafting purposes – to avoid the need for constant repetition of “right or part of the right”.

Notes

1. In most European legal systems a consensual assignment is considered to be based on agreement and is dependent on the validity of the agreement. However, GERMAN law, GREEK law, ESTONIAN law and SWISS law adopt a principle of abstraction by which the assignment is considered to be independent of the agreement to assign, so that a defect in the latter does not necessarily affect the validity of the assignment, though in most cases it will. (see for GERMANY BGH NJW 1959, 498, 499). Since SCOTTISH law follows the abstraction principle in general, it is thought, in the absence of direct authority that this also applies in assignments (*Reid*, The Law of Property in Scotland, no. 612; see further *ibid*, nos. 652-658. In Scotland the term “assignation” is used, but in these Notes, for the sake of consistency, this will be referred to as “assignment”. For a recent monograph on the Scottish law, see *Anderson*, Assignation). See, for a comparative treatment, Kötz, Rights of Third Parties, no. 67, reproduced in *Zweigert and Kötz*, An Introduction to Comparative law³, 446; for a Franco-German comparison, *Cashin-Ritaine*; for GERMAN law Staudinger (-Busche), BGB [2005], Pref. to §§ 398 ff, nos. 20-25; for GREEK law A. P. 481/1960, NoB 1961, 227; 946/2002 ChrID B/2002, 689; EIIDik 44 (2003) 1355; 826/2001 EIIDik 43 (2002) 731; CA Athens 459/1993 NoB 42 (1994), 206. In ENGLISH law a completed assignment of an existing right, as opposed to a mere agreement to assign or an assignment of a future right, is treated as a transfer of property and accordingly is not required to fulfil the conditions of a valid contract, such as consideration: *Holt v. Heatherfield Trust Ltd.* [1942] 2 KB 1, 5; *Chitty on Contracts* I²⁹, nos. 20-018, 20-027; *Goode*, Commercial Law³, 680-681.
2. The AUSTRIAN CC § 1392 describes assignment as a form of novation by substitution of a new creditor; the transfer, however, does not impose liability on the debtor and must not nosen the debtor's position (1395). In the BELGIAN, LUXEMBOURG and FRENCH CC the provisions relating to consensual assignments are contained in the

chapter on sales but extend to assignments based upon another relationship. Doctrine, however, treats the assignment as a matter of property law in the first place. In addition Title II of Book 4 of the FRENCH and BELGIAN CC arts. 2075 ff include provisions covering the pledge of rights. Similarly GERMAN law distinguishes between the assignment of rights, which is governed by the general rules on contract (CC §§ 398 ff) and pledge, which is governed by the rules on property law (CC §§ 1273 ff). The same holds true for ESTONIAN law (LOA §§ 164 ff and LPA §§ 314 ff respectively). The rules governing the consensual assignment of rights (*cessioni di crediti*) in ITALIAN law are laid down in CC arts. 1260-1267, in statute no. 52, 21 February 1991 and, about securitisation, in statute no. 130, 30 April 1999. The LUXEMBOURG CC deals with the assignment of rights in arts. 1689-1691 and 1295. The original provisions were modified in important respects by the Law of 21 December 1994 to relax the legal requirements. The SLOVENIAN LOA deals with assignment in §§ 417-426. Although regulated in the LOA, an assignment is considered to be a real contract in causal relationship to the obligatory contract (e.g. sale of the right). CZECH legal provisions relating to assignment of rights can be found mainly in the CC §§ 524-530, see also commentary by Švestka/Jehlička/Škárková, OZ⁹, 663-672. Some special commercial rules applicable to assignment of rights can be found in Ccom § 477).

3. In the NETHERLANDS the provision on assignment in CC art. 3:94 forms part of the general rules on transfer of ownership (CC arts. 3:83 ff). Dutch law considers a full transfer of fiduciary ownership to be void (on the basis of CC art. 3:84(3), as interpreted by HR 19 May 1995, NedJur 1996, 119), but recognises two forms of pledge of rights. The first is the normal pledge, which is considered possessory in character and for the creation of which it is necessary that the pledge be in writing signed by the assignor and that notice be given to the debtor: CC arts. 3:236(2), 3:94, 3:98. The second is the so-called 'silent' (or non-possessory) pledge, which does not depend on notice to the debtor but must be contained in a writing which is either authenticated by a duly authorised person (e.g. a notary) or has the date of its signature certified by a tax authority and the fact of certification entered in a register which is not open to the public. PORTUGUESE law treats the assignment of rights to performance as falling within the law of obligations, distinguishing between transfers (CC arts. 577 ff) and pledges (CC arts. 679 ff). Both outright assignments and assignments by way of security are covered by the NORDIC Uniform Promissory Notes Acts (DANISH Promissory Notes Act 1938, FINNISH Promissory Notes Act 1947, SWEDISH Promissory Notes Act 1936), parts of which apply even to the assignment of non-documentary, non-negotiable rights: Björn, 107. On DANISH law see Gomard, Obligationsret III, chap. 18 and von Eyben *a. o.* chap. 12.
4. Under POLISH law the assignment of rights to performance falls within the law of obligations; it is considered a contract between the creditor and a third party (assignee). The assignment is shaped as an agreement based on *causa*, see: CC art. 510 ("The contract of sale, barter, donation or any other contract which obliges transfer of the claim transfer the claim to the assignee, unless a special provision provides otherwise or the parties have agreed otherwise. If the conclusion of the contract of assignment takes place in the course of the performance of an obligation arising from a contract previously concluded and obliging transfer of the claim, from a bequest, from unjustified enrichment or from another occurrence, the validity of the contract of assignment depends on the existence of that obligation.")

5. In SPANISH law the assignment of rights to performance is regulated as a form of the sale contract. Notwithstanding, it is widely admitted that the assignment may be supported in other contractual cases. The assignment is dependent on its cause (it is not an abstract disposition), is not subject to any special form and brings about the transfer of property as from the day of perfection, without any kind of formality or notification to the debtor. See TS6 October 2004, RAJ 2004/5986 and Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Pantaleón*), Código Civil I, 1019 ff.
6. Being a part of the provisions on change of subjects of obligations, in SLOVAKIA, the right to performance can be assigned to a different subject through a contract between the creditor (assignor) and a third party, without the need of the debtor's consent pursuant to CC § 524. This applies also to commercial legal relations. On the basis of general rules on obligations (CC § 495), assignment is on principle a causal contract. The assignment of rights for purposes of security is regulated separately (CC § 554). However, the general rules on assignment of rights apply as to the requirements for the assignment (in particular the need for written form).

III. – 5:103: Priority of provisions on proprietary securities and trusts

- (1) In relation to assignments for purposes of security, the provisions of Book IX apply and have priority over the provisions in this Chapter.
- (2) In relation to assignments for purposes of a trust, or to or from a trust, the provisions of Book X apply and have priority over the provisions in this Chapter.

Comments

This Article serves as a reminder that there are special rules in other Books on proprietary securities and on trusts and that, in so far as there is any conflict, those rules will take priority over the rules of the present Chapter. Subject to that priority the rules of the present Chapter apply to assignments for any purpose.

Notes

1. In SLOVAKIA the provisions on assignment of rights are used also for assignments for purposes of security. Although there are no rules on trust, detailed provisions on fiduciary transfers of rights for purposes of security are provided for in the CC §§ 553-553e, which would prevail in cases of conflict. The same holds true for GERMAN law, where, however, some particular rules were developed to amend the rules on assignment for the purpose of security; the handling of both types of assignment differs in cases of insolvency, cf. Insolvency Act §§ 47, 51 no. 1. For trusts see the special rule in Insolvency Act § 47 (on “personal rights” which would include most trust relationships).
2. In SPAIN the basic rules on proprietary securities are in the CC arts. 1857 ff. Although the problem of priority of application has provoked discussions, it seems that it depends on the will of the parties and on the terms of the specific obligation whether the assignment provisions or the security provisions should have priority. Due to the limitations of

the formalistic approach, a functional approach should prevail; therefore, the application of potentially overlapping rules of law should depend on the intention and the purposes the parties seek in giving and taking security. Regarding trust, the SPANISH CC only regulates it in a testamentary framework (CC arts. 781-786).

Sub-section 2:

Requirements for assignment

III. – 5:104: Basic requirements

- (1) The requirements for an assignment of a right to performance are that:
 - (a) the right exists;
 - (b) the right is assignable;
 - (c) the person purporting to assign the right has the right or authority to transfer it;
 - (d) the assignee is entitled as against the assignor to the transfer by virtue of a contract or other juridical act, a court order or a rule of law; and
 - (e) there is a valid act of assignment of the right.
- (2) The entitlement referred to in paragraph (1)(d) need not precede the act of assignment.
- (3) The same contract or other juridical act may operate as the conferment of an entitlement and as the act of assignment.
- (4) Neither notice to the debtor nor the consent of the debtor to the assignment is required.

Comments

A. The basic requirements

Paragraph (1) sets out the basic requirements for an assignment of a right – that is to say, for an actual transfer. An act of assignment may be wider in scope. It may relate to rights which do not yet exist, or which are not yet assignable (e.g. because the debtor has not yet consented in a case where such consent is required) or which have not yet been acquired by the granter. This Article is not concerned with what an act of assignment may cover but with the requirements for an actual assignment. The several ingredients are elaborated in subsequent Articles. The time when an assignment takes place is covered in III. – 5:114 (When assignment takes place).

B. The existence of the right

The right must exist before it can be transferred. This is obvious. It is mentioned in paragraph (1)(a) only to point up the contrast between the actual assignment – the transfer – and the act of assignment. See III. – 5:106 (Future and unspecified rights) and III. – 5:114 (When assignment takes place).

C. The assignability of the right

The right must be assignable at the time when the transfer is to take place. On assignability, see III. – 5:105 (Assignability: general rule). An act of assignment can relate to an unassignable right and the transfer will then take place if and when the right becomes assignable, assuming all other requirements are met. See III. – 5:114 (When assignment takes place).

D. Right or authority to assign

The person purporting to assign the right must have the right or authority to assign. Again this requirement has to be satisfied at the time when the transfer is to take place. Normally the creditor will be the person making the assignment but the formula used in paragraph (1)(c) covers cases where the creditor acts through a representative and also cases where some other person is authorised by law to effect an assignment. For example, the law on the financial consequences of divorce may provide that a spouse may be ordered by a court to assign certain rights to the other spouse. If the spouse refuses to assign, a clerk of court may be authorised to effect the assignment on behalf of the recalcitrant spouse. See further III. – 5:111 (Right or authority to assign).

E. Assignee's entitlement

Paragraph (1)(d) answers a question which was left unanswered in the Principles of European Contract Law. It adopts the same solution as is adopted in Book VIII for the transfer of corporeal movables. The assignee must be entitled as against the assignor by virtue of a contract or other juridical act, court order or rule of law to the transfer of the right in question. This is of particular significance if the contract conferring the entitlement (for example, a contract of sale of the right) is void or avoided. The assignment then falls. See III. – 5:118 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation).

F. Valid act of assignment

An entitlement is not enough. A person might be entitled under, say, a contract or a court order to an assignment at some point in the future but that will not by itself effect a transfer. There will in that situation have to be a separate act of assignment to effect the transfer. Of course, as already noted, the juridical act conferring the entitlement may itself operate as an immediate act of assignment. There will then be no need for a separate act of assignment.

G. No requirement of preceding underlying obligation or entitlement

In most cases an assignment will be made because of an underlying obligation to make it. However, this is not an essential requirement under the present Article. A person can transfer a right to another even if not obliged to do so, and it does not matter whether there never has been an obligation or whether there has been an obligation which has come to an end before the assignment. This is made clear by paragraph (2) which expresses the same idea from the other point of view – that of entitlement. The assignee must be entitled to the transfer but the entitlement can arise from the act of assignment itself: there does not need to be a *preceding* entitlement.

The effects of the invalidity or termination of the underlying obligation (if any) are regulated by III. – 5:118 (Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation).

H. No need for separate act of assignment

Paragraph (3) makes it clear that there does not need to be a *separate* act of assignment – that is, an act of assignment separate from a contract or other juridical act giving rise to the assignee's entitlement. The contract or other juridical act which creates the entitlement to the transfer may itself, and very often will itself, operate as the act of assignment. The policy here is the same as in relation to the transfer of goods under Book VIII. An "abstract" system, drawing a clear distinction between the obligatory and the transferring aspect of, say, a contract for sale, is not adopted. It will be a question of interpretation whether a contract containing an undertaking to assign is to be construed as operating as an act of assignment or as requiring a separate later act of assignment.

I. Notice to debtor not a constitutive requirement

Paragraph (4) makes it clear that notice to the debtor is not required to effect the transfer of the right from the assignor to the assignee. However, as will be seen later, notice to the debtor plays a significant role in identifying a point in time after which the debtor is not discharged by paying to the assignor.

In some legal systems an assignment of a right is not validly constituted unless and until notice of the assignment has been given to the debtor or some other overt act performed, such as entry of the assignment in the assignor's accounting records. Failing such notice or equivalent act the assignment (i.e. the transfer of the right) is of no effect. The person attempting to assign the right remains the creditor.

There are two reasons for the approach adopted in the Article. The first relates to the question whether the notice requirement serves any useful purpose. Notice to the debtor is not equivalent to public notice (for example, by registration), since it is visible only to the debtor. While a requirement of notice may help to prevent a collusive ante-dating of an assignment made, for example, to overcome insolvency rules governing unfair pre-

ference, the date of an assignment is rarely in question and can usually be established by other means. The second, and more important, reason for omitting notice as a constitutive requirement is that it is inimical to modern receivables financing, which involves acts of assignment relating to a continuous stream of receivables arising from both present and future contracts. In the nature of things, future debtors cannot normally be identified at the time of the act of assignment. Moreover, in recent years there has been a sharp movement, particularly in factoring operations, from notification to non-notification financing, also known as invoice discounting, in order to avoid disturbing relations between the assignor-supplier and its customer, the debtor, and to allow the assignor to collect in the debts on behalf of the assignee. The use of non-notification financing depends heavily on the validity of the transfer of the debts from assignor to assignee. Accordingly any requirement of notice to the debtor as a constitutive element of the assignment could seriously undermine receivables financing generally and non-notification financing in particular.

J. Consent of debtor not normally required

Paragraph (4) also makes it clear that the consent of the debtor is not required for an assignment. There are, however, some cases where the consent of the debtor will have effects on the consequences of an assignment. One example is where there is a contractual prohibition of assignment. This will not make the right unassignable but, unless the debtor consents, it will preserve the debtor's right to pay the assignor and obtain a good discharge by so doing. (See III. – 5:108 (Assignability: effect of contractual prohibition) paragraphs (2) and (4)(a)).

Notes

1. Because national systems differ in their approach to assignment they also differ as to the requirements. In countries, such as GERMANY, where property law is characterised by the abstraction principle, this will also apply to assignments. In others, transfer of property is generally "causal" and the same applies to assignments of rights (see e.g. for AUSTRIA, *Koziol and Welser*, *Bürgerliches Recht* II¹³, 116 ff). See the Notes to III. – 5:102 (Definitions).
2. On formal requirements for an act of assignment, see the Notes to III. – 5:110 (Act of assignment: formation and validity).
3. In FRANCE and BELGIUM, where transfer of property is in principle non-abstract and consensual and even implied in the underlying contract for assignment (see the model of para (3) of the Article), the assignment is regulated in the CC in association with the contract most frequently underlying it, namely the sale. In Belgium, contemporary doctrine rejects the treatment by the CC and now clearly distinguishes the proprietary aspect from the underlying contract, which can be of any type, though the rule stands that 1° the act of assignment can be merely consensual (CC art. 1690(1)) and 2° parties having contracted an assignment are presumed to have fulfilled also the act of assignment (general rule on transfer of property in CC art. 1138). Notice to the debtor is not required for the transfer of property, but for the obligational effects vis-à-vis the debtor

(CC art. 1690(2)) and/or in relation to *bona fide* acquirers (CC art. 1690(3) and (4), see *infra* III. – 5:121). Belgian law on assignment in general thus exactly corresponds to III. – 5:104. BELGIAN law does not recognise a “security ownership” in rights of performance other than financial instruments. If the right is not a financial instrument, it is either an outright assignment (whether fiduciary or not) or a pledge (charge) (Cass. 17 October 1996, Foyer culturel de Sart-Tilman, RW 1996-97, 1395 obs M. E. Storme). In FRANCE an assignment of a right is treated as a sale of rights, only with a different terminology (CC arts. 1689-1695 refer to “*transport de la créance*”). The general rules on contracts and other juridical acts apply to it, unless it is of a type to which some special rule applies. It follows from these general rules that an act of assignment is subject to the general requirements of consent, capacity, object and *causa*. It need not normally be in writing and is not subject to any other requirement as to form (except for transfer of capital shares, which requires a writing under CC art. 1865). It is governed by the general rules of proof by which a writing is required for transfer of rights whose value is above an amount fixed by decree (CC art. 1341). However, acts of assignment differ from other contracts transferring property in that they also create a legal relationship (*lien de droit*) and in that the debtor must be informed of the assignment by way of notice (CC art. 1690). It is worth noting that the debtor’s consent is not required for validity (see Terré/Simler/Lequette, Les obligations⁹, 1217, nos. 1277 et seq.). It is worth noting also that acts of assignment which are not subject to notification (*signification*) have developed significantly in such cases as assignment of negotiable rights, assignment of professional rights to bank and credit institutions by a mere *bordereau* (Loi Dailly of 2 January 1981: CMF art. L. 313-33) and assignment for purposes of security (Law of 23 December 1988: CMF arts. L. 214-1 f): See Terré/Simler/Lequette, Les obligations⁹, 1217, no. 1297 et seq.).

4. In the NETHERLANDS notice to the debtor is required in order for the assignment to have any effect (CC art. 3:94), though sustained criticism of this rule seems likely to lead to a change in the law. See also ITALIAN CC art. 1262(1). In GREEK law (see Stathopoulos, nos. 203-206) the requirements for a valid assignment are: 1. a contract between the assignor and the assignee (CC art. 455) and 2. the assignability of the right (CC arts. 464-466 lay down when the right is unassignable). The assignment contract is without further formality valid between the parties, but for the assignee to acquire the right against the debtor and third parties, there must be notification of the assignment to the debtor (CC art. 460). In SCOTLAND notification to the debtor is required before the assignment takes effect as a transfer of the right (McBryde, Law of Contract in Scotland, nos. 12.83-12.100). CZECH positive law is generally in accordance with the content of the Article. See CC § 524 as commented by Švestka/Jehlička/Škárková, OZ⁹, 663-666. The contractual model is used and *causa* is required (see CC §§ 524.2 and 495). However, if the assignment is to affect the debtor notification to the debtor is required; the notification must be made without undue delay (see commentary by Švestka/Jehlička/Škárková, OZ⁹, 664 and CC § 526.1). In SLOVAKIA and POLAND neither the consent of the debtor (respectively SLOVAK CC § 524(1) and POLISH CC art. 509 § 1) nor notification to the debtor are a prerequisite for a valid assignment. However, the assignor is obliged to notify the debtor about the assignment. Under SLOVAKIAN law, if the assignor does not notify and if the assignee does not inform the debtor, the assignment will not affect the debtor (see CC § 526(1)). In POLISH law, until the assignor informs the debtor about the assignment, the debtor is discharged by performing

to the assignor, unless the debtor knew about the assignment at the time of the performance (CC art. 512).

5. ESTONIAN law and legal doctrine agree on the requirements for an effective assignment similarly to the present Article (LOA § 164; Varul/Kull/Köve/Käerdi (-Käerdi), *Võlaõigussaadus I*, § 164, no. 4.2). Generally neither notice to the debtor nor consent of the debtor is required. In order to protect the debtor, it is provided that if at the time of performance of the obligation to an assignor, the debtor is not and does not need to be aware of the assignment, the debtor is deemed to have performed the obligation for the benefit of the correct person (LOA § 169(1)).
6. In the SPANISH CC assignment is regulated only in the framework of the sale contract (CC arts. 1526-1536) but those rules are applicable to all assignable rights (*Lacruz Berdejo and Rivero Hernández*, *Elementos II*³, 217). The requirements of a valid assignment by the creditor are in SPANISH law the same as expressed in the commented article: CC art. 1112 provides that all the rights acquired via obligation are able to be transferred, except for when there is a contrary provision established by the parties or when such assignment is contrary to law; e.g. in the CC the right to alimony (CC art. 151(1)) or a future inheritance (CC art. 1271(2)) are non-transferable rights. It is obvious that the transferred right has to exist and the person who is assigning must have a title to transfer it (CC art. 1529: the seller is liable for the *veritas nomini* of the assignment). There is no requirement of notifying the debtor and the debtor's consent is not needed (*Bercovitz*, *Comentarios*: CC art. 1527).
7. In ENGLISH law a simple act of assignment, which may be merely an informal notification to the assignee that the right is assigned, or an instruction to the debtor to pay the assignee, suffices to effect an assignment in equity: see *Chitty on Contracts I*²⁹, no. 19-021. If the assignment is of a future right, an agreement supported by consideration may be required: *Chitty loc. cit.*, nos. 19-027 et seq. A legal assignment, which will enable the assignee to sue in the assignee's own name, requires formalities under the Law of Property Act 1925 s. 136: see *Chitty loc. cit.*, nos. 19-006 et seq. See generally *Chitty loc. cit.*, chap. 19.
8. In HUNGARY the CC § 328 provides as follows. (1) A creditor is entitled to transfer the right to another person by contract (assignment). (2) Rights which are of a personal nature and rights whose assignment is not permitted by legal regulation cannot be assigned. (3) The debtor must be notified of an assignment; the debtor is entitled to tender performance to the assignor before notification. (4) If the debtor is notified by the assignor, the debtor is allowed to tender performance only to the new creditor (assignee) after notification; in the case of notification by the assignee, the debtor is entitled to demand certification of the assignment. In the absence of certification, the debtor is entitled to tender performance to the person claiming to be the assignee solely at the debtor's own risk. Under CC § 329(1) an assignee is subrogated to the original creditor through the assignment, and security rights also pass to the assignee. Under CC § 329(2) notification of the debtor regarding assignment suspends the period of limitation. Under CC § 329(3) a debtor is entitled to invoke against the assignee defences and rights of set-off on the legal grounds prevailing at the time of notification. Under CC § 330(1) the assignor is liable as a security provider for the performance of the debtor's obligation to the assignee, up to the value of the consideration received in return for the assignment, unless the assignor has assigned the right to the assignee expressly as a non-guaranteed right or has otherwise excluded liability. CC § 330(2) provides that otherwise the provi-

sions on contracts of sale apply to assignments for consideration, while the provisions on donations apply to gratuitous assignments. Under CC § 331 if a right is transferred to another person on the basis of a legal regulation or official order, unless otherwise prescribed therein, the provisions on assignment are applied. In such a case, the liability of the previous creditor as a security provider is maintained only if so prescribed by a specific provision.

III. – 5:105: Assignability: general rule

- (1) All rights to performance are assignable except where otherwise provided by law.
- (2) A right to performance which is by law accessory to another right is not assignable separately from that right.

Comments

A. The general rule of assignability

The general rule is that all rights to performance of an obligation are assignable. This is, however, subject to any rules of law which limit or prohibit assignment. For example, III. – 5:109 (Assignability: rights personal to the creditor) provides that certain rights of a personal nature are not assignable. There may also be restrictions in national laws.

Illustration 1

H, a private individual, purports to assign all his future income and assets to A as security for a loan. Proceedings are brought in England to enforce payment. Under English law the assignment is void as contrary to public policy in that its effect is to deprive the assignor of all means of livelihood. This overriding rule of English law will displace the general rule of assignability.

There will often be mandatory rules to the effect that certain types of accessory rights cannot be transferred separately but only along with the main right.

B. Effect of contractual prohibition of assignment

The effect of a contractual prohibition of assignment is dealt with in III. – 5:108 (Assignability: effect of contractual prohibition).

C. Existing rights to future performance

The rights which can be assigned need not be immediately exigible. A right to a payment at some time in the future can be assigned and this applies even if the payment still has to be earned.

Illustration 2

A company, C, has entered into a contract with E to construct a factory, payment to be made in stages against architects' certificates. C may validly assign its rights to future payment although these are dependent on its execution of the contract works.

D. Conditional rights

A conditional right can be assigned. The assignee will take it subject to the condition.

E. Accessory rights

An accessory right is not assignable separately from the right to which it is accessory. The typical example of an accessory right is a security right of a type which is dependent on the primary right. It is for other branches of the law to decide which rights are accessory and which are not.

Notes

1. All European legal systems recognise the assignability of rights under existing contracts, though with exceptions, for example, where the assignment would be against public policy or where the rights are personal to the creditor: *Kötz*, Rights of Third Parties, nos. 68 ff. A global assignment of future rights by an individual will in most systems be considered contrary to public policy in that it deprives the assignor of future livelihood. Also considered against public policy in many jurisdictions are the assignment of salaries of public officers, such as judges, and the assignment of disputed rights. The Article requires effect to be given to any overriding mandatory rules.
2. In CZECH law the first rule is exactly and expressly the same. The assignment of civil as well as of commercial rights is still possible if not otherwise agreed between assignor and the debtor (CC § 525.2). In relation to a separate assignment of a right to performance which is by law accessory to another right, there is no such express provision but the applicable effective rule is the same, because by assignment of a right the appurtenances and all rights attached are *ex lege* transferred to the assignee (CC § 524.2).
3. Under ESTONIAN law claims for maintenance, claims for compensation for damage arising from a bodily injury or the death of a person may be assigned only if counter-performance of equal economic value is received in exchange for the assignment (LOA § 166(1)).
4. The DUTCH CC expresses the first rule but adds that the assignability of a right to performance may also be excluded by a contract concluded by the debtor and the creditor (art. 3:83). The same rules apply under GERMAN law and follow from CC § 398, see Staudinger (-Busche), BGB [2005], § 398, nos. 34 et seq. For several exceptions see the notes to the following Articles.
5. In SCOTLAND the general principle is the assignability of any right to performance of an obligation, except where otherwise provided, as in paragraph (1) of the Article. Apart

from statutory provisions on such matters as social security benefits, the main exceptions to the rule on assignability are alimentary provisions and rights strictly personal to the creditor. See *McBryde*, *Law of Contract in Scotland*, nos. 12.14-12.39; *Gloag and Henderson*, *The Law of Scotland*¹¹, nos. 8.16 and 33:01.

6. For the exceptions from the general rule of assignability in SLOVAK law, see especially CC § 525 and CCP §§ 317 and 319 (i.e. rights to performance that become extinguished with the death of the debtor at the latest, or rights the substance of which would be changed by the assignment, or rights which could not be subject to execution). Although any regulation of separate assignment of accessory rights is lacking, security rights cannot be assigned by their nature. It is however apparently possible to assign the right to performance without its appurtenances (cf. Judgment of the Supreme Court 4 Obo 210/01; Supreme Court's declaratory judgment Obpj 2/99).
7. The SPANISH CC art. 1112 provides that all the rights acquired via obligation are transferable, except when there is a contrary provision established by the parties or when such transfer is contrary to law. There is no express provision about separate assignment of an accessory right, but as the CC art. 1528 considers that when the principal right is assigned, the accessory rights are assigned as well (because of the impossibility of separating those rights), it is logical that a separate assignment of an accessory right is not possible in Spanish law (*Navarro Pérez*, *La cesión de créditos*, 114). That is also the rule when a right is transferred by the means of a subrogation (CC art. 1212).
8. In FRENCH and BELGIAN law the general rule is that all rights to performance of an obligation are assignable, including monetary and non-monetary obligations, conditional rights and disputed rights. However, the assignability of rights is subject to legal exceptions such as for rights to aliment or social benefits, salaries and in insolvency law. The effect of a contractual prohibition of assignment is expressly recognised in France by statutory law (Law NRE of 15 May 2001). See *Terré/Simler/Lequette*, *Les obligations*, 1217, no. 1278).
9. In ENGLISH law generally rights are assignable unless they are personal, assignment is forbidden by statute or the contract under which the right arises declares the right to be non-assignable, though in the last case the assignment may still be effective as between assignor and assignee. See *Chitty on Contracts*, nos. 19-042–19-056.
10. Under POLISH law the assignability of a right to performance may be excluded by statutory law, a contract, or the nature of the obligation (CC art. 509 § 1).
11. In GREEK law (see *Stathopoulos*, no. 206) a right to performance is unassignable: (1) when the right is not subject to attachment (CC art. 464); (2) the right, by reason of the nature of the performance, is personal to a particular creditor (CC art. 465), e.g. a right to the performance of a certain task where the personal factor is predominant (such as provision of confidential services) and (3) when the creditor and the debtor have agreed on its unassignability (CC art. 466).

III. – 5:106: Future and unspecified rights

- (1) A future right to performance may be the subject of an act of assignment but the transfer of the right depends on its coming into existence and being identifiable as the right to which the act of assignment relates.
- (2) A number of rights to performance may be assigned without individual specification if, at the time when the assignment is to take place in relation to them, they are identifiable as rights to which the act of assignment relates.

Comments

A. Future rights

Difficulty has been experienced with the assignment of future rights – that is, rights which do not yet exist as opposed to rights which exist but which are subject to a time restriction or a condition. Future rights might, for example, be rights under contracts which have not yet been concluded. There is a concern about the economic effects on the assignor of parting with future assets and possible means of subsistence and a perception that an act of assignment requires specificity of subject-matter at the time of its making, coupled with notification to, or acceptance by, the debtor which is often impossible in the case of future rights. But the commercial importance of receivables financing (i.e. the provision of finance through the purchase of, or loans on the security of, rights to payment and other rights to performance) and the impracticability of requiring rights to be individually specified or determinable at the time of the act of assignment have led to an increasingly general acceptance that an act of assignment can cover future rights and that the rights will then be transferred without the need for any new act of transfer once they come into existence. At the international level this is manifested by the 1988 UNIDROIT Convention on International Factoring and the UN Convention on Assignment of Receivables in International Trade. Under Article 5 of the former it suffices that the rights are identifiable to the assignment at the time they come into existence.

The present Article makes it clear that an act of assignment may relate to future rights. However, the actual transfer depends on the right coming into existence and being identifiable as the right covered by the act of assignment. No further act of assignment is required. The identifiability criterion need not be satisfied when the right comes into existence but must be satisfied before the right will be transferred.

Illustration 1

C, a credit card issuer, obtains a large loan from its bank, B, and agrees to assign to B its future rights against cardholders to a value not exceeding the amount of the loan. While this agreement is perfectly valid as a contract, it cannot effect a transfer, since it does not provide the means by which the assigned rights can be identified.

B. Rights not individually specified

Paragraph (2) makes it clear that there can be an assignment of a bundle of rights, the individual rights not being separately identified. This facility is important in practice. However, the rights must be capable of identification as covered by the act of assignment at the time when the assignment is to take place in relation to them.

Illustration 2

S, a company supplying timber to timber merchants, enters into a factoring agreement with F, a factoring company, by which S assigns to F by way of sale all its existing and future rights to payment arising under sale contracts made or to be made with S's customers carrying on business in the United Kingdom. This can validly effect assignments, since in relation to any future right it can be ascertained at the time it comes into existence whether it falls within the factoring agreement as a receivable due from a United Kingdom customer of S.

Illustration 3

S, a furniture manufacturer, supplies furniture to retail shops and department stores. S agrees to sell to F, a factoring company, such of its existing and future rights to payment as are listed in schedules from time to time sent by S to F. There can be effective assignments as to all rights so listed.

Notes

1. The assignment of rights under future contracts has long been recognised in ENGLISH and IRISH laws, which require identifiability but not specificity: *Goode*, Commercial Law³, 676-677. Similarly in SCOTTISH law a future right is assignable but must be defined: see *McBryde*, Law of Contract in Scotland, no.12.31. The same position is taken in the UNIDROIT Convention art. 9(1)(b)). However, under ENGLISH law a statutory assignment (which enables the assignee to sue in the assignee's own name) is confined to the assignment of existing rights of which notice is given to the debtor. Many jurisdictions have tended to be hostile to the assignment of rights under future contracts, partly on the ground of want of specificity and the fact that the rights cannot be "determined" at the time of the assignment, partly, in some cases, because of the legal rule that an assignment of rights is not complete until notice has been given to the debtor or the assignment has been accepted by the debtor, which of course requires that the debtor is identifiable. Though a number of systems now accept the principle of assignability of rights under future contracts, there is divergence as to the time at which the determinability of the right is required to be satisfied. In some systems it is sufficient if the rights are determinable at the time they come into existence.
2. This is the position under AUSTRIAN law (OGH EvBl 1969/15; JBl 1984, 85; SZ 61/74; 18 April 1974, JBl 1975, 654; OGH 4 March 1982, SZ 55/32 170; for the assignment of a bundle of rights, which is valid if the single obligations are determinable, see OGH 26 June 2001, *ecolex* 2001, 907) and the same is true of GERMAN law as regards transfers (*Kötz*, Rights of Third Parties, no. 82; *Staudinger (-Busche)*, BGB [2005], § 398, nos. 53 and 63) even if they take place for security purposes (*Busche*, loc. cit., nos. 60 et seq.) but

not as regards pledges (see CC § 1280). The same is true for PORTUGUESE law (see Brito, Factoring, 54; Cristas, Transmissão Contratual do Direito de Crédito, 313 f; Leitão, Cessão de Créditos (2005), 428 f). In other systems the rule that the right must be determinable at the time of the assignment is retained, either expressly or through a requirement of notification to the debtor or identifiability of the debtor as a condition of validity of the assignment. This is the position in SCOTTISH law (McBryde, Law of Contract in Scotland, nos. 12.30-12.31), DUTCH law (CC art. 3:84(2)) and probably LUXEMBOURG law, as regards ordinary pledges. In BELGIAN law, the assignment of future rights is possible but will only take effect when the right comes into existence. One has to distinguish 1° the underlying contract, 2° the act of assignment, and the effect. The contract can relate to any future right which can be defined, the act of assignment to any rights which can be identified, the effect to any existing right. However, a right which has already arisen from a contractual or non-contractual relationship is not seen as a future but as an existing right (e.g. future rent due under a contract of lease) and an assignment will thus have immediate effect. The position of CZECH doctrine is not certainly determined (see Švestka/Jehlička/Škárková, OZ⁹, 663-664) and, at present, there is no very established jurisprudence on this question. The ESTONIAN LOA § 165 requires the right to be sufficiently defined “at the time of the assignment”. As actual transfer, i.e. assignment, depends on the right coming into existence, this is understood as the requirement that the rights should be sufficiently defined at the time they come into existence (Varul/Kull/Kõve/Käerdi (-Käerdi), Võlaõigusseadus I § 165, nos. 3.2, 3.3.).

3. FRENCH law does not in principle recognise the assignment of rights under future contracts (see Terré/Simler/Lequette, Les obligations, no. 1178, but in the case of assignments to a bank or other credit institution the *Loi Dailly* of 2 January 1981 allows delivery of a memorandum (*bordereau*) identifying the accounts transferred which can include accounts from future operations where the amount of the debt and the identity of the debtor have not yet been determined (art. 1). A similar rule exists in DUTCH law in relation to a ‘silent’ pledge (CC art. 3:239(1), and see *Verhagen and Rongen*, chap. 4) but for ordinary pledges the requirement of notification to the debtor limits the possibility of assignment of future rights. In ITALY the prevailing view is that only rights arising out of existing contracts (including rights payable in the future) may be assigned (*Bianca*, Diritto civile IV, 589; *Perlingieri*, Cessione dei crediti, 7 ff. See also Cass. 90/4040). However, there is a special regime for factoring (Law no. 52 of 21 February 1991 art. 3) which permits the assignment to the factor of rights under future contracts. See *Bassi*, Factoring. In POLISH law there is no statutory provision in regard to the assignment of future rights. However, such a possibility is admitted by the doctrine and judiciary (e.g. Supreme Court 2 July 2004, II CK 409/03, Pr. Bankowe 2005/6/5; Supreme Court 30 January 2003, V CKN 345/01, OSNC 2004/4/65). A contract of assignment of a future right has to specify a relationship from which the future right will arise. On DANISH law on the assignment of pay not yet earned, of damages for personal injury and loss of dependency not yet awarded, see Notes to III. – 5:109 (Assignability: rights personal to the creditor).
4. In SPANISH law, and even though some previous doubts existed as to the time when proprietary effects were produced (see for a summary *Garcia Vicente*, CCJC 2005, 1099 ff), the TS 6 November 2006 finally has admitted the global assignment of future rights as a proprietary device.
5. Also in SLOVAKIA there is no explicit legal regulation of the assignment of future rights, but it is recognised by legal doctrine and practice. CC § 151c(2), which enables

the parties to put in pledge future or conditional rights, can be used by way of analogy. A similar scheme is known in the suretyship guarantee in commercial relations (Ccom art. 304(2)).

6. According to the prevailing view in doctrine and jurisprudence in GREECE the subject of an assignment can be a future right to performance but the transfer of the right depends on the identification of the right as far as its object and extent are concerned at the time of its coming into existence (see in Georgiades and Stathopoulos (*-Kritikos*), art. 455, no. 49; *Karakostas*, Interpretation of Civil Code, art. 455, § 1599.24; A. P. 1471/2000 EII Dni 2001, 701. See also the recent monograph of *Georgiades*, The assignment of future receivables).

III. – 5:107: Assignability in part

- (1) A right to performance of a monetary obligation may be assigned in part.
- (2) A right to performance of a non-monetary obligation may be assigned in part only if:
 - (a) the debtor consents to the assignment; or
 - (b) the right is divisible and the assignment does not render the obligation significantly more burdensome.
- (3) Where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.

Comments

A. General

The creditor may not wish to assign the whole right but only such part as is necessary to achieve the commercial purpose of the assignment. For example, a company wishing to borrow € 30 million from its bank on the security of a debt of € 200 million owed to it by a third party may want to assign to the bank only such part of the debt as will provide the bank with adequate security for the loan. Similarly, a wholesaler who has contracted to buy a quantity of fungible goods to be delivered in two separate consignments to be separately paid for and who has orders from two sub-buyers, each for half the total quantity, may wish to assign the right to the first consignment to one sub-buyer and the right to the second to the other.

Whether a right may be assigned in part depends partly on whether it is a right to performance of a monetary obligation or a non-monetary obligation.

(i) *Rights to money*

Paragraph (1) provides that a right to performance of a monetary obligation may be assigned in part. Partial assignment of a right to the payment of money does not usually lead to any practical difficulties, though it may expose the debtor to increased costs, which under paragraph (3) the debtor would be entitled to recover (see Comment B).

Illustration 1

L lends B €10 000. L can assign to A the right to €4000 forming part of the €10 000. If B incurs additional bank charges as the result of having to make two separate payments B is entitled to recover these from L or set them off against the liability to L.

(ii) Rights other than to money

Where the right is to performance of a non-monetary obligation the considerations are rather different. In the case of a non-monetary right it would often be unfair to the debtor to require a division of the performance, for this would change the relationship between performance and counter-performance in a manner which could prove detrimental to the debtor and could lead to problems if the assignee wished to terminate for fundamental non-performance. Accordingly, paragraph (2) of the Article provides that a right to performance of a non-monetary obligation may, unless the debtor consents to the assignment, be assigned in part only if the right is divisible and the assignment does not render the obligation significantly more burdensome.

Illustration 2

S contracts to sell 100 computers to B, delivery to be made to B in Hamburg in four instalments of 25 computers each. B can assign to A the right to delivery in Hamburg of one, two or three instalments, but cannot assign the right to delivery of part of an instalment, for this would require S to divide the performance of an obligation which by its terms is indivisible as to each instalment. It might also, depending on the facts, render the obligation significantly more burdensome to S.

Illustration 3

F engages C to build a factory, including a tool shed, for €20 million, payable in stage payments against architects' certificates. If F sells the tool shed to A for €50 000 while retaining the rest of the factory, F cannot assign to A its rights under the contract as regards the tool shed, because the contract is an entire contract under which C's performance is indivisible.

Illustration 4

The facts are as in Illustration 3 except that the contract allocates a separate price to the tool shed and stipulates that this is to become payable on completion of its construction. On selling the tool shed F can assign its rights relating to the construction of the tool shed.

B. Security or other accessory rights

Assignment of part of a right in conformity with this Article carries with it a transfer of a *pro rata* share of any security rights or other accessory rights securing performance of the debtor's obligations (III. – 5:115 (Rights transferred to assignee) and obliges the assignor to transfer to the assignee a *pro rata* share of all transferable independent rights (III. – 5:112 (Undertakings by assignor) paragraph (6)).

C. Protection of the debtor

From the debtor's perspective partial assignments have the disadvantage of bringing exposure to the expense and inconvenience of multiple rights. The debtor is already protected to some extent by the provision in paragraph (2) to the effect that a non-monetary right, even if of a divisible nature, cannot be assigned without the debtor's consent if that would render the obligation significantly more burdensome to the debtor. Paragraph (3) of the Article gives further protection by providing that where a right is assigned in part the assignor is liable to the debtor for any increased costs which the debtor thereby incurs.

A risk arises where the right as a whole is disputed, in which event the debtor, having pleaded and called evidence in one case, would face the burden of doing so all over again in subsequent proceedings, with the danger of conflicting decisions, the debtor's defence being upheld in one case and rejected in another. For these types of case the debtor's protection must be found in the applicable procedural law.

Notes

1. Divisible rights are assignable under the laws of most Member States of the European Union. In the ITALIAN CC partial assignment of credits is provided for in art. 1260(2). There is no special statutory rule for partial assignments under DUTCH law, but partial assignments have been explicitly recognised in case law: see HR 19 December 1997, NedJur 1998, 690 (*Zuidgeest/Furness*) and further *Verhagen and Rongen* chap. 8. The situation is the same in CZECH and POLISH law, where there is no express provision comparable to the Article but the existing possibility of partial assignment is not controversial (see respectively *Švestka/Jehlička/Škárová*, OZ⁹, 664 and *Mojak*, 1038). There is no explicit statutory rule allowing partial assignment under GREEK law, but the possibility is inferred from CC art. 456, which regulates the obligations of the assignor regarding the handing over of the documents proving the right. Under CC art. 456(2), if part of the right is assigned, certified copies of such documents are to be handed over to the assignee in lieu of the originals. Also, scholars state that assignment of part of a right is possible, provided that the right is divisible: *Stathopoulos*, *Law of Obligations*⁴, § 27, no. 9; *Filios*, *Enochiko Dikaio*, § 88A. In AUSTRIA the possibility of assigning parts of a right is recognised if it is a monetary obligation (see OGH 17 March 1987, SZ 60/46) or another divisible obligation (see *Schwimann (-Heidinger)*, ABGB VI³, § 1393, no. 3). None of these countries appears to have a particular rule for the protection of the debtor of the kind embodied in this Article, though German scholars have argued for such a rule, deriving from the principle of good faith (see *Staudinger (-Busche)*, BGB [2005], § 398, no. 46) and GREEK law is understood to require that the assignment should not be detrimental to the debtor: *Georgiades*, 409, no. 16; *Georgiades and Stathopoulos (-Kritikos)*, art. 455, nos. 44-45. Similar arguments have been made in PORTUGAL (*Cristas*, *Transmissão Contratual do Direito de Crédito*, 219). There is no regulation of assignability in part in SLOVAK law; although disputable, partial assignments are widely recognised by the courts (see e.g. Judgement of the Supreme Court 4 Obo 210/01; Supreme Court's declaratory judgement Obpj 2/99 – assignment of ancillary accessories

to a claim). In SCOTTISH law the assignability of divisible parts of a right to performance of an obligation is recognised (*McBryde*, *Law of Contract in Scotland*, no. 12.33). In ENGLISH law there cannot be a legal assignment of part of a debt, but an equitable assignment is possible. See *Chitty on Contracts* I²⁹, no. 19-014.

2. No specific rules are provided on the partial assignability of a right in the SPANISH CC. However, regarding monetary obligations, as they are by nature divisible, a partial assignment is always possible. When the obligation is non-monetary, it is usually considered that it is not assignable in part either because of the impossibility of dividing the object of the obligation, or because assigning it in part without the debtor's consent would make the obligation more burdensome for the debtor. (For discussion see *Navarro Pérez*, *La cesión de créditos*, 352).
3. In FRANCE transfer of rights may be partial, in which case the assignor and the assignee (or the assignees) may receive payment depending on the circumstances and unless otherwise agreed by the parties, without any right of preference for the assignor (See *Terré/Simler/Lequette*, *Les obligations*⁹, 1128, no. 1290).

III. – 5:108: Assignability: effect of contractual prohibition

- (1) A contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.
- (2) However, where a right is assigned in breach of such a prohibition or restriction:
 - (a) the debtor may perform in favour of the assignor and is discharged by so doing; and
 - (b) the debtor retains all rights of set-off against the assignor as if the right had not been assigned.
- (3) Paragraph (2) does not apply if:
 - (a) the debtor has consented to the assignment;
 - (b) the debtor has caused the assignee to believe on reasonable grounds that there was no such prohibition or restriction; or
 - (c) the assigned right is a right to payment for the provision of goods or services.
- (4) The fact that a right is assignable notwithstanding a contractual prohibition or restriction does not affect the assignor's liability to the debtor for any breach of the prohibition or restriction.

Comments

A. Conflicting interests

Where a contract contains a clause prohibiting the creditor from assigning rights under it two conflicting interests immediately come into play.

One interest is respect for freedom of contract and party autonomy. A contractual prohibition should in principle be respected. The debtor may have good commercial reasons for inserting a no-assignment clause. In the first place, the debtor may not want to have to deal with an unknown creditor who may be more severe than the assignor. Secondly, the debtor may wish to avoid the risk of overlooking the notice of assignment and paying

the assignor, in which event there would be a risk of having to make a payment or give other performance a second time, to the assignee. Thirdly, a debtor who expects to have continued mutual dealings with the creditor will wish to preserve the right of set-off, a right which would be cut off as regards cross-rights arising after receipt of notice of assignment. Fourthly, the assignee may be incorporated or have its principal place of business in a jurisdiction whose legal or tax regime is unfavourable to the transaction. There is, therefore, an argument for saying that an assignment in breach of a no-assignment clause should be ineffective, whether the contract contains an outright prohibition or restricts the creditor's right to assign, e.g. by requiring the debtor's consent.

The other relevant interest is in the free alienability of assets. Rights to performance of obligations, particularly monetary obligations, are important assets. The marketability of monetary rights is of enormous practical and economic importance. In relation to the transfer of movables it is a widely accepted principle, adopted also in these rules, that contractual prohibitions or restrictions do not affect transferability. The market in monetary rights is no less important today than the market in corporeal movables.

The laws of the Member States differ in the effect they give to anti-assignment clauses.

B. Balancing the interests

There are various ways in which the interests in freedom of contract and the interest in the alienability of assets can be balanced. One way, adopted in the UNIDROIT Principles (art. 9.1.9) and to a more limited extent in the Principles of European Contract Law (art. 11:301) is to distinguish between monetary rights, or some monetary rights, and other rights and to allow the first to be more freely assignable than the second, in spite of a contractual prohibition. However, such a distinction, especially if limited to certain types of monetary rights (such as in PECL "future rights to the payment of money") risks giving inadequate weight to the interest in alienability, which is not confined to certain categories of monetary rights or even exclusively to monetary rights.

The present Article adopts two techniques to balance the interests, one applying to assignments in general and the other only to assignments of trade receivables (see para (3)(c) and Comment C below). The general technique is to allow the right to be transferable (thus recognising fully the interest in alienability) while providing that the debtor can obtain a good discharge by performing to the assignor (even although the assignor is no longer the creditor). The debtor also preserves full rights of set-off against the assignor as if the right had not been assigned. This does not affect the debtor's right under III. – 5:116 (Effect on defences and rights of set-off) to invoke certain defences and rights of set-off against *the assignee* if the debtor chooses to pay the assignee and not the assignor. The debtor can also recover damages from the assignor for any loss caused by breach of the restriction or prohibition, although in practice such loss is likely to be minimal if the debtor is allowed to continue to perform in favour of the assignor. The debtor's interests are therefore protected and the principle of freedom of contract is respected so far as is possible consistent with not restricting alienability. The rules for the protection of the debtor do not prevent the debtor from consenting to, or acquiescing

in, the assignment and paying the assignee, should the debtor wish to do so. The debtor is permitted, but not obliged, to pay the assignor. The notion that the debtor can obtain a good discharge by paying someone who is not the creditor is perhaps strange at first sight but it is not unfamiliar in this context. It is widely recognised, for example, that a debtor who has not been notified of an assignment and does not know of it can obtain a good discharge by paying the assignor. This is the position under these rules also (see III. – 5:119 (Performance to person who is not the creditor)).

A practical advantage of the solution adopted here is that the assignee becomes the holder of the right as soon as the assignment takes effect and, as a result, is protected from the assignor's creditors so long as the right continues to exist. Once the debtor pays the assignor and is discharged the assignee can recover the proceeds from the assignor on the basis of unjustified enrichment. The assignor has been enriched by receiving a payment which discharges the debtor and therefore causes the assignee to suffer a corresponding disadvantage. The question of priority in the proceeds after the right is extinguished by performance is dealt with in a later Article (III. – 5:122 (Competition between assignee and assignor receiving proceeds)) in a way similar to that employed in article 24 of the United Nations Convention on the Assignment of Receivables in International Trade. The assignee's claim to the proceeds has priority over competing claims, such as the claims of the assignor's creditors, so long as the proceeds are separately identifiable in the assignor's funds. There is a particular need to protect the assignee in this situation because the assignee cannot obtain protection in the normal way by notifying the debtor. The assignee is helpless to prevent the debtor from paying the assignor. The fact that the debtor is allowed to pay the assignor and thus obtain some benefit from the contractual prohibition should not prejudice any more than is necessary the position of the assignee in relation to the assignor and the assignor's creditors.

C. Exceptions to rule that debtor can perform to assignor

The general rule stated in paragraph (2) is for the protection of the debtor. There is therefore no need for it if the debtor has consented to the assignment and no justification for it if the debtor has misled the assignee into believing that there is no prohibition or restriction. Exceptions for these situations are provided in paragraph (3)(a) and (b).

A further exception is provided in paragraph (3)(c). This applies a special rule for "trade receivables", a rule which is not found in the laws of the Member States but which has been adopted in a number of international conventions and also throughout much of North America. It is justified by a different consideration – the interest in enabling "trade receivables" to be used as a source of finance. In this case too the assignment is completely effective and the debtor who has been notified of the assignment must pay the assignee. This exception is particularly necessary where the assignment relates to a continuing stream of future debts, for example, by a supplier to a factor under a factoring agreement. In this type of arrangement it is manifestly impossible to expect the factor to scrutinise the individual contracts, which may run into hundreds, in order to see whether these contain a provision against assignment. Even where, as will usually be the case, the contract is a standard-term contract which does not embody such a provision, the assign-

ee who examines one such contract cannot be sure that the assignor will not at some stage change the terms without notification. So paragraph (3)(c) allows the assignment to take effect where it is an assignment of a right to payment for the provision of goods or services. In accordance with the normal rule, the debtor can invoke against the assignee the defences and rights of set-off allowed by III. – 5:116 (Effect on defences and rights of set-off). This exception is confined to the assignment of rights to the payment of money for the provision of goods or services; for it is in the field of receivables financing that the no-assignment clause typically creates problems. The exception in paragraph (3)(c) represents a response to commercial needs which is steadily gaining acceptance. See, for example, the American Uniform Commercial Code, Revised Article 9, section 9-406 (d); the 1988 UNIDROIT Convention on International Factoring, Article 6(1); and the UN Convention on the Assignment of Receivables in International Trade (2001), Article 9.

D. Right may be non-assignable for another reason

The Article deals only with the effect of a contractual prohibition or restriction on assignment. It is only such a prohibition or restriction which is denied effect by paragraph (1). If the right is non-assignable by law for another reason it will remain non-assignable. For example, a right may be non-assignable by virtue of the following Article on the ground that performance would be so personal to the creditor that the debtor could not reasonably be expected to render performance to anyone else. The rule in paragraph (1) would not render such a non-assignable right assignable merely because it had been reinforced by a contractual prohibition.

E. Assignor remains liable to debtor for non-performance of obligation

The overriding of contractual prohibitions or restrictions does not affect the assignor's liability to the debtor for non-performance of the obligation not to assign, a point made clear by paragraph (4).

F. Assignments in security

Paragraphs (2) and (3) of this Article do not apply to assignments in security of rights to the payment of money. See IX. – 2:301 (Encumbrances of right to payment of money).

Notes

1. The effect of a no-assignment clause on the assignee's rights against the debtor differs from country to country. Under the ITALIAN CC art. 1260(2), a no-assignment clause is ineffective as between assignee and debtor unless it is proved that the assignee knew of the clause at the time of the assignment, and the position is similar under GREEK law, CC art. 466(2) (though with a different allocation of the burden of proof), and POR-

TUGUESE law: CC art. 577(2). The ESTONIAN LOA § 166(2)-(3) clearly states that a no-assignment clause has no effect towards other persons. Under SPANISH law a prohibition against assignment is generally considered to be of no effect against an assignee except where the assignee acts in bad faith (*Diez-Picazo*, Fundamentos II, 813), but some authors consider that even an assignee who took the right without knowledge of the no-assignment clause cannot assert the right against the debtor unless the latter consented to the assignment (*Pantaleón*, Comentario, 1023). The case law affords as unique precedent the TS 26 September 2002, which implicitly grants efficacy to the prohibition of assignment (Commentary by *Veiga Cobo*, RDBB 2003, 281 ff and by *Cruz Moreno*, CCJC 2003, 915 ff). The position in ENGLISH law is thought to be that an assignment is effective as between assignor and assignee despite a prohibition on assignment: see *Chitty on Contracts*, no. 19-045. In one case it was held that an assignment in breach of a prohibition against assignment was wholly void (*Helstan Securities Ltd. v. Hertfordshire County Council* [1978] 3 All ER 262), but since the case concerned only the question whether the assignee could recover from the debtor the ruling went beyond what was necessary for the decision, and a subsequent comment on the case suggesting that the debtor could not validly prohibit the assignor from disposing of the sums paid to it by the debtor (*Goode*, “Inalienable Rights?”) received sympathetic consideration by the House of Lords in *Linden Gardens Trust Ltd. v. Lenesta Sludge Disposals Ltd.* [1994] 1 AC 85, 104, though it was not found necessary to decide the point. Subsequent cases have held that an anti-assignment clause does not prevent the assignor holding any proceeds received from the debtor on trust for the assignee, and if the debtor has not paid it may be that the assignee can force the assignor to sue on the assignee’s behalf. See *Don King Productions Inc v. Warren* [2001] Chap. 291; *Barbados Trust Co. v. Bank of Zambia* [2007] EWCA Civ 148, [2007] 1 Lloyd’s Rep 495. However, it is likely that the debtor may refuse to recognise a prohibited assignment and can rely on set-offs that arose even after it had been notified. There is no exception for receivables in English law but one was recommended by the Law Commission in its Report on Company Security Interests (Law Com 296, 2005), para. 6.73. In SCOTLAND no-assignment clauses are held effective: *James Scott Ltd. v. Apollo Engineering Ltd.* 2000 SC 228; *McBryde*, Law of Contract in Scotland, no. 12.38. NORDIC law fully recognises the validity and effectiveness of a no-assignment clause vis-à-vis the debtor (*Ussing*, *Aftaler*³, 229), as does DUTCH law (CC art. 3:83(2)) except in the rare case where the debtor led the assignee to believe that the right was assignable and the assignee relied in good faith and reasonably on the debtor’s statement or other conduct (CC art. 3:36). In FRANCE it has been held that, since the assignee is not a party to the contract containing the no-assignment clause, the assignee is not bound by such clause and can obtain payment from the debtor: Cass.com. 21 November 2000, D. 2001, p. 123, obs. *Valérie Avena-Robardet*). However, the principle of the validity of a no-assignment clause and the effect of a contractual prohibition of assignment is expressly recognised in a statute enacted on 15 May 2001 (Law NRE “*sur les nouvelles régulations économiques*”). See *Terré/Simler/Lequette*, Les obligations⁹, 1218, no. 1278. LUXEMBOURG law has no express provision corresponding to the present Article. In POLAND some authors maintain that a no-assignment clause is effective towards other persons even if they act in good faith (see: *Czachórski*, *Zobowiązania*, 360). Undoubtedly, as provided in CC art. 514 with respect to claims verified in writing, the prohibition of assignment is effective towards an assignee acting in bad faith. In SLOVENIA a no-assignment clause prevents assignment in civil law relationships even against the third

party. In commercial relationships such a clause has no effect. See LOA § 417(2) and (3). The basic rule under GERMAN law is the effectiveness of a no-assignment clause, see CC § 399. But Ccom § 354a establishes a particular rule for monetary claims under commercial contracts, which remain assignable; but the debtor is protected as in III. – 5:108(2). In SLOVAKIA a contractual prohibition of assignment is detrimental for a valid assignment of rights pursuant to CC § 525(1) (“It is impossible to assign a claim in breach of a contractual prohibition”). This would affect also an assignee in good faith.

2. In AUSTRIA the rules on contractual prohibitions of assignment have recently been changed. The new CC § 1396a provides that with monetary obligations between parties who are not consumers a contractual prohibition of an assignment is only valid if it has been individually negotiated and does not considerably worsen the position of the creditor. Besides that the prohibition is only of relative effect: if the right is transferred despite a prohibition the transfer is still effective even if the assignee knew of the prohibition and without the assignee becoming liable towards the debtor (see CC § 1396a(3)). CC § 1396a is, however, not applicable if the obligation is non-monetary or if a consumer is involved. In such cases it is – in parts – still argued that a contractual prohibition of assignment has an absolute effect (see *Koziol and Welser*, Bürgerliches Recht II¹³, 119). Under AUSTRIAN law there also exist statutory prohibitions of assignment (e.g. CC §§ 1070, 1074, ConsProtA § 12, EO § 293(2)). In CZECH law there is express legal provision stating that an assignment is not possible if it would violate an agreement made with the debtor (CC § 525.2).
3. In so far as the Article denies effect to no-assignment clauses in assignments of receivables it follows the approach first taken in what is now section 9–401(1)(b) of the AMERICAN UCC and in art. 6(1) of the UNIDROIT Factoring Convention. A similar approach is also to be found in many of the Canadian Personal Property Security Acts (e.g. Saskatchewan PPSA 1993 s. 41(9)). BELGIAN doctrine now clearly distinguishes the question of the validity of the no-assignment clause under the law of obligations from the effect of the clause in relation to the debtor and under property law. As a right to performance has no other existence than its “immaterial” existence between creditor and debtor, any restriction validly contracted between creditor and debtor will automatically and necessarily have effect *erga omnes*. A no-assignment clause will however be simply invalid, also between the parties, if the party who stipulated it has no legitimate interest in doing so. Stricter rules will apply to the validity of such clauses relating to shares in companies. The rule of para (4) is therefore an impossibility under Belgian law: either the clause is invalid, also between the parties, or it is effective *erga omnes*, subject only to the protection of an assignee as under para. (2)(a) and (b) of the Article.

III. – 5:109: Assignability: rights personal to the creditor

- (1) A right is not assignable if it is a right to a performance which the debtor, by reason of the nature of the performance or the relationship between the debtor and the creditor, could not reasonably be required to render to anyone except that creditor.
- (2) Paragraph (1) does not apply if the debtor has consented to the assignment.

Comments

A. Rights personal to the creditor

In a sense, every assignment of a right changes the debtor's position in some degree. The debtor has to perform in favour of a different person, and that person may have a more stringent attitude towards enforcement of rights than the original creditor. That by itself is not a sufficient consideration to prevent the assignment.

There are, however, rights which by the nature of the subject-matter or the relationship between the parties are personal to the creditor, so that it would be unfair to expose the debtor to an obligation to perform to an assignee. Different legal systems have different formulations of the principle underlying this conception. Under some the rule is stated as being that rights to performance under personal contracts, or contracts for personal services, are not assignable; in others that a right cannot be assigned if this would significantly alter the nature or content of the performance or render counter-performance less likely. All these formulations would appear to be encompassed by the rule embodied in this Article, since they all presuppose that the identity of the original creditor is important to the debtor. The typical example given of an assignment that would materially increase the burden or risk on the debtor is one which relates to the assignment of rights under an insurance policy covering goods which the assignor is selling to the assignee. Since the personal character of the insured is material to the insurer's risk, to allow an assignment would be to expose the insurer to a risk of a kind different from that which it had agreed to accept. This is a factor indicating that the benefits of the insurance policy are intended to be personal to the insured.

Illustration

P agrees to publish a book W is writing. An act of assignment by P to A of P's right to call for the book from W is not effective to assign the right, since the character and reputation of the publishing house are matters of importance to an author and the publisher cannot be changed without the author's consent.

An employer's right to performance under a contract of employment also falls into the category of non-assignable rights, since for both parties the relationship is a personal one which does not in principle permit substitution of a new party as creditor without the consent of the other party to the contract.

Where an act of assignment is ineffective to transfer the right because of the present Article the intended assignee will normally have the right to recover damages from the intending assignor for non-performance of the obligation to assign.

B. Mandatory rules

Independently of this and the preceding Article, overriding mandatory rules may render a purported assignment ineffective.

Notes

1. In GERMAN law a right cannot be assigned if the effect would be to alter the substance of the debtor's performance (CC § 399) or if the right is personal to the creditor. The position is similar under BELGIAN, FRENCH, LUXEMBOURG, GREEK (CC art. 465), ESTONIAN, SLOVENIAN (LOA § 417(1)) and DUTCH law. Similarly the ITALIAN CC art. 1260(1) expressly excludes the assignability of rights which are of a strictly personal character such as alimentary rights (CC art. 447(1)). These are considered to include rights where performance in favour of the particular creditor is of importance to the debtor, such as rights under an insurance policy or a contract of employment. ENGLISH law too does not recognise the validity of an assignment of rights personal to the creditor, e.g. the benefit of an author's contract to write a book or the assignment of a motor insurance policy: *Treitel*, *The Law of Contract*¹¹, nos. 15-051–15-057. SCOTTISH law is the same: *McBryde*, *Law of Contract in Scotland*, nos. 12.36-12.41; cf discussion in *Anderson*, nos. 2.34-2.46. DANISH law does not allow assignment of wages and salary not yet earned and of claims for damages for personal injury and loss of dependency, which have not yet been awarded or recognised, see *von Eyben a. o.* 39 ff. POLISH law provides that a claim cannot be assigned if this would be inconsistent with the nature of the obligation, CC art. 509(1) (e.g. where the nature of the performance is such that it is personal to the creditor). In AUSTRIA (deriving from CC § 1393 second sentence) the right to personal work and services under an employment contract or the employee's right to holidays are not assignable (see *Koziol/Bydlinski/Bollenberger (-Neumayr)*, *ABGB*², § 1393, no 3). Under the CZECH CC (§ 525(1)), firstly, an assignment is not possible if the right comes to an end no later than upon the creditor's death or if the content of the right would be changed by a substitution of the creditor and, secondly, there is expressly added that it is not possible to assign a receivable if it cannot be made subject to the execution of a judgment. SLOVAK law is to the same effect (CC § 525(1)). The restriction relating to a possible change of content of the right, according to case law, is applicable only to rights to performance which are by their nature personal to the creditor and the assignment of which might prejudice the debtor's position (See Judgment of the Supreme Court 4 Obo 210/01).
2. Strictly personal rights are non-transferable in SPANISH law, due to their special character *intuitu personae*. Although the CC does not have an express rule on the matter, this result may be inferred from the legal nature of assignment which is not compatible with any change of the legal content of the contract (*Navarro Pérez*, *La cesión de créditos*, 110). An example of a personal right that is not assignable is a right to aliment, except when it is overdue and the right to sue is assigned (CC art. 151(1)). The debtor's consent may validate an assignment of a right only when the personal character does not stem from a legal provision (otherwise, the credit is non-transferable by the CC art. 1112), but either from the terms of the obligation or from the non-fungible nature of the performance to be made.

III. – 5:110: Act of assignment: formation and validity

- (1) Subject to paragraphs (2) and (3), the rules of Book II on the formation and validity of contracts and other juridical acts apply to acts of assignment.
- (2) The rules of Book IV.H. on the formation and validity of contracts of donation apply to gratuitous acts of assignment.
- (3) The rules of Book IX on the formation and validity of security agreements apply to acts of assignment for purposes of security.

Comments

A. Application of general rules

An act of assignment will be a contract or other juridical act. The general rules on contracts and other juridical acts apply to it, unless it is of a type to which some special rule applies. It follows from these general rules that an act of assignment need not normally be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses. In practice, contracts or other juridical acts by which rights are assigned are almost invariably in writing but there is no need to embody this as a general legal requirement. Later Articles give adequate protection to the debtor.

B. Gratuitous assignments

The policy considerations which justify special rules for the formation and validity of contracts of donation (dealt with in the later Part IV.H. on Donation) also justify such a requirement for gratuitous assignments. Paragraph (2) therefore applies the donation rules by reference.

C. Assignments for purposes of security

The same applies to assignments for purposes of security. The special rules for security agreements, dealt with in Book IX (Proprietary securities), are therefore applied.

Notes

1. The UN Convention has no substantive rule but provides in art. 8 that an assignment is valid as to form if it meets the formal requirements either of the law of the State in which the assignor is located or of the applicable law by virtue of rules of private international law. The UNIDROIT Factoring Convention does not prescribe any formal requirements for the assignment of receivables but is confined to assignments of which notice in writing is to be given to the debtor. The laws of most countries of the European Union

do not have formal requirements for the validity of a non-gratuitous act of assignment of rights as between assignor and assignee. These countries include AUSTRIA, BELGIUM, ENGLAND, GERMANY (where it does not depend on non-gratuitousness), GREECE, ITALY, LUXEMBOURG, PORTUGAL, SCOTLAND, SLOVENIA, SPAIN and the NOR-DIC countries. In the NETHERLANDS an assignment and a pledge are always required to be in writing signed by the assignor (CC arts. 3:94 and 3:236(2)). For the creation of a “silent”, or non-possessory, pledge of rights either the written instrument must be officially authenticated (e.g. by a notary) or, if it is not, the date of its creation must be officially certified. POLISH law does not require a special form for the validity of the assignment. However, if a right is verified in writing, its assignment must also be verified in writing (CC art. 511). The same is generally true for ESTONIAN law, as LOA § 11(3) states that if a contract must be entered into in a specific form, agreements on assignment of rights arising from the contract must also be entered into in such form unless otherwise provided by law or the contract (applicable to act of assignment (see Varul/Kull/Kõve/Käerdi (-Käerdi), § 164, no. 4.2.1. c)). For assignments for purposes of security, the format which can be reproduced in writing is required (LPA § 315(2¹)). In AUSTRIA – similarly to the rule in this Article – it depends on the contract that is the title for the assignment which requirements have to be met (*Koziol and Welser, Bürgerliches Recht II*¹³, 120). In CZECH law the assignment needs to be done in writing (see above). Writing is also required in SLOVAKIA, pursuant to CC § 524(1).

III. – 5:111: Right or authority to assign

The requirement of right or authority in III. – 5:104 (Basic requirements) paragraph (1)(c) need not be satisfied at the time of the act of assignment but has to be satisfied at the time the assignment is to take place.

Comments

Even if there is an existing, assignable right and a valid act of assignment there will be no transfer of the right if the person purporting to assign it by the act of assignment has no right or authority to do so. See III. – 5:104 (Basic requirements) paragraph (1)(c). Normally only the creditor will be in a position to assign the right, whether acting personally or through a representative, but there may be cases where some other person is authorised by law to assign the right.

This Article makes it clear that the requirement of right or authority to assign need not be satisfied at the time of the act of assignment but must be satisfied at the time the assignment is to take place. A person can grant an act of assignment of a right yet to be acquired but the actual transfer of the right will not take place until it is acquired.

Notes

1. This rule may be said to follow from the very nature of assignment as a transfer of the creditor's right to performance. It is normally taken for granted.
2. There are no specific provisions on entitlement to assign a right in the SLOVAK law. Therefore general civil law rules will apply, which means that only the creditor (even through a representative) may assign the right to performance.
3. In SPANISH law the creditor is the only person authorised to assign a right, whether directly or by the means of any legal representation, due to the creditor's liability for the *veritas nomini* of the right (CC art. 1529). The assignor must have a legal title in order to assign a credit, but since it is legal to assign future rights, this title may arise *a posteriori*, when the right comes into the existence (see note on III. – 5:114 (When assignment takes place)).

Sub-section 3:

Undertakings by assignor

III. – 5:112: Undertakings by assignor

- (1) The undertakings in paragraphs (2) to (6) are included in the act of assignment unless the act of assignment or the circumstances indicate otherwise.
- (2) The assignor undertakes that:
 - (a) the assigned right exists or will exist at the time when the assignment is to take effect;
 - (b) the assignor is entitled to assign the right or will be so entitled at the time when the assignment is to take effect;
 - (c) the debtor has no defences against an assertion of the right;
 - (d) the right will not be affected by any right of set-off available as between the assignor and the debtor; and
 - (e) the right has not been the subject of a prior assignment to another assignee and is not subject to any right in security in favour of any other person or to any other incumbrance.
- (3) The assignor undertakes that any terms of a contract or other juridical act which have been disclosed to the assignee as terms regulating the right have not been modified and are not affected by any undisclosed agreement as to their meaning or effect which would be prejudicial to the assignee.
- (4) The assignor undertakes that the terms of any contract or other juridical act from which the right arises will not be modified without the consent of the assignee unless the modification is provided for in the act of assignment or is one which is made in good faith and is of a nature to which the assignee could not reasonably object.
- (5) The assignor undertakes not to conclude or grant any subsequent act of assignment of the same right which could lead to another person obtaining priority over the assignee.
- (6) The assignor undertakes to transfer to the assignee, or to take such steps as are necessary to complete the transfer of, all transferable rights intended to secure the performance which are

not already transferred by the assignment, and to transfer the proceeds of any non-transferable rights intended to secure the performance.

(7) The assignor does not represent that the debtor has, or will have, the ability to pay.

Comments

A. General

A contract or other juridical act by which a right is assigned will normally impose obligations on the person assigning the right. The most basic obligation will be to assign the right in accordance with the contract or other juridical act.

Contracts or other juridical acts assigning rights frequently contain undertakings (warranties) by the assignor designed to ensure that the assignee acquires the benefit of the bargain. Often these are restricted to warranties as to the assignor's legal rights against the debtor and undertakings to perform any further acts necessary to perfect the assignee's title. Sometimes such undertakings go further and provide that if the debtor defaults the assignor will be liable for performance or will repurchase the assigned rights. In the absence of such a provision the normal rule is that the assignor incurs no liability for the debtor's non-performance. See paragraph (7).

In the absence of express provision in the contract or other juridical act of assignment the default rules relevant to the particular type of transaction may come into play. For example, if the right has been sold the default rules on the obligations of the seller and buyer will come into play. If the right has been donated the default rules applying to contracts of donation will come into play, and similarly if the right has been assigned in security. However, these background default rules may not cover every situation and it can be difficult to apply rules drafted primarily for corporeal movables to assignments of rights to performance. So, to fill any gaps and for the convenience of the user, the present Article contains a set of implied undertakings which apply to any assignment unless otherwise provided. Such undertakings are found in many laws; in others they are often the subject of express provisions in the contract to assign. The undertakings by the assignor set out in the Article are designed to protect the assignee in the event that the assigned rights prove legally worthless or are subordinate to the interests of a prior party or are reduced in value by a modification of the contract under which they arise.

B. Existence and enforceability of right and entitlement to assign

Paragraph (2) of the Article imports undertakings that the right exists or will exist at the time when the assignment is to take effect, that the assignor is entitled to assign the right or will be so entitled at the time when the assignment is to take effect and that the right will not be subject to defences or rights of set-off against the assignor.

Illustration 1

C assigns to X by way of sale a batch of debts due from D. Subsequently C purports to assign the same debts to A by way of security for a loan. C thereby commits a breach of the undertaking to A that C is entitled to assign the right.

Illustration 2

C assigns to A a purported claim against D for the price of goods said to have been sold and delivered under a contract of sale. No such contract was ever made. C is liable to A for breach of the undertaking as to the existence of the claim.

Illustration 3

C assigns to A a purported claim against D for the price of goods sold and delivered under a contract of sale. When A sues D for non-payment of the price D successfully defends the claim on the ground that the goods were never delivered. C is liable to A for breach of the undertaking that D has no defence to the claim.

Illustration 4

C assigns to A all C's rights under a consumer credit agreement entered into by C as creditor with the debtor, D. C failed to comply with a statutory requirement that the agreement should state the annual percentage rate of charge for the credit. The statute provides that in such a case the agreement is unenforceable by C, though not by D. A can sue C for breach of the implied undertaking that D has no defences against an assertion of the right.

Illustration 5

C assigns to A a claim against D for repayment of a loan of €10 000. D does not dispute that the loan has become repayable but asserts a right to set off against it a cross-claim for €20 000 which is held to the credit of a separate account D holds with C. The existence of the right of set-off constitutes a breach of C's implied undertaking to A.

However, the undertaking is not broken by the existence of rights of set-off that do not affect the assignee, for example, set-off in respect of cross-claims by the debtor against the assignor arising from dealings between them after the debtor's receipt of notice of assignment (see III. – 5:116 (Effect on defences and rights of set-off)). Moreover, the undertaking does not cover the assignee's inability to obtain performance because the debtor absconds or becomes bankrupt.

C. Freedom from prior rights

Paragraph (2)(e) imports an undertaking that the claim has not previously been assigned or made subject to a security interest or any other encumbrance. The undertaking is not limited to freedom from consensual security interests; it also applies to security interests or other incumbrances created by law.

D. Protection of assignee's reliance on terms

The interpretation and effect of a contract depends in large measure on the intention of the parties. This could be dangerous for an assignee. The parties might have agreed that a term which has one apparent meaning should have some quite different meaning. As between themselves the true meaning will prevail. The assignee can have no better right than the assignor. So the assignee could also be affected by the secret agreement between the original parties. Paragraph (3) therefore imports an undertaking by the assignor that any terms of a contract or other juridical act which have been disclosed to the assignee as terms regulating the right have not been modified and are not subject to any undisclosed agreement as to their meaning or effect which would be prejudicial to the assignee.

After the assignment has taken effect the assignor is no longer the creditor and would no longer be able to modify the terms regulating the right unless the act of assignment so provides. Modification of the content of the assigned right and the corresponding obligation would be a matter for the debtor and the assignee as the new parties to that legal relationship. Of course, other terms of the contract between the assignor and the debtor could still be modified by agreement between them, provided they did not alter the terms regulating the assigned right.

In some cases an assignment of a contractual right will leave the assignor with no room to modify the contract from which the right arises. The assignor may have performed fully under the contract and may have assigned a simple right to payment. In relation to that right the assignee is the new creditor. Any modification of the amount to be paid or the time of payment would be a matter for agreement between creditor and debtor, that is to say between the assignee and the debtor. In other cases, however, the contract between the assignor and the debtor may remain in effect for many purposes between these two parties. For example, the assignor may still be obliged to perform under it. Clearly a modification of the contract agreed between the assignor and the debtor could indirectly affect the assignee's right. In principle, once contractual rights have been assigned it should not be open to the assignor and the debtor to agree on modifications to the contract under which they arise, unless the assignment agreement so provides or the assignee consents to the modification. This is the main rule under paragraph (4). However, a strict adherence to this principle would cause considerable commercial inconvenience, particularly where the assignment relates to rights under an executory contract involving continuous performance on the part of the assignor, such as a construction contract. For example, in the course of performance of a construction contract circumstances may arise where the parties find it necessary to agree on a variation outside the contractual variation provisions, as where additional work is required that could not have been reasonably anticipated. Again, the modification may be of a part of the contract which has no relevance to the assigned rights. Accordingly the last part of paragraph (4) permits modifications without the assignee's consent where these are made in good faith and are not modifications to which the assignee could reasonably object.

Illustration 6

C, a building contractor, agrees with D, a bank, to construct a vault for the storage of securities and other valuables belonging to D's customers. Soon afterwards D sells its banking business to E, to whom D assigns its rights under the building contract. In the course of construction it is discovered that a stream, the existence of which is not shown on any drawings relating to the site, flows directly under the floor of the vault and that to prevent the entry of water it is necessary to install an underground pump at considerable additional expense to pump away the water. Though this does not fall within the variation clause of the contract the architect nevertheless considers the installation of the pump unavoidable if the vault is not to be rendered unusable and issues the requisite order to the contractor, indicating that the cost of the pump and labour will be an addition to the contract price. This modification is binding on E even though made without E's consent.

E. No subsequent act which could destroy assignee's priority

The implied undertaking in paragraph (5) – that the assignor will not conclude or grant any subsequent act of assignment of the same right which could lead to another person obtaining priority over the assignee – is necessary because of the later Article which, as between successive apparent assignees of the same right, gives priority to the one who notifies the debtor first. In the absence of such a provision the first assignee would be left without a remedy. The assignor would not be liable for non-performance of the obligation to assign because the assignor would actually have assigned the right and the assignee would have obtained it. The assignee would then however have lost the right because of the operation of the rule on priority. It is obviously right in such circumstances that there should be a remedy against the assignor who has placed the second "assignee" in a position to obtain priority by notification.

F. Transfer of certain security rights

The general rule is that supporting security rights pass with the assignment to the assignee, in so far as they are transferable. They do not require separate assignment. See III. – 5:115 (Rights transferred to assignee) paragraph (1). However, there may be situations where something needs to be done by the assignor to effect or complete the transfer. The undertaking in paragraph (5) obliges the assignor to do what is necessary for that purpose. The obligation can be excluded by agreement and applies only to security rights which are transferable. For example, an independent personal security on first demand will normally not be transferable (see IV.G. – 3:108 (Transfer of security right)). The assignor can, however, be required to transfer the proceeds (see UCP art. 49).

G. No undertaking that debtor has ability to pay

Paragraph (7) makes it clear that unless otherwise agreed between the assignor and the assignee, the assignor does not undertake that the debtor has, or will have, the ability to

pay. This is to counter any arguments that in the case of a sale or security agreement the assigned right would not be fit for its purpose if the debtor could not pay.

H. Other obligations

This Article is not exhaustive of the obligations to the assignee which may be imposed on an assignor. In particular, while it does not import any undertaking that the assignor has no knowledge of any matters casting doubt on the debtor's ability to pay, the general duty to act in accordance with the requirements of good faith and fair dealing may require disclosure of matters known to the assignor indicating that the debtor may be insolvent.

Notes

1. Provisions similar to those of the Article are contained in the UN Convention art. 14 and in the Unidroit Principles art. 9.1.15. GERMAN law applies the rules of the CC governing warranties on a sale as amended by some particular rules, see CC §§ 401-403. Similar warranties are to be found in PORTUGUESE law (CC arts. 587, 892 ff, 957 ff; *Antunes Varela*, *Obrigações em geral* II⁷, 330 ff; *Pires de Lima and Antunes Varela*, *Código Civil Anotado* I⁴, 602 ff), ITALIAN law (CC art. 1266) and DUTCH law in respect of a silent pledge (CC art. 3:239(2)) and a sale or swap of rights (CC arts. 7:47, 7:17). In FRENCH, BELGIAN and LUXEMBOURG law, such rules will apply where the underlying contract is a sales contract (see CC arts. 1693 and 1694); if the underlying relationship is a different one, different rules may apply. Similar rules are applicable in CZECH law but there is no such express provision (see notes above and CC mainly the § 524 as commented by *Švestka/Jehlička/Škárková*, OZ⁹, 663-666 and the authoritative general literature, for instance *D. Hendrych* under headword “*postoupení pohledávky*” and CC § 527). Section 41 of the FINNISH and SWEDISH Sale of Goods Acts can be interpreted in this way, while under section 9 of the NORDIC Promissory Note Acts the seller of a right warrants its existence and validity. The UN Convention and ESTONIAN law draw no distinction in this regard between assignments for value and gratuitous assignments; most other codes confine the warranties to assignments for value (the same is true for SLOVENIAN law), while under GERMAN law the rules on donation apply as amended by CC §§ 401-403. Under SPANISH law the assignor warrants the existence and legitimacy of the right at the time of the assignment (CC art. 1529) but as a rule gives no further warranties, though if to the knowledge of the assignor and unknown to the assignee the debtor was insolvent at the time of assignment the assignor is liable for the debtor's default. There appear to be no reported cases in ENGLISH law concerning implied warranties in an assignment, nor is the question discussed in the contract textbooks. This may be because of the common practice of including express warranty provisions in assignment contracts. AUSTRIAN law (CC § 1397) provides that if the assignment is made for consideration the assignor undertakes that the right exists and that payment will be paid on the due date, though liability is limited to what the assignor received from the assignee for the assignment. Liability of the assignor is excluded with assignments that are based on a contract of donation (CC § 1397 first

sent.) as well as for incumbrances which can be seen in the public books or for coincidental circumstances or circumstances that fall within the sphere of the assignee (CC § 1398). According to POLISH law the assignor warrants to the assignee that the right exists and is due to the assignor. The assignor is liable for the solvency of the debtor at the time of the assignment only if this liability is assumed (CC art. 516). In ESTONIAN law, in relation to the underlying obligation to assign, relevant questions are covered by sales law (LOA § 208(3): the provisions concerning the sale of things apply to the sale of rights and other objects unless otherwise provided by law and if this is not contrary to the nature of the object: the seller of a right must allow the purchaser to acquire the right which is the object of the contract of sale), or by the rules on donation (LOA §§ 259 ff) or factoring (LOA §§ 256 ff). In SCOTTISH law the assignor, where the assignment is for onerous cause, gives implied warrandice that the right assigned is due and the title to assign good, possibly also securing against its own actions that might hurt the assignee's right (*Stair*, The Laws of Scotland XV, 862). In SLOVAKIA, in the case of an assignment for value, the assignor would be liable to the assignee if the assignee did not take over as creditor of the right, or if the debtor performed lawfully to the assignor, or if the assigned right was wholly or partly extinguished due to rights of the debtor against the assignor (e.g. set-off) – see CC § 527(1). However, the assignor warrants the enforceability of the claim to the amount of obtained value, only due to a written contract with the assignee. This liability extinguishes if the assignee does not enforce the claim without undue delay (CC § 527(2)).

Sub-section 4:

Effects of assignment

III. – 5:113: New creditor

As soon as the assignment takes place the assignor ceases to be the creditor and the assignee becomes the creditor in relation to the right assigned.

Comments

Once an outright assignment (as opposed to an assignment in security) takes effect the assignee becomes the creditor. The assignor will no longer be the creditor and will therefore not have the right to assign the right to anyone else. The right will not be the assignor's to assign. (If the assignment is by way of security, the assignor has the right to assign further, but that right is correspondingly limited in that there is no right to make a second assignment that will take priority over the first one. Assignments by way of security will be governed by Book IX.) However, a purported second assignment will not be completely ineffective, and in certain circumstances may even take priority over the first one. The rule is that where an assignor has made successive purported assignments, and the second "assignee" did not know of the earlier assignment at the time of

the second purported assignment, priority goes to the assignee who first gives notice to the debtor. (See III. – 5:121 (Competition between successive assignees). This is an exception to the *nemo dat* principle.)

The assignee becomes the creditor in relation to the right assigned – not in relation to some greater or lesser right. The right remains the same before and after the assignment. If, for example, it was a conditional right in the hands of the assignor it remains a conditional right in the hands of the assignee.

Illustration 1

In June a football club X concludes a contract with Y for the provision by Y of stewarding services at a football match which will take place in November (if the team qualifies). The contract provides for an advance payment to be made on 15 October. The contract also provides that all the rights and obligations under it are subject to the resolutive condition that they are to cease to have effect if the team fails to qualify. In August Y assigns its rights to payment under the contract to Z. In September the team fails to qualify. Z has no right to the advance payment due to be made in October. That right was subject to a resolutive condition and has now come to an end. The assignment cannot convert a conditional right into an unconditional right.

It goes without saying that the assignment of a right to performance does not make the assignee the debtor in any corresponding obligation or subject the assignee to any obligation which by law falls on the assignor.

Illustration 2

X sells and assigns to Y a right to a payment under a contract with B. The payment is to be made by B in advance of performance by X. It is to be returned if X does not perform. B is notified of the assignment and makes an advance payment to Y. X does not perform. X has assigned only the right to the payment. X's obligation to repay the amount of the payment has not been transferred. B has a right to repayment from X, not Y.

The above two examples show the importance of careful analysis in cases involving advance payments. In Illustration 1, for example, the position would be the same as in Illustration 2 if the team had failed to qualify after the advance payment had been made on 15 October. The obligation to pay and the corresponding right would have been extinguished by the payment. The right would no longer have been subject to a resolutive condition, although other rights and obligations under the contract would be. Any obligation to repay would have to be based on an implied term of the contract or on the rules regulating the effects of the termination or extinction of rights and obligations. The rules on unjustified enrichment would not apply because the extinction of the relevant rights and obligations would not be retrospective and the payment was not affected by any error or other vitiating factor. Whether the obligation to repay is based on an implied term of the contract or an independent rule of law, it would originally have been an obligation on Y, the assignor, to the debtor and would not have been transferred or extinguished by the assignment of the right.

The general result, that the assignee becomes the new creditor in relation to the right assigned but is not subject to any obligations to repay which fall on the assignor, is important for commercial purposes and particularly for receivables financing. The United Nations Convention on the Assignment of Receivables in International Trade contains a provision (Article 21) to make it clear that failure by the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

It will be remembered that “right” is defined earlier as including a part of a right (III. – 5:101 (Scope of section) paragraph (3)).

Notes

1. This generally follows from the nature of an assignment, without being expressly stated in the laws. This is the case in GREECE, see *Stathopoulos*, nos. 203 and 207. In POLAND it is recognised in case law that as a result of the assignment, all rights of the creditor are passed on to the assignee and the legal relationship itself does not get changed (see: Supreme Court 5 September 2001, I CKN 379/00, Lex no. 52661). Similarly in the SLOVAK judicature: cf. e.g. Judgment of the Supreme Court of SR 1 Cdo 73/2000. There is no such express provision in CZECH law but this non-controversial general rule is easily construed on the basis of the CC § 524 (see *Švestka/Jehlička/Škárková*, OZ⁹, 663-666 and *D. Hendrych*). In SCOTLAND it is a basic rule that the assignment places the assignee in the shoes of the assignor (*Gloag and Henderson*, *The Law of Scotland*¹¹, no. 33.07). An effective assignment is said to deprive the assignor of a title to sue in respect of what has been assigned, and to give it to the assignee (*McBryde*, *Law of Contract in Scotland*, no. 12.79). The analysis in ENGLISH law is different, but the result is much the same in that the debtor is obliged to pay the assignor until notified of the assignment, when the debtor becomes obliged to pay the assignee.
2. In SPAIN according to the legal nature of assignment as a true *titulus transferendi* (CC art. 1526), the effect of an assignment is not to create a limited right or a kind of condominium or participation in the assigned claim, but to transfer the whole ownership, without any right of redemption. That is why there is no need to put forward any special rule.
3. In FRANCE, once the assignment takes effect, the assignee becomes the new creditor. However, assignments subject to the form requirement of CC art. 1690 will only be “*opposable*” to the debtor once notice is given to the debtor, either by way of *signification* or by way of acceptance in an authenticated deed (*acte authentique*), which does not require the consent of the debtor. See *Terré/Simler/Lequette*, *Les obligations*⁹, 1219, nos. 1279 et seq. In the case of successive assignments, the rule laid down by art. 1690 is strictly applied: the assignee who first gives notice to the debtor will be deemed the creditor, unless fraud is established (when the assignee was aware of the earlier assignment at the date of the purported second assignment). See *Terré/Simler/Lequette*, loc. cit., nos. 1286 et seq.
4. In BELGIUM, as soon as the requirements for assignment are met, the assignee will be the creditor in relation to anyone except the debtor (art. 1690(2)), and subject to the application of the principle of reliance (CC arts. 1240 and 1690(4)).

III. – 5:114: When assignment takes place

- (1) An assignment takes place when the requirements of III. – 5:104 (Basic requirements) are satisfied, or at such later time as the act of assignment may provide.
- (2) However, an assignment of a right which was a future right at the time of the act of assignment is regarded as having taken place when all requirements other than those dependent on the existence of the right were satisfied.
- (3) Where the requirements of III. – 5:104 (Basic requirements) are satisfied in relation to successive acts of assignment at the same time, the earliest act of assignment takes effect unless it provides otherwise.

Comments

This Article deals with the time an assignment takes place. Again it has to be read along with III. – 5:121 (Competition between successive assignees).

A. Assignment of an existing, assignable right by the creditor

Where the right exists and is assignable at the time of an act of assignment by the creditor, the assignment normally takes effect immediately upon conclusion of the contract by which it is assigned or, in the case of an assignment by a unilateral juridical act, at the time when that act is made. (Under the rules in Book II a unilateral juridical act is not made until it is communicated to the person affected by it, in this case the assignee). Of course, this will not apply if the act of assignment itself provides for a later time. It is not necessary that an assigned right to money has become payable; it suffices that it exists as a present right, exigible in the future (*debitum in praesenti, solvendum in futuro*).

Illustration 1

On May 1, C enters into a contract with O to construct a factory at a price of €2 million, payment to be made in instalments against architects' certificates. On June 1, C assigns its rights to A. The first certificate is issued on August 12. The assignment takes effect on June 1.

B. Other cases

In other cases the assignment normally takes effect as soon as the requirements are satisfied, unless the act of assignment provides otherwise. If, for example, the right is not in existence or is not assignable at the time of the act of assignment, the assignment will take place when it comes into existence or becomes assignable, unless otherwise provided. Similarly, if the person granting an act of assignment of an existing right is not the creditor, the assignment will take place when that person acquires the right and becomes the creditor, unless otherwise provided.

Illustration 2

S, a timber supplier, enters into a factoring agreement with F by which S agrees to offer for sale to F monthly batches of rights to payment arising from sales of timber to S's customers. The agreement provides for the sale to take effect as regards any such receivables when the offer relating to them is accepted by F. A batch of receivables is offered to F on May 15 and accepted on May 20. The assignment of those receivables takes effect on May 20 because that was what was agreed in the act of assignment.

C. Special rule for future rights

The main policy reason behind the rule in paragraph (2) is that in the case of an act of assignment of future rights, the assignee, who will very often have paid for the rights, should be preferred to the creditors of the assignor. Solutions to achieve this policy objective are widely adopted. It follows from the earlier rules that there will be no assignment at all if the future right never comes into existence. The effect of the present provision is that once it has come into existence the assignment can be retrospectively regarded as having taken place when all the other requirements were satisfied. Normally that will mean that the right will be deemed to have been transferred at the time of the act of assignment.

D. Requirements satisfied simultaneously

Paragraph (3) deals with a situation which could arise when a person purports to assign the same right to successive assignees. If the right is not yet in existence or is not yet assignable or if the grantor is not yet the creditor, the requirements for an effective assignment could be satisfied simultaneously for all the assignees. Paragraph (2) provides that in such a case the assignments are treated as being made in the same order as the acts of assignment, unless one of the acts provides that it is only to have effect at some later date (which would be unlikely).

Illustration 3

On September 1, X, a property developer, assigns to Bank Y all its rights under contracts of sale to be entered into in the future with purchasers of the properties currently in course of construction. On October 1, X assigns the same rights to Bank Z. The development is completed the following year and X sells one of the properties to P on August 10 of that year. The assignment of X's right to the price is dependent on the sale but thereupon takes effect in relation to Bank Y, which had the earlier act of assignment.

Notes

1. Paragraph (1) is in line with art. 10 of the UN Convention (although differently expressed) and also reflects those national laws which recognise the assignment of rights under

- future contracts. See *Kötz*, Rights of Third Parties, no. 104. Such rights are treated as nascent at the time of the contract to assign. In AUSTRIA and POLAND the assignment of a future right is conditional on the coming into existence of that right, see respectively OGH 6 October 1984, JBl 1984, 85 *Kozioł* and SN 19 September 1997, III CZP 45/97, OSNC 1998/2/22). The principles expressed in paragraphs (2) and (3) of the Article are accepted also under ESTONIAN law (see Varul/Kull/Kõve/Käerdi (-Käerdi), § 165, nos. 3.3., 4.4) and GERMAN law (see Staudinger (-Busche), BGB [2005], § 398, nos. 63 et seq.). In SLOVAKIA the effect of a valid contract of assignment would be subject to a suspensive condition that the assigned right would have to come into existence (cf. CC § 36 cl. 2 and also the Judgment of the Supreme Court of SR 1 Cdo 73/2000). In SCOTLAND, as noted above, intimation to the debtor is necessary to complete the assignee's right but if that right is a future right the assignment will become effectual only when it vests in the assignor, *Gloag and Henderson*, The Law of Scotland¹¹, no. 33.01. Future rights are said to vest by accretion. In the factoring of debts in Scottish practice there may be a further or corroborative assignment once the debt exists. See *McBryde*, Law of Contract in Scotland, nos. 12.31, 12.91. In ENGLISH law there may be an effective legal assignment of future rights under an existing contract, *Chitty on Contracts* I, no. 19-008; assignment of rights under future contracts is possible in equity, though an agreement supported by consideration may be necessary: cf. *Chitty* loc. cit., nos. 19-028 ff.
2. On the subject-matter of the present rule there are two distinct problems in SPANISH law. Firstly, there is the question of the time when the assignee acquires a property right in the assigned claim when the claim did not exist at the time when the agreement to assign was reached. The question is highly disputed, specially where the assignor becomes bankrupt and the trustee seeks to retain the assigned right for the estate. Unfortunately, there is no prevalent opinion at present, and the case law is undecided. Secondly, who gets priority where there were multiple assignments? Most scholars suggest that the assignee who first gives notice to the debtor has the prior ranking. Although a highly pragmatic proposal, probably this approach is inconsistent with the rule governing property rights in claims (cfr, *Pantaleón*, Comentario, 1021).
 3. In FRANCE an act of assignment has the same effects as a contract transferring property, with the appropriate adaptations in relation to the fact that it also creates a legal relationship. Where the right exists and is assignable at the time of an act of assignment by the creditor, the assignment normally takes effect immediately upon conclusion of the contract by which the right is assigned in accordance with the *solo consensus* principle, except for assignments for purposes of securities (ordonnance of 24 June 2004: Ccom art. L. 228-1). Where the rights do not exist at the time of an act of assignment, the assignment takes effect provided that such rights are likely to come into existence and are sufficiently identifiable (Civ. 1ère, 20 March 2001). It has been held that rights under a future contract may not be assigned whereas merely potential rights are assignable provided that the contract was concluded (Com; 15 January 1973). See *Terré/Simler/Lequette*, Les obligations⁹, 1217, no. 1278. For BELGIUM see the Notes to III. – 5:106.
 4. CZECH law conforms with paragraph (1) and paragraph (2), see *Knappová* (-*Dvořák*), Civil Law II⁴, 114; in case of para. (3), there is no express statutory provision and little experience on the subject. However, it can be assumed that even though each of the successive acts of assignment is effective between its parties, as a practical matter it is

important which one is notified to the debtor first (as the notification is the moment when any act of assignment becomes effective for the debtor, see Švestka/Jehlička/Škárková, OZ⁹, 941). Similar rules applicable to future rights can be found also outside the CC and Ccom, for instance in the legal regulation of future transactions (*futures*).

III. – 5:115: Rights transferred to assignee

- (1) The assignment of a right to performance transfers to the assignee not only the primary right but also all accessory rights and transferable supporting security rights.
- (2) Where the assignment of a right to performance of a contractual obligation is associated with the substitution of the assignee as debtor in respect of any obligation owed by the assignor under the same contract, this Article takes effect subject to III. – 5:302 (Transfer of contractual position).

Comments

A. Transfer of primary right

The first effect of an assignment is to transfer the primary right to performance itself. This follows from the definition of an assignment as a transfer. The assignee becomes the new holder of the right, the new creditor, as soon as the assignment takes effect. However, there are later provisions which enable the debtor to obtain a discharge by paying the assignor in good faith at any time prior to the receipt of a notice of assignment. The assignee who does not give notice to the debtor is also liable to be replaced as the new creditor by a second purported assignee who gives notice to the debtor first: see III. – 5:121 (Competition between successive assignees).

B. Transfer of remedies

An assignment of a right carries with it by implication a transfer of the assignor's right to damages and default interest for future non-performance. This follows from the fact that the assignee is now the holder of the right. Whether the assignment also transfers any rights accrued for past non-performance depends on the terms of the act of assignment.

C. Transfer of accessory rights and supporting security rights

An assignment also operates to transfer all accessory rights (or in the case of a partial assignment a *pro rata* share of those rights) such as contractual rights to interest or rights to call for earlier payment or otherwise modify terms. It transfers accessory rights securing the debtor's performance, for example, dependent personal securities and forms of proprietary security which are considered accessory to the right so as to be discharged when the right is satisfied. In many legal systems the transfer of accessory rights is considered so inherent in an assignment that it cannot be excluded by agreement, for the effect would

be to leave the assignor with security for a right no longer vested in the assignor, with the result that neither assignor nor assignee would be able to enforce the security.

However, there are also rights which, though intended to secure performance, are not in terms accessory in character. These supporting security rights are also transferred unless, of course, they are by their nature non-transferable. The policy here is the same as in relation to subrogation in the case of a plurality of debtors or security providers (see III. – 4:107 (Recourse between solidary debtors) paragraph (2) and IV. G. – 2:113 (Security provider's rights after performance) paragraph (3)). There is no reason why a former creditor (the assignor) should retain a security right the exercise of which would merely constitute an unjustifiable enrichment.

D. Assignment of rights and substitution of assignee as debtor

Where the assignment of rights is associated with an agreement by which the assignee also assumes responsibility, in place of the assignor, for payment of rights incurred by the assignor to the debtor, this Article takes effect subject to III. – 5:302 (Transfer of contractual position). That Article is designed to ensure that the assignee cannot obtain the benefit of the rights assigned before effectively assuming the burdens taken over from the assignor, this requiring the assent of the other party to the contract.

Notes

1. This Article reflects the law in most jurisdictions: Kötz, Rights of Third Parties, no. 91. Paragraph (1) produces the effect stated in most of the European codes or doctrines, namely that accessory rights pass without the need for a separate act of transfer. In AUSTRIA it is considered implicit in CC §§ 1393, 1394: see OGH SZ 60/46; ÖRZ 1992/26, OGH 23 February 1993, RdW 1993, 362 (different in the case of pledges, see *Koziol and Welser*, Bürgerliches Recht I¹³, 387). In CZECH law the same is stated by CC § 524(1) (see also above). The position is similar in BELGIUM (CC art. 1692; *van Gerven*, Verbintenissenrecht, 574); the NORDIC countries; FRANCE (CC art. 1692 and *Loi Dailly* art. 4(3)); GERMANY (CC §§ 398, 401); GREECE (CC art. 458; see *Georgiades and Stathopoulos (-Kritikos)*, art. 458; *Agallopoulou*, Greek Civil law, 298; Athens Court of Appeals 459/1993, NoB 42 [1994] 206 at 207); ITALY (CC art. 1263(1)); LUXEMBOURG (CC art. 1692); the NETHERLANDS (CC arts. 6:142 and 3:82); ESTONIAN LOA § 167; PORTUGAL (CC art. 482); SLOVENIA (LOA § 421(1)) and SPAIN (CC art. 1528). The rule provided in paragraph (1) is also reflected in POLISH law (CC art. 509 § 2: “together with the claim, all rights connected therewith pass to the assignee, in particular rights to overdue interest”). There does not appear to be a rule to this effect in ENGLISH law. In SCOTTISH law an assignment carries all rights accessory to the assigned right: *Anderson*, nos. 2.01-2.21. The SLOVAK CC similarly provides that the assignment of a right transfers also the ancillary rights (e.g. default interest) and all rights connected therewith (CC § 524(2)). The legal doctrine includes in this category also the accessory securities. It is explicitly stated in commercial relations regarding suretyship guarantees (Ccom § 307 cl. 3). However, there are exceptions in case law,

stating that a separate contract (suretyship guarantee) cannot be transferred without the consent of the party to the contract, as it might alter the content of the obligation significantly (see Judgment of the Supreme Court of SR 2 Obo 155/04-156/04).

III. – 5:116: Effect on defences and rights of set-off

- (1) The debtor may invoke against the assignee all substantive and procedural defences to a claim based on the assigned right which the debtor could have invoked against the assignor.
- (2) The debtor may not, however, invoke a defence against the assignee:
 - (a) if the debtor has caused the assignee to believe that there was no such defence; or
 - (b) if the defence is based on breach by the assignor of a prohibition or restriction on assignment.
- (3) The debtor may invoke against the assignee all rights of set-off which would have been available against the assignor in respect of rights against the assignor:
 - (a) existing at the time when the debtor could no longer obtain a discharge by performing to the assignor; or
 - (b) closely connected with the assigned right.

Comments

A. Defences

This Article assumes the existence of a valid assignment. If the purported assignment has not taken place (e.g. because the act of assignment is void or ineffective to effect a transfer) the debtor has no obligation to pay or otherwise perform in favour of the purported assignee.

A widely accepted principle, and that adopted in this Article, is that the assignee cannot stand in any better position than the assignor. Accordingly the assignee acquires the rights subject to all defences which the debtor could have asserted against the assignor, and this is so whether the grounds of defence arose before or after the notice of assignment. For this purpose, “defences” includes procedural defences.

Illustration 1

S sells and delivers goods to B and then assigns the seller’s rights to A. The goods do not conform to the contract of sale. If A claims the price B has the same defences against A as would have been available against S. So B may be able to terminate for fundamental non-performance and refuse to pay the price to A. Alternatively B can retain them and claim a reduction of the price.

Illustration 2

S contracts to sell goods to B, delivery to be made in one month’s time. S then assigns the seller’s rights to A but fails to deliver the goods. B can refuse to pay the price to A.

Illustration 3

S agrees to sell goods to B, and then assigns the seller's rights to A. The contract contains a provision that all disputes are to be referred to arbitration. There is a dispute as to the quality of the goods and B refuses to pay A the price. A sues B to recover the price. B is entitled to ask that the dispute be referred to arbitration in accordance with the contract.

B. Assignee incurs no positive contractual liability

The assignee incurs no positive contractual liability to the debtor for non-performance by the assignor. All the debtor can do is to rely on that non-performance as a defence to the assignee's right and to make a separate claim against the assignor.

C. Restrictions

Paragraph (2) contains two restrictions on the debtor's general right to invoke against the assignee any defence which could have been invoked against the assignor. The first – that the debtor cannot invoke a defence if the debtor has led the assignee to believe that there was no such defence – can be regarded as a special application of the principle of good faith and fair dealing in the exercise of rights, remedies and defences. The second – that the debtor cannot invoke any defence based on breach by the assignor of a no-assignment clause – is designed to prevent the rules on no-assignment clauses from being defeated indirectly. The debtor must be prevented from withholding performance from the assignee, or terminating for fundamental non-performance and pleading the fact of termination against the assignee, if the ground for withholding or termination is simply a breach by the assignor of a no-assignment clause.

D. Right of set-off

General. Somewhat different rules apply to set-off. It is generally accepted that the debtor should be allowed to exercise against the assignee the same right of set-off (if any) as the debtor could have invoked against the assignor in respect of cross-rights which exist at the time of receipt of the notice of assignment. In cases where no notice of assignment is given the relevant cut off time should be the time when the debtor can no longer obtain a discharge by performing to the assignor.

Illustration 4

C, who is owed €100 000 by O for the cost of building works, assigns the rights under the building contract to A, who gives notice of the assignment to O. Subsequently O lends C €40 000 under a loan agreement which is unconnected with the building contract. O cannot set off the right for repayment of the loan against the liability to A.

Illustration 5

S sells machinery to B at a price of € 1 million payable by five annual instalments of € 200 000. By a separate contract S agrees to service the equipment for a period of five years. S assigns all S's rights under these contracts to A. In a claim by A for non-payment of an instalment B can set off a cross-right for damages for loss suffered as the result of S's breach of the servicing contract.

Unmatured obligations. It is not necessary to the right of set-off that the relevant cross-right should have matured at the time of the debtor's receipt of notice of assignment; it suffices that it is in being as a *debitum in praesenti, solvendum in futuro*. If the rule were otherwise, a debtor's potential right to set off against the creditor a cross-right due to mature at the same time as the creditor's right would be extinguished by the creditor's assignment of the creditor's right, contrary to the fundamental principle that an assignment should not prejudice the debtor. However, under the rules on set-off it is necessary that the cross-right should have matured by the time the debtor is called upon to give performance of the assigned right, for the debtor is not entitled to use set-off to accelerate the cross-right. Once the debtor has received a notice of assignment or is otherwise precluded from obtaining a discharge by performing to the assignor, it would be unfair to the assignee and contrary to principle to allow the assignee's interest to be reduced or extinguished as the result of the debtor setting off independent rights arising from new dealings between the debtor and the assignor. Where, however, those new rights are closely connected with the assigned right, it is reasonable that the assignee should take subject to them.

Illustration 6

In June S supplies goods to B at the price of € 10 000, payment to be made on or before 31st December. In August B lends S € 4000 under a loan agreement which requires the loan to be repaid by 1st November. In October S assigns to A the debt of € 10 000 due from B, and A gives notice of the assignment to B immediately afterwards and requires B to pay the € 10 000 on or before 31st December. B can set off the loan of € 4000 which will by then have become repayable, and it is irrelevant that it had not become repayable when B received the notice of assignment from A.

Illustration 7

The facts are as in Illustration 6 except that the loan of € 4000 is not repayable until 1st February in the following year. On 15th January in that year, following B's failure to pay A the € 10 000, A makes demand for payment of that sum. B cannot set off the loan of € 4000, since this has not yet become repayable.

Notes

1. The principle that the assignee acquires rights subject to all defences which the debtor could have asserted against the assignor is common to all European legal systems and reflects the policy that the debtor should not be prejudiced by the assignment (*Kötz, Rights of Third Parties*, no. 97). However, legal systems differ as to whether the grounds

of defence must exist, either actually or potentially, at the time of the assignment coming into effect. This is a requirement in FRANCE (CC art. 1690); LUXEMBOURG (CC art. 1690); GERMANY (CC § 404); GREECE (CC art. 463(1)); BELGIUM (*Cornelis*, Handboek, no. 335; *van Gerven*, Verbintenissenrecht, 575 – “existence” is broadly understood: e.g. the right to suspend performance until the other party performs is seen as arising with the obligation itself and thus necessarily existing at the time of notice even if there is not yet any actual non-performance by the assignor, Cass. 13 September 1973, RCJB 1974, 352 obs. *M. L. Stengers*; Cass. 27 September 1984, RW 1984-85, 2699; Cass. 28 January 2005, no. C.04.0035N, VTB-VAB t. ABB, RW 2006-2007, 476); SLOVAKIA (CC § 529); and PORTUGAL (CC art. 585) and probably also in DENMARK see on Promissory Note Act § 27, *Ussing*, Obligationsretten⁴, 219; and SCOTLAND (*McBryde*, Law of Contract in Scotland, no. 12.68). The rule can be construed in CZECH law from the CC §§ 526(1) and 528, see *Švestka/Jehlička/Škárková*, OZ⁹, 668 and 670. In ENGLISH law the debtor may rely on defences connected to the contract but may only set off other claims if they arose before the debtor was notified of the assignment: see *Chitty* on Contracts I²⁹, no. 19-069. In most other systems, and under art. 20(1) of the UN Convention, it is immaterial whether the ground of defence arises before or after the receipt of notice of assignment. In AUSTRIA CC § 1396 stipulates that the assignment cannot worsen the position of the debtor and that the debtor has against the assignee all defences available against the assignor. Following the principle that a person cannot transfer more rights than that person actually has, defences can be relied on only as far as they exist at the time when the assignment takes place (OGH 4 April 1978, SZ 51/38; *Lukas*, Zession, 154; a different opinion that all remedies that exist up to the time of notice are available is supported by *Rummel* (-*Ertl*), ABGB II(3)³, § 1396 no. 1).

2. The right of set-off is more complex. In some systems the right of set-off is excluded altogether if the assignment has been perfected by acceptance by the debtor, as opposed to notification, unless the debtor in signifying acceptance reserves the right of set-off. This is the position in FRANCE (CC art. 1295, but abolished in BELGIUM), LUXEMBOURG (CC art. 1295 and the DUTCH CC art. 6:130), ITALY (CC art. 1248(1); Cass. 15 October 1997, no. 4416; Cass. 1980, no. 1484) and SPAIN (CC art. 1198). In most systems the availability of set-off depends on whether the debtor's right against the assignor is closely connected to the assigned right or is an independent right. In the former case set-off is available even in respect of a right arising after receipt of notice of assignment; in the latter case it is restricted to rights that have matured prior to such receipt (though under art. 4(2) of the *Loi Dailly* in FRENCH law the relevant date is the date of the assignment) and to rights accrued but not matured at the time of receipt provided that these have matured at the time of the assignee's demand for payment (e.g. LUXEMBOURG CC art. 1295 and the DUTCH CC art. 6:130). Thus under BELGIAN law set-off by the debtor with a right against the assignee is only possible if (a) the requirements for set-off were met before the notification or (b) the rights are closely connected (the latter rule with some exceptions in case of transfer of contract, See Cass. 26 June 2003, RW 2003-2004, 1419 critical obs. *M. de Theije* “Compensatie na cessie” = Rev.not. b. 2003, 620 = TBH 2004, 476 critical obs. *I. Peeters*). See *Kötz*, Rights of Third Parties, no. 98. GERMAN law upholds all set-off situations and even protects the debtor's reliance on future opportunities for set-off, see CC § 406. Under POLISH law the debtor may set up against the assignee all defences which the debtor had against the assignor at the time of learning of the assignment (CC art. 513). As stated by the case law, the

debtor can set up the defences related to the relationship between the assignor and the assignee, and in particular can question the *causa* of the assignment (see: Supreme Court 19 February 1998, III CKN 387/97, OSNC 1998/10/162). In addition, the debtor may set-off against the assigned right any right the debtor has against the assignor, even though that right has become due after the debtor learned of the assignment; however, this does not apply where the right against the assignor became due later than the assigned right (CC art. 513). Under the SLOVAK CC § 529 cl. 1 the debtor's defences that could have been invoked against the right at the time of assignment, are retained by the debtor. The debtor may invoke against the assignee all rights of set-off the debtor had against the assignor at the time of the notification about the assignment by the assignor, or adequate averment by the assignee, if reported to the assignee without undue delay. This applies to unmatured rights as well (CC § 529(2)). There is no special regulation for rights of set-off closely connected to the right. Also according to GREEK law (CC art. 463(2) on set-off) a cross-right which the debtor had against the assignor, at the time of the notification, may, even though not due, be asserted in set-off against the assignee, if it became due not later than the right that has been assigned. For AUSTRIA the principles mentioned above also apply in the case of set-off. In SLOVENIAN law the debtor has against the assignee all valid counter-claims available against the assignor, regardless of notification. See LOA § 421(2).

3. The NORDIC Promissory Note Act § 28 provides: "The debtor is entitled to invoke against the assignee a valid counter-claim on the assignor unless the debtor acquired the counter-claim after the time he had obtained knowledge or surmise of the assignment. If the counter-claim was due after that time and later than the debt fell due it cannot be invoked against the assignee." However it is generally held that a connected counter-claim against the assignor may be set off even if it was acquired after the right was assigned and the assignment had been notified to the debtor, see *Ussing, Obligations-retten*⁴, 350.
4. Under ESTONIAN law grounds of defence must exist at the time of the assignment (LOA § 171(1), corresponds to GERMAN CC § 404), which is not dependent on receipt of the notice. Defences on the ground of effectiveness of the assignment (e.g. infringement of form requirements) are considered to be defences against the purported assignee (see Supreme Court Civil Chamber's decision from 21 April 2005, civil matter no. 3-2-1-35-05). The debtor may not invoke a defence against the assignee based on a no-assignment clause in their contract (LOA § 171(2)). The debtor has also a right to set off a right against the assignor against the right of the assignee unless: 1) the debtor has acquired the right from a third party and, at the time of acquiring the right, the debtor knew or should have known of the assignment; or 2) the right against the assignor falls due later than the assigned right and after the debtor became or should have become aware of the assignment (LOA § 171(3), closely corresponds to GERMAN CC § 406).

III. – 5:117: Effect on place of performance

- (1) Where the assigned right relates to an obligation to pay money at a particular place, the assignee may require payment at any place within the same country or, if that country is a Member State of the European Union, at any place within the European Union, but the assignor is liable to the debtor for any increased costs which the debtor incurs by reason of any change in the place of performance.
- (2) Where the assigned right relates to a non-monetary obligation to be performed at a particular place, the assignee may not require performance at any other place.

Comments

A. Effect of assignment on place of performance of money obligation

Where the debtor has to pay the creditor at the latter's place of business or by transfer to the creditor's bank account an assignment of the right necessarily involves a change in the place of performance. Within a given country the place of payment is usually of little significance, since most payments of any significance are made by inter-bank transfer, and it is as easy for the debtor to arrange payment to the assignee's account as to the assignor's account. Rather different considerations may apply where the place of payment is changed to one in a different country. Apart from increased costs, which the debtor is entitled to recover from the assignor under paragraph (1) of this Article, the debtor may be affected by currency controls, increased transfer risks and the need to allow greater time for the transfer to be effected. Hence the general rule stated in paragraph (1) that the assignee may not require payment in a country different from that of the place where payment is due. However, this rule is modified where the original place of payment is in a Member State of the European Union, in which case the assignee may require payment to be made either in that State or in any other Member State. In effect, the European Union is treated as a single country for the purpose of paragraph (1) of this Article. This reflects the concept of the European Union as a single market and the advent of the European Monetary Union and the Euro as the obligatory common currency of Member States of the EMU. This rule goes beyond what is found in any of the national laws but is convenient in the context of a single market.

Illustration 1

S in Hamburg sells goods to B in Paris, payment to be made by inter-bank transfer to the credit of S's account with its bank in Hamburg. S assigns the debt to A in Milan. On giving notice of the assignment A can require B to make payment to the credit of A's account in Milan.

Illustration 2

The facts are as in Illustration 1 except that S is in New York and B is required to make payment to S in New York. A, the assignee in Milan, can require B to pay anywhere in the United States but not in any other country.

B. Place of performance of non-monetary obligations cannot be changed

Non-monetary obligations raise quite different considerations, since a change to a new place of performance even within the same country may fundamentally alter the nature of the obligation. For example, where there is a contractual obligation to ship goods f. o. b. Southampton, the place of shipment is an essential term of the contract and the obligation ought not, by reason of an assignment, to be converted into an obligation to ship f. o. b. Liverpool. Accordingly paragraph (2) provides that the assignee of a right to the performance of a non-monetary obligation cannot change the place of the debtor's performance.

Notes

1. An assignment of a monetary right almost invariably entails a change in the place of performance of the debtor, namely to the assignee's place of business or into the assignee's bank account instead of the place of business or bank account of the assignor. It is indeed inherent in the assignability of monetary rights that the assignee can require payment to be made to it instead of to the assignor. Accordingly while most legal systems do not appear to have an express rule concerning payment to the assignee it is generally accepted that, at least so long as payment is to be made within the same country, the assignee can require such payment to its location, though the assignor may be liable for any increased costs incurred by the debtor. NORDIC law is one of the few laws to make express provision to this effect in § 3 of the NORDIC Promissory Note Acts. In GREECE doctrinal opinions are divided, some taking the view that the debtor remains entitled to pay at the assignor's domicile (e.g. Georgiades and Stathopoulos (-Kritikos), art. 455, no. 60) while others argue for the domicile of the assignee (Georgiades, 421, note 57). GERMAN law imposes on the creditor who changes domicile the increased cost or risk of remittance (CC § 270(3)) and this rule is also found in DUTCH law (CC arts. 6:116-117); SLOVAK law regarding commercial legal relations (CC § 337 cl. 2); and ESTONIAN law LOA § 85(3). CZECH Ccom § 337.2 and art. 57 of the Convention on Contracts for the International Sale of Goods (CISG) is considered to be applicable by analogy to assignments. Some writers on CISG argue against the analogy, but the better view is that to insist on the debtor's right to pay at the original place of payment is inconsistent with the assignability of the right. In AUSTRIA it should follow from CC § 1396 that the place of performance does not change. It seems that under the SLOVENIAN law the assignee would not have a right to demand from the debtor anything that would put the debtor in a worse position than before the assignment. This is clearly provided in the LOA § 421(1). The rule in para. (2) of the Article would also be the position in SCOTTISH and ENGLISH law in accordance with the general principle that the assignee cannot acquire any right which the assignor did not have. CZECH CC does not have any express provision on the issue and legal writers insist on the strict position that the assignee cannot unilaterally designate another place of performance than originally agreed (Švestka/Jehlička/Škárková, OZ⁹, 936).
2. POLISH law provides a general statutory rule regarding the place of performance, which can also be applied to assignments. In general, a monetary performance is to be effected at the place of residence or business of the creditor at the time of the performance. If the

creditor has changed the place of residence or business after the creation of the obligation, the creditor must bear the additional costs of transfer (CC art. 454). As to the non-monetary performance, if its place has not been indicated and does not follow from the nature of the obligation, the performance is to be effected at the place of the debtor's residence or place of business at the time of the creation of the obligation. In SCOTTISH law the general rule is that payment should be made at the place of business of the creditor, who will be the assignee if there has been an intimated assignment (McBryde, *Law of Contract in Scotland*, no. 24.19).

3. The SPANISH CC does not distinguish between monetary and non-monetary obligations regarding to the place of performance. The CC art. 1171 states that the place of performance of any obligation is the one indicated in the terms of the contract, or, in its default, the debtor's residence. A change of the place of performance requires an agreement between the parties, explicit or tacit. Furthermore, the debtor's situation must not get worse due to the assignment. Therefore the debtor may oppose to the assignee any exceptions which could have been opposed to the assignor (*Navarro Pérez, La cesión de créditos*, 352).
4. In FRANCE and BELGIUM no similar rule expressly exists, probably because of the rules on place of performance providing that the normal place of performance is the debtor's place for monetary obligations and the place where the goods lie in other obligations to deliver.

III. – 5:118: Effect of initial invalidity, subsequent avoidance, withdrawal, termination and revocation

- (1) This Article applies where the assignee's entitlement for the purposes of III. – 5:104 (Basic requirements) paragraph (1)(d) arises from a contract or other juridical act (the underlying contract or other juridical act) whether or not it is followed by a separate act of assignment for the purposes of paragraph (1)(e) of that Article.
- (2) Where the underlying contract or other juridical act is void from the beginning, no assignment takes place.
- (3) Where, after an assignment has taken place, the underlying contract or other juridical act is avoided under Book II, Chapter 7, the right is treated as never having passed to the assignee (retroactive effect on assignment).
- (4) Where, after an assignment has taken place, the underlying contract or other juridical act is withdrawn in the sense of Book II, Chapter 5, or the contractual relationship is terminated under any rule of Book III, or a donation is revoked in the sense of Book IV. H., Chapter 4, there is no retroactive effect on the assignment.
- (5) This Article does not affect any right to recover based on other provisions of these model rules.

Comments

A. Introduction

This Article had no equivalent in the Principles of European Contract Law. Those Principles deliberately left open the question here addressed, on the view that it fell to be resolved in the context of the transfer of movables generally. Now the question has been resolved for the purposes of Book VIII on the transfer of corporeal movables. It has been decided that where the underlying contract or other source of entitlement to a transfer is void or avoided then the transfer falls away also. There is no transfer. For the sake of consistency the same approach is adopted here.

The typical case of the application of the Article will be where there is a sale of a right to payment followed by notification to the debtor that the right has been assigned. Notification is not necessary for an effective assignment, but it produces the practical effect that the debtor is likely to pay the assignee. Then it becomes clear that the sale contract was void, or has been avoided. The effect of the present Article is that the assignment is regarded as never having taken place. It will normally be up to the assignor to notify the debtor of this situation, thus ensuring that the debtor would no longer be in good faith in paying the purported assignee and would no longer obtain a good discharge by so doing. See III. – 5:119 (Performance to person who is not the creditor).

B. Contract or other juridical act

The Article does not apply where the entitlement derives from a court order or rule of law. In those cases, although it is possible that the order or rule might turn out to be invalid, this is very much less likely than in the case of a private law juridical act and the consequences can be left to the rules governing the source of obligation in question.

C. Invalidity of underlying contract or act

Paragraphs (2) and (3) contain the key rule. If the underlying contract or other juridical act is void or is avoided then there is no assignment in so far as entitlement derives from that contract or other juridical act. However, it is possible that there will be a separate entitlement by virtue of a later contract or other juridical act. Nothing in the Article prevents an assignment from taking place by virtue of such a later entitlement.

Illustration 1

X concludes a contract with Y whereby X will gratuitously assign a right to Y in a year's time. The contract is void because X is under the age of legal capacity for juridical acts. A year later X is no longer under the age of legal capacity. X knows the contract is void and that he is under no obligation to assign the right but decides to assign it anyway. X executes a formal document of assignment in favour of Y and mentions that he is aware of the invalidity of the earlier contract. The assignment is

not based on the earlier contract. There is a separate juridical act of assignment which in itself confers entitlement on Y.

D. Termination, withdrawal or revocation

Paragraph (4) deals with the situation where the underlying contract or other juridical act is valid but where the relationship resulting from it is brought to an end, whether by withdrawal under Book II or by termination under Book III or by revocation of a donation under Book IV. In these situations there is no retrospective effect on any assignment which has already taken place. Restitution may sometimes be required but this will depend on the rules affecting the relevant situation and there would have to be a re-assignment of the right. It would not revert automatically.

Illustration 2

A contract between X and Y contains a provision (one among many in a complicated agreement) obliging X in exchange for payment to assign certain rights to Y. Payment is made and X assigns the rights. After some time it becomes clear that there has been a fundamental non-performance by Y of other obligations under the contract. X terminates the contractual relationship. The assignment is not automatically affected. Whether there will have to be a re-assignment of the rights and a repayment of the price paid for them will depend on whether this part of the performances due under the contract is divisible. See III. – 3:510 (Restitution of benefits received by performance) and III. – 3:511 (When restitution not required).

If restitution is required under other provisions (for example, those just cited) then the present Article does not affect the right to it. This is made clear by paragraph (4).

E. No need to regulate assignment subject to condition or time limit

It is not necessary to regulate specifically the situation where an assignment is made subject to a condition or time limit. If the condition or time limit is suspensive the situation is clearly covered by III. – 5:114 (When assignment takes place) paragraph (1) which specifies that the assignment takes place when the requirements for an assignment are satisfied “or at such later time as the act of assignment may provide”. If all the other requirements for an assignment are met then the assignment will simply take effect when the condition is fulfilled or the specified time arrives.

If the condition is resolute (or if the assignment is subject to a resolute time limit) then the transaction can be analysed simply as two assignments. The existing creditor assigns now and the assignee agrees to re-assign when the time arrives or the condition is fulfilled. It would be a question of interpretation whether the agreement to re-assign operated as an act of assignment itself or required a separate later act of assignment. If it fell to be interpreted as operating as an act of assignment, with delayed effect, there would be no need for a separate act of assignment when the time arrives or the condition is fulfilled. See III. – 5:104 (Basic requirements) paragraph (3).

Notes

1. The question of the effect of some defect of, or some event affecting, an underlying obligation on a transfer of property made on the basis of that obligation is one which has divided legal systems. Reference should be made to the Notes to III. – 5:102 (in particular, Note 1) and III. – 5:104 and to the Notes to the equivalent Article in Book VIII (VIII. – 2:202) where the matter is fully discussed.

Sub-section 5:

Protection of debtor

III. – 5:119: Performance to person who is not the creditor

- (1) The debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive performance.
- (2) Notwithstanding that the person identified as the assignee in a notice of assignment received from the assignor is not the creditor, the debtor is discharged by performing in good faith to that person.
- (3) Notwithstanding that the person identified as the assignee in a notice of assignment received from a person claiming to be the assignee is not the creditor, the debtor is discharged by performing to that person if the creditor has caused the debtor reasonably and in good faith to believe that the right has been assigned to that person.

Comments

A. General

This Article sets out the ways in which the debtor can obtain a discharge when the right has been assigned. It is in addition to the special rules in III. – 5:108 (Assignability: effect of contractual prohibition) allowing the debtor, subject to certain exceptions, to obtain a good discharge by paying the assignor where the assignment has taken place in breach of a contractual prohibition or restriction. It is clearly necessary to have provisions for the protection of the debtor if notice to the debtor is not a requirement for an effective assignment. The debtor must be given the means of knowing to whom performance is to be made (a matter developed further in the next Article) and must be protected if performance has been made in good faith to the wrong person.

B. Performance to creditor

It goes without saying that the debtor will always be discharged by performing to the person who is for the time being the creditor. Performance to the creditor extinguishes the obligation.

C. Performance to assignor before receipt of notice of assignment

Paragraph (1) provides that the debtor is discharged by performing to the assignor so long as the debtor has not received a notice of assignment from either the assignor or the assignee and does not know that the assignor is no longer entitled to receive payment. The debtor would not necessarily lose this protection merely because the debtor knew from some other source that the right had been assigned. It is not uncommon for a right to be assigned but for the understanding between assignor and assignee to be that the assignment will not be notified and that the assignor will continue to receive payments.

There is no requirement that the notice of assignment must be in any particular form. However, the next Article enables the debtor to request adequate proof of the assignment in any case of doubt and to withhold performance until it is provided. The notice may be given either by the assignor or by the assignee, but in the latter case the next Article enables the debtor to request the assignee to provide reliable evidence of the making of the assignment.

The law on unjustified enrichment protects the assignee in any case where the debtor obtains a discharge under this provision by performing to the assignor. The debtor will have paid to a person who is no longer the creditor. The assignor is enriched without legal justification. The assignee suffers a corresponding disadvantage because the assignee can no longer recover from the debtor. So the assignee can recover from the assignor whatever has been paid or transferred by the debtor in performance of the obligation. This right is supplemented by the limited provision in III.–5:122 (Competition between assignee and assignor receiving proceeds) giving the assignee priority over the proceeds so long as they remain separately identifiable in the assets of the assignor.

D. Performance to person identified as assignee in notice of assignment

Where the debtor receives a notice of the assignment from the assignor the debtor should be entitled to rely on it and to obtain a discharge by performing in good faith to the person named as assignee in it. This is provided for by paragraph (2). The debtor would not be in good faith if there was reason to suppose that the notice of assignment was sent by a fraudster. The debtor would also not be in good faith if the debtor knew that the assignment was ineffective because the right was non-assignable by law. In cases of genuine doubt the debtor could request further particulars or evidence under the following Article and in the meantime withhold performance.

Paragraph (3) deals with the situation where a notice of assignment is received from a person claiming to be the assignee. Here there is an obvious risk of fraud. Anybody could send such a notice. Accordingly the requirements for the debtor to obtain a discharge by paying the person identified in the notice as the assignee are more strict. The debtor must have been given cause by the creditor to believe reasonably and in good faith that the person claiming to be the assignee is in fact the new creditor. To obtain protection the debtor should request reliable evidence of the assignment to the purported assignee under paragraph (3) of the following Article and in the meantime can withhold performance.

If the debtor does obtain a good discharge by virtue of the provisions of this Article the law on unjustified enrichment again comes into play. The debtor has obtained a discharge by performing to the wrong person. The person wrongly identified as the assignee has been enriched without legal justification. The assignor has suffered a corresponding disadvantage because no longer able to recover from the debtor. So the assignor can recover from the supposed assignee under the law on unjustified enrichment.

Notes

I. General

1. All systems agree that a debtor who has no knowledge of the assignment obtains a good discharge by giving performance to the assignor, whilst a debtor who has been notified in accordance with the requisite formalities or (in most jurisdictions) has accepted the assignment must perform in favour of the assignee. In most legal systems all that the notice need state is that an identified right has been assigned.
2. Difficulties arise where notice is given to the debtor but is defective or where no notice is given but the debtor acquires knowledge of the assignment from other sources and in either case has not accepted the assignment.

II. Debtor's knowledge of assignment

3. In most systems the debtor's knowledge of the assignment, even without notification, precludes the debtor from performing in favour of the assignor, for this is seen as contrary to good faith. However, in SCOTTISH law mere knowledge does not preclude the debtor from performing in favour of the assignor (McBryde, *Law of Contract in Scotland*, no. 12.93; discussion in *Anderson*, nos. 6.21 et seq.), so that in effect until intimation is received the debtor has the choice whether to give performance to the assignor or the assignee. This is true also in NORDIC law (Promissory Note Act § 29) and in the NETHERLANDS (CC art. 6:37). The position in BELGIAN law is controversial, some authors taking the position that mere knowledge of the assignment does not preclude the debtor from performing in favour of the assignor (*Dirix*, nos. 15–11; *Cornelis*, *Handboek*, no. 335), while others (e.g. *Herbots*, no. 309) consider that a debtor who performs in favour of the assignor after knowledge of the assignment is necessarily acting in bad faith. The text of CC art. 1690 provides that the debtor who is notified is only bound by the assignment when the debtor recognises it, which means that the debtor is not bound to perform to the assignee; the reason is that an assignee who has not notified leaves an

authority to collect with the assignor. In GREEK law before notification occurs, the debtor may and is obliged to make payment to the assignor and such payment releases the debtor (see CC art. 461); after notification the debtor is relieved only if payment is made to the assignee (see *Stathopoulos*, no. 205). The notification is not subject to a certain form but can be made by the assignor or the assignee to the debtor orally, in writing, judicially or extrajudicially, expressly or indirectly (see Georgiades and Stathopoulos (-*Kritikos*), art. 460, no. 15; *Stathopoulos*, Law of Obligations⁴, § 27, no. 28). Also in GREECE it is debatable whether mere knowledge of the assignment precludes the debtor from performing in favour of the assignor. According to the prevailing view, however, a debtor who is aware of the assignment though there was no notification, and who is asked by the assignor to pay the debt, has the right to refuse payment if the invocation of the right deriving from CC art. 461 would have the character of an obvious abuse of right (CC art. 281; see Georgiades and Stathopoulos (-*Kritikos*), art. 461, no. 6). It has even been proposed (*Stathopoulos*, Law of Obligations⁴, § 27, no. 28) that the knowledge of the debtor about the assignment of the claim through another source should equal notification. In SLOVAKIA, the good faith principle does not come into play in this regard. Without notification by the assignor or averment by the assignee, the debtor is discharged by performing in favour of the assignor (CC § 526(1)). In CZECH law also (CC § 526.2) and POLISH law (CC art. 512) the rule is that until the assignor notifies the debtor, or until the assignee proves the fact of the assignment to the debtor, the debtor may still perform in favour of the assignor (see *Švestka/Jehlička/Škárová*, OZ⁹, 668 and *Mojak*, 1062).

4. The majority of European Union legal systems favour the rule by which the debtor is entitled to act on mere knowledge of the assignment to perform in favour of the assignee but cannot any longer give performance to the assignor. This is the position in ITALY (CC art. 1264(2)); AUSTRIA (CC § 1365); GERMANY (CC § 407(1)); the NETHERLANDS (CC art. 6:37); the NORDIC countries (Promissory Note Act § 29); SLOVENIA (LOA § 419); ENGLAND (*Tolhurst v. Associated Portland Cement Manufacturers* (1900) Ltd. [1902] 2 KB 660, 668); ESTONIA (LOA § 169(1)); PORTUGAL (CC art. 583(1)) and, according to one theory, BELGIUM (see Note 3 above) and LUXEMBOURG (CC art. 1691). In several countries this result is reached by the application of the principle that a debtor acting in good faith is to be protected: this is, for example, the case in SPANISH law, CC art. 1164.
5. In FRANCE, as long as the assignor has not notified the debtor of the assignment, performance in favour of the former creditor is effective as against the assignee, unless the debtor knew of the assignment at the time of the performance (see *Bénabent*, Les obligations¹¹, 521, no. 728). Until notification the assignment of a right is not effective against the debtor and the debtor cannot invoke it. Moreover, the assignee may not normally request performance from the debtor. However, it has been recently held that the assignee may request payment by the debtor provided that such payment does not affect third parties' rights (Com., 28 September 2004, Bull.civ., IV, no. 173). On the other hand, once the debtor is notified, the debtor is bound to perform in favour of the assignee and may invoke the defences and rights of set-off that the debtor had against the assignor, in accordance with the principle that assignment of right must not alter the debtor's situation.

III. Competing demands

6. All the systems surveyed possess a rule of some kind for the protection of the debtor faced with competing demands. See the Notes to III. – 5:121.

III. – 5:120: Adequate proof of assignment

- (1) A debtor who believes on reasonable grounds that the right has been assigned but who has not received a notice of assignment, may request the person who is believed to have assigned the right to provide a notice of assignment or a confirmation that the right has not been assigned or that the assignor is still entitled to receive payment.
- (2) A debtor who has received a notice of assignment which is not in textual form on a durable medium or which does not give adequate information about the assigned right or the name and address of the assignee may request the person giving the notice to provide a new notice which satisfies these requirements.
- (3) A debtor who has received a notice of assignment from the assignee but not from the assignor may request the assignee to provide reliable evidence of the assignment. Reliable evidence includes, but is not limited to, any statement in textual form on a durable medium emanating from the assignor indicating that the right has been assigned.
- (4) A debtor who has made a request under this Article may withhold performance until the request is met.

Comments

A. General

This Article is designed to protect a debtor in various situations of uncertainty.

B. Assignment but no notice

The first situation in which the debtor needs protection is where the debtor has reason to believe that there has been an assignment but has not received any notice of assignment. In such a case the debtor cannot safely perform to the assignee and indeed may not even know who the assignee is. However, the debtor may fear that performance to the assignor might also be unsafe. Paragraph (1) enables the debtor to ask the assignor to clarify the situation by providing a notice of assignment or a confirmation that the right has not been assigned or that the assignor is still entitled to receive payment. Until the position is clarified the debtor can withhold performance. The debtor would, however, not be able to rely on this right if acting contrary to the requirements of good faith and fair dealing – for example, if the debtor did not believe that the right had been assigned and was just adopting a delaying tactic.

Illustration 1

C assigns to A a right to payment by D. Neither C nor A gives notice of the assignment but D learns of it from another source. If D is confident that the right has been assigned to A then D may pay A and will be discharged. If D is not confident then D can ask C to clarify the position and in the meantime may withhold payment.

C. Inadequate or unclear notice

The next situation where the debtor needs protection is where a notice of assignment has been received but it is not in textual form on a durable medium or does not give enough information to enable the debtor to be able to perform to the assignee. In such a case the debtor may, under paragraph (2), ask the person who gave the notice to provide a new notice in that form which contains adequate information. Again the debtor may withhold performance until the request is met. Again the debtor would not be able to rely on this right if acting contrary to the requirements of good faith and fair dealing.

D. Notice received from assignee

The notice may be in textual form on a durable medium and adequate on its face. However, if it is given by the assignee the debtor may have reason to doubt whether it is genuine. Paragraph (3) enables the debtor to ask the assignee to provide reliable evidence of the making of the assignment. This would include any document emanating from the assignor and indicating that the assignment has taken place. The debtor is entitled to withhold performance until the evidence is furnished.

Illustration 2

C orally assigns to A a debt due from D. A gives notice of the assignment to D but fails to respond when D requests evidence of the assignment. D may either pay A, in which case D obtains a discharge from liability, or withhold performance until A has provided reliable evidence of the making of the assignment.

Notes*When debtor bound to perform in favour of assignee*

1. Most systems seek to protect the debtor by a rule to the effect that a debtor cannot be compelled to give performance to the assignee unless the debtor has received notice in writing (sometimes reinforced by further formalities for the notice) or has accepted the assignment. So while the debtor may be able to obtain a good discharge by performing in favour of the assignee after receiving a defective notice or merely in reliance on knowledge of the assignment acquired from other sources, the debtor cannot be compelled to give such performance, see for GERMAN law CC §§ 410, 409. Exceptions, in which the

debtor's knowledge is equated with notice for all purposes, are PORTUGUESE law (*Pires de Lima and Antunes Varela*, Código Civil Anotado I⁴, 602 ff, *Cristas*, Transmissão Contratual do Direito de Crédito, 190 ff) and SPAIN (*Diez-Picazo*, Fundamentos II, 815-816), under which a debtor acquiring knowledge of the assignment must give performance to the assignee even in the absence of notification. For GREECE see the note under the previous article. It is generally assumed that under ENGLISH law the Law of Property Act 1925 s. 136 has the effect that an assignee cannot sue in its own name alone, but as a mere equitable assignee must join the assignor as claimant, unless the assignment was in writing signed by or on behalf of the assignor and written notice of assignment has been given to the debtor. Nevertheless a debtor who has acquired knowledge of the assignment cannot safely pay the assignor; and the question whether an equitable assignee is precluded from suing in its own name alone remains unsettled and may depend on whether the requirement to join the assignor is considered a rule of substantive law or merely a rule of practice: *Furmston*, no. 6.273. According to POLISH law, as long as the assignor has not notified the debtor of the assignment, performance in favour of the former creditor is effective as against the assignee, unless the debtor knew of the assignment at the time of the performance (CC art. 512). The provisions of this Article generally correspond to the rule under the ESTONIAN LOA § 172. The AUSTRIAN CC § 1395 stipulates that notwithstanding an assignment the debtor can perform in favour of the old creditor if not given notice of the assignment. Notice can be given by both the assignor and the assignee, although this view was lately subject to criticism arguing that notice should only come from the former. Although not mentioned in the wording of the provision the debtor is under a "duty" (not an obligation) to enquire about the lawfulness of the assignment if the debtor has reason to doubt this – e.g. if given notice twice and the notices are contradictory (see Schwimann (*-Heidinger*), ABGB VI³, § 1395, no. 5). In BELGIUM, it is disputed whether notice of assignment can be given by the assignee without proof of consent of the assignor; however, the debtor who has reasonable doubts about the owner of the right can invoke the *exceptio dubii* to refuse payment to either party. In order not to have to pay interest, payment will have to be deposited (Comp. CA Antwerp 13 December 2001, TBH 2002, 466; CA Antwerp 13 December 2001, TBH 2002, 470).

2. The NORDIC Promissory Note Act § 31(1) provides that the assignment is not valid against the creditors of the assignor unless the debtor has been notified of the assignment by the assignor or the assignee. DUTCH law not only provides as the main rule for assignment that it is not valid unless the debtor has been notified but also that the debtor may require a certified summary of the act of assignment (CC art. 3:94). DANISH law requires the assignment to be clear and visible but provides no form, see *Gomard*, Obligationsret III, 85 ff. In SCOTTISH law (for which see *McBryde*, Law of Contract in Scotland, nos. 12.83-12.100) intimation of an assignment must be made to the debtor by either the assignee or the assignor to perfect the assignee's rights; intimation regulates preference amongst assignments, with an unintimated assignment being effective only between the parties to it. Intimation may take various forms but the debtor's knowledge of the assignment is generally not enough unless the debtor was a party to the assignment itself.
3. In SLOVAKIA notification by the assignor need not be in writing. In such case the debtor is not entitled to demand proof of the assignment (CC § 526(2)). The assignee

has to sufficiently aver the assignment to the debtor. The rule is the same in CZECH law (CC § 526(2)) which also provides that until the debtor is notified of the assignment, or until the assignee proves the assignment to the debtor, the debtor is discharged by rendering performance to the assignor (CC § 526.1).

4. In FRANCE, no similar rule expressly exists.

Sub-section 6:

Priority rules

III. – 5:121: Competition between successive assignees

- (1) Where there are successive purported assignments by the same person of the same right to performance the purported assignee whose assignment is first notified to the debtor has priority over any earlier assignee if at the time of the later assignment the assignee under that assignment neither knew nor could reasonably be expected to have known of the earlier assignment.
- (2) The debtor is discharged by paying the first to notify even if aware of competing demands.

Comments

A. General effects

The assignor may have purported to assign the same right to two or more assignees, whether dishonestly or inadvertently. There may also be honest and open successive assignments in security where the first assignment is for a debt substantially below the value of the assigned rights, so that there is scope for one or more further assignments. Assignments by way of security are governed by Book IX. (Proprietary securities).

The first general effect of this Article is to displace *as between the successive purported assignees* the normal rule, which would apply by virtue of the preceding Articles, that the first assignment to take effect would result in the right being transferred to the assignee under that assignment. The assignor would then have no right to assign so that subsequent purported assignees would take nothing. The effect of this Article is that in this special situation the normal rule is replaced by a rule giving priority according to the time of notification to the debtor. The effect of giving priority to a particular assignment (if it is an absolute assignment and not one in security) is that the competing interest is extinguished.

This rule applies only as between the successive purported assignees. In a question between an assignee and creditors of the assignor, the assignee takes the assigned right as soon as the assignment is effective: notification is irrelevant. It might be thought that this combination of rules could lead to an inescapable circle of priorities.

Illustration 1

C assigns a right to A1 who does not notify the debtor. C's creditor, X, then attaches the right in C's hands. C then assigns the right to A2 who immediately notifies the debtor. It looks as if A1 has priority over X, who has priority over A2, who has priority over A1 and so on in a circle.

However, the answer is that X gets nothing. X merely attempts to attach something which is not there. The attachment is completely ineffectual. X has no priority over anyone. X was too late. A2 takes the right and becomes the new creditor. A1 has a claim against C for breach of the undertaking not to grant a subsequent act of assignment which could lead to another person obtaining priority (III. – 5:112 (Undertakings by assignor)).

There could also be a competition between the second purported assignee who has notified the debtor and a person, such as an attaching creditor or an assignee, deriving right from the first assignee who has not notified the debtor. However, any such person deriving right from the first assignee would take the right as it is – in essence as a right inherently liable to be defeated until the assignment is notified. For this reason the Compilation and Redaction Team considered it unnecessary to add some such words as “and any person deriving right from such an earlier assignee” immediately after “earlier assignee” in paragraph (1).

The second general effect is that the debtor will be discharged by paying the first purported assignee to notify even if the debtor is aware of the competing demands and even if the first to notify was aware, or could reasonably be expected to have been aware, of the earlier assignment. The debtor cannot be expected to investigate questions of good faith on the part of successive purported assignees. The earlier purported assignee will not have a right to recover from the one who is the first to notify (assuming that the notification is made in good faith and in ignorance of the prior assignment) because, by virtue of this Article, the one who is the first to notify is in this situation regarded as the assignee. The debtor will have paid to the true creditor. The earlier purported assignee will have a remedy against the assignor for breach of the implied undertaking not to conclude or grant a subsequent act of assignment which could lead to another person obtaining priority. If, however, the first notifier knew or ought to have known of the earlier assignment then the earlier assignee will be able to recover from the first notifier on principles of unjustified enrichment. In that situation the debtor will have obtained a discharge by paying a person who was not the creditor.

B. The first-to-notify rule

Legal systems differ in their approach to competing assignments. In some systems the principle *nemo dat quod non habet* is applied. Having made the first assignment, the creditor has nothing left to assign. Accordingly the second assignment is ineffective, and while the debtor obtains a good discharge by giving performance to the second assignee without knowledge of the first assignment, the second assignee is required to account to the first assignee for any performance received. Other legal systems give

priority to the second assignee who neither knew nor ought to have known of the prior assignment if the second assignee's assignment is the first to be notified to the debtor (whether by that assignee or by the assignor). This latter approach is that adopted here. It reflects two distinct ideas. The first is that giving notice of assignment in good faith is the closest equivalent to the acquiring of possession in good faith, which is a recognised method of obtaining priority in the case of corporeal movables. The second is that an intending assignee, before giving value, can ask the debtor whether the debtor has received any prior notice of assignment. If the first assignee has failed to give such a notice the second assignee should be entitled to assume that there is no earlier assignment, unless the second assignee has acquired knowledge of the earlier assignment in some other way or ought to have known of the earlier assignment, e.g. because it had been registered in a public register.

Illustration 2

S assigns to A1 a right to payment from D and then purports to assign the same right to A2, who is the first to give notice of assignment to D. If A2 neither knew nor ought to have known of the prior assignment at the time of taking A2's own assignment, A2 has priority. This is the case whether the assignments or either of them were outright transfers or were transfers by way of security only. However, if the assignment to A2 is outright, A1's rights are not merely subordinated but extinguished.

C. Neither party notifies

Where neither party has given notice of assignment, the ordinary rule *qui prior est tempore potior est jure* applies. However, the priority of the first assignee is provisional only, being liable to be displaced if the second assignee, being unaware of the earlier assignment, gives notice of assignment before such a notice has been given by the first assignee.

D. Assignments in security

This Article does not apply to assignments in security of rights to the payment of money. See IX. – 2:301 (Encumbrances of right to payment of money). It is inconsistent with the registration system for such security.

Notes

1. Paragraph (1) of this Article represents the majority rule in European legal systems, albeit with certain variations in detail. It is the rule found in ENGLAND (*Dearle v. Hall* (1828) 3 Russ & Ry 1, 38 ER 475), BELGIUM (CC art. 1690 III), FRANCE (*Terré/Simler/Lequette*, Les obligations, no. 1189), NORDIC countries (under the Promissory Note Act § 31(2)), GREECE (*Stathopoulos*, Law of Obligations⁴, § 27, no. 131, ITALY (CC art. 1265(1)), PORTUGAL (CC art. 584), SLOVENIA (LOA § 420). In FRANCE, once the debtor is notified, the assignor's creditors may still request an order of attachment on

the assigned right. If a right has been successively assigned by an unscrupulous assignor, the successive assignee, if it first gives notice to the debtor, takes priority over the earlier assignee, unless a fraudulent collusion is established (Cass.com., 19 march 1980, Bull. civ., IV, n°137: held that the mere knowledge of the earlier assignment by the successive assignee does not amount to fraudulent collusion; see *Bénabent*, *Les obligations*¹¹, 522, no. 729). The debtor is discharged by paying the first assignee to notify even if aware of the competing demands. By contrast AUSTRIAN law (OGH 13 July 1981, SZ 54/104; OGH 11 July 1985, JBl 1986, 235; OGH 27 April 1995, JBl 1996, 251); ESTONIAN law (LOA § 164(3)); POLISH and GERMAN law give priority to the first assignee, this being a corollary of the principle in those jurisdictions that a second assignment is devoid of legal effect (Staudinger (-Busche), BGB [2005], § 408, no. 2); but the debtor's reliance is protected under CC § 408, which may include the case of a first notice in favour of the second assignee unless the debtor knows of the first assignment. In the NETHERLANDS an assignment is ineffective without notification. It follows that the priority question arises only if both or all the competing assignees have given notice. In that event priority goes to the first assignee in accordance with the principle *nemo dat quod non habet*. The position is the same in SCOTLAND (McBryde, *Law of Contract in Scotland*, nos. 12.83 (2), 12.87-12.90; Wilson, *Scottish Law of Debt*², no. 27.5(a)). In SPANISH law there is no rule on this matter; scholars propose the application of the first in time rule, but granting the debtor the privilege of discharging by paying in good faith to the assignee in respect of whom the notification was made (*Pantaleón*, *Comentarios*, 1021-1022). In CZECH law the first notification seems easily to prevail by application of *prior tempore potior jure* and having regard to the above mentioned provision of the CC § 526(1). This principle applies in SLOVAKIA, as well, although notification is not needed. Only the first assignment is valid, but according to the general provisions on fulfilment of obligations (CC § 562), the debtor in good faith would obtain discharge by paying to the first to submit the creditor's warrant of entitlement (e.g. the contract itself). Subsequent relations would be governed by the law of unjustified enrichment.

III. – 5:122: Competition between assignee and assignor receiving proceeds

Where the debtor is discharged under III. – 5:108 (Assignability: effect of contractual prohibition) paragraph (2)(a) or III. – 5:119 (Performance to person who is not the creditor) paragraph (1), the assignee's right against the assignor to the proceeds has priority over the right of a competing claimant so long as the proceeds are held by the assignor and are reasonably identifiable from the other assets of the assignor.

Comments

In the two situations mentioned in the Article the assignor receives proceeds which are rightfully due to the assignee but the debtor obtains a good discharge. The assignee has a right against the assignor to the proceeds based on unjustified enrichment but that is merely a right to performance of an obligation and would confer no priority over other creditors of the assignor. The present Article confers a very limited, and generally rather temporary, priority over the other creditors. It applies only so long as the proceeds paid to

the assignor are held by the assignor and can be identified as separate from the assignor's other assets.

Notes

1. The solution adopted here is similar to that employed in article 24 of the United Nations Convention on the Assignment of Receivables in International Trade. The assignee's claim to the proceeds has priority over competing claims, such as the claims of the assignor's creditors, so long as the proceeds are separately identifiable in the assignor's funds. Under BELGIAN law, in the case of payment of money, the assignee is an unsecured creditor of the assignor and has no priority, unless the payment was made on a separate account.
2. GERMAN law, in contrast, only provides for an obligatory remedy under the rules of unjustified enrichment, see CC § 816(2).

Section 2:

Substitution and addition of debtors

III. – 5:201: Scope

This Section applies only to the substitution or addition of a new debtor by agreement.

Comments

The rules in this Section are not intended to apply to transfers of obligations by operation of law – for example, under special laws providing for rights and obligations to be transferred automatically when businesses are transferred or when one public body is succeeded by another.

The rules in this Section apply to obligations generally and not only to monetary obligations or contractual obligations.

The question of which parties must agree is regulated by the later articles in the Section.

III. – 5:202: Types of substitution or addition

- (1) A new debtor may be substituted or added:
- (a) in such a way that the original debtor is discharged (complete substitution of new debtor);
 - (b) in such a way that the original debtor is retained as a debtor in case the new debtor does not perform properly (incomplete substitution of new debtor); or
 - (c) in such a way that the original debtor and the new debtor have solidary liability (addition of new debtor).
- (2) If it is clear that there is a new debtor but not clear what type of substitution or addition was intended, the original debtor and the new debtor have solidary liability.

Comments

A. Introduction

The rules on the substitution or addition of debtors in this Section are designed to enable parties to achieve results, *while maintaining a legal relationship in existence*, which they could also achieve by bringing it to an end and starting afresh. This will often save time and energy and avoid the risks of opening up for renegotiation issues already satisfactorily settled. Although the rules in this Section are not confined to contractual relationships, it is in relation to such relationships that they will find their main application: they reflect the policy of favouring contractual security and stability which underlies many of these model rules.

There will often be situations where it is necessary or desirable to change the debtor in a contractual relationship. In many such cases the reason will be a change of legal personality without any change of economic functioning. An individual trader, or a partnership, becomes a company. A company is restructured and parts of its business hived off to a subsidiary. A public body is replaced by another public body. An office-holder without a separate legal personality is succeeded by a new holder of the office. Some such situations will be regulated by special laws providing for the automatic transfer of the ownership of assets and of rights and obligations. Such special laws are not affected by this Section. In many situations involving a change in legal personality without a change in economic functioning what is required is not just the transfer of obligations but the transfer of an entire contractual position – rights and obligations. This is regulated by the following Section but the rules on substitution of debtors are there incorporated by reference. There may also, however, be cases where no transfer of rights is required but just the taking over of an obligation or the addition of a new debtor. The debtor may have already received everything due under a contract and may be left only with an obligation to perform. In simple cases, such as for example the delivery of an item which has already been paid for, all that may be required if the debtor cannot easily perform personally will be for the debtor to delegate performance to a third party. This can be done under III. – 2:106 (Performance entrusted to another). The debtor will remain liable under the contract. There is no change of parties. The creditor will not usually be entitled to refuse

performance by the delegated person (III.–2:107 (Performance by a third person)). However, there may be cases where, for all sorts of possible reasons, the debtor or the creditor or the third party wishes the obligation to be taken over by the third party with the effect of discharging the debtor, wholly or partly, or at least with the effect of making the third party an additional debtor under the contract. This could be done by a termination of the original contractual relationship by agreement between the debtor and creditor followed by the conclusion of a new contract between the creditor and the new debtor, or with both the original debtor and the new debtor. The rules in this Section enable it to be done more directly by keeping the existing relationship and simply replacing or adding a debtor.

B. The three techniques

Paragraph (1) of the present Article sets out three ways in which there can be a new debtor in a legal relationship, the relationship remaining otherwise unchanged. The first technique is complete substitution. The new debtor completely replaces the old, who is discharged. This is the converse of assignment. The second technique is incomplete substitution. The new debtor replaces the old, but the substitution is not complete so long as the new debtor has not performed the obligation. Until then the original debtor is retained as a subsidiary debtor in case the new debtor does not perform. The third technique is the addition of a new debtor. The original debtor is not discharged at all but the creditor gains another debtor, both debtors having solidary liability.

The key feature of the legal techniques regulated in this Section is that the legal relationship is preserved – with a change in parties on the debtor's side – rather than destroyed. Of course, if the parties to a contract prefer to tear up the contract and start again with a new one, they are free to do so.

In regulating these three types of situation the model rules go beyond the Principles of European Contract Law, which regulated only what is here called complete substitution. The extension was agreed in principle at the last meeting of the Study Group in Athens in June 2008. The decision reflected a view long held by some members of the Study Group that the PECL rules were incomplete. It also reflected the fact that many national systems regulate different types of substitution or addition of a new debtor and that the Unidroit Principles of International Commercial Contracts of 2004 do the same (see arts. 9.2.1 to 9.2.8). The Study Group gave the Compilation and Redaction Team authority to expand the PECL rules broadly on the policy lines of the Unidroit Principles. In carrying out this remit the Compilation and Redaction Team has had regard to the need to use DCFR concepts and terminology and to try to ensure coherence with the rest of the model rules.

C. Terminology

The terminology used – complete substitution of new debtor, incomplete substitution of new debtor, addition of a new debtor – is new. Traditional terms such as delegation or

expromission or assumption of debt, or variants of them, have been deliberately avoided because of the danger that they might carry unwanted conceptual baggage with them and in accordance with the general policy of using neutral descriptive language whenever possible.

D. No formal requirements

In accordance with the general approach of these model rules no formal requirements are laid down for the substitution or addition of a new debtor.

E. Negotiating history irrelevant

Under this Article it does not matter how the change of parties was negotiated. Any one of the three parties – creditor, original debtor or new debtor – may take the initiative and may carry things forward by contacting either or both of the other two. Often it will be the original debtor who takes the initiative and negotiates with the new debtor with the objective of being relieved of the obligation. Sometimes the new debtor will make an offer to the creditor to take over the obligation, perhaps as a bargaining counter to obtain some benefit from the creditor in return. Or the creditor may initiate the process, perhaps because of worries about the debtor's ability to perform. The process does not matter. What matters is the outcome – what the parties decide to do. As the creditor's consent is always required before a new debtor can be substituted the creditor will always be able to veto complete or incomplete substitution.

F. Default rule

It may happen that the creditor simply accepts a new debtor but does not make it clear which technique is being employed. For this situation, paragraph (2) provides that the addition of a new debtor, with both debtors having solidary liability, is the default rule. The reason for this is that the technique least damaging to the creditor ought to be preferred in case of doubt. The discharge of a debtor ought not to be readily presumed.

Notes

I. *"Cumulative" and "discharging" assumption of debt*

1. Many European civil codes deal expressly with two types of assumption of debt. In the first type the debtor continues to be bound, with the third person collaterally stepping in as an additional debtor (cumulative assumption of debt). In the second type the original debtor is released from the debt and fully replaced by the new debtor (discharging or privative assumption of debt). See e.g. the AUSTRIAN CC §§ 1405, 1406; the GERMAN CC §§ 414-418 and Staudinger (-Rieble), BGB [2005], § 414, nos. 22 et seq.; the GREEK CC arts. 471, 477; the ITALIAN CC arts. 1268-1273; the SLOVAK CC § 531 cl.

1 and 2; and the PORTUGUESE CC art. 595(2). The FRENCH CC clearly recognises the possibility of a cumulative assumption of debt in CC art. 1275. On cumulative assumption of debt in SPANISH law, see Díez-Picazo, *Fundamentos* II⁴, 852. In POLISH law, see: Czachórski, *Zobowiązania*⁸, 370-371. Under the ESTONIAN LOA § 178, a cumulative assumption of debt (or “joining in obligation”) creates a solidary obligation; if the purpose of the joining in obligation is to provide additional security for the debt (no personal economic interest in debt); generally the provisions on personal security (LOA §§ 142 ff) apply *mutatis mutandis*. For a general historical and comparative survey, see Adame Martínez, *Asunción de Deuda en Derecho Civil*.

2. In the NETHERLANDS the CC art. 6:155 deals only with a “transfer of a debt from the debtor to a third person” with the effect, if the creditor declares approval, of substituting the new debtor for the original debtor. BELGIAN law like the proposed Article distinguishes basically three types of situations, each with at least two variations:
 - a) cases where the old debtor is fully discharged, the new debtor either taking up an independent debt (novation) or substituted for the old debtor in the same debt (liberating assumption of debt) (see CC arts. 1271 and 1276);
 - b) *delegatio solvendi* (CC art. 1275), where the new debtor becomes the primary debtor and the old debtor remains bound as a subsidiary debtor; the delegation can be either dependent delegation, in which case the new debtor takes up the same debt, or independent delegation, in which case the new debtor takes up an independent debt (compare the latter case with the independent guarantees in Book IV, Part G, Chapter 3, differing however from the *delegatio solvendi* as the guarantor is normally the subsidiary debtor and not the primary debtor);
 - c) cases where an additional debtor takes up either exactly the same debt (solidary liability) or a concurrent debt.
3. The distinction between cumulative and discharging assumption of a debt is also recognised in non-codified systems. In SCOTLAND, for example, the original debtor will be released by delegation only if this is the creditor’s clear intention. There is a presumption against release (*Gloag and Henderson*, *The Law of Scotland*¹¹, no. 3.38).

II. Formal requirements

4. The codifications dealing expressly with the substitution of a new debtor for the original debtor do not generally lay down any formal requirements. This is true, for example, of GERMAN law: if, however, the contract from which the transferred debt arises required a special form, the same requirements are applicable for the agreement for the replacement of debtor (Staudinger (-Rieble), *BGB* [2005], § 414, nos. 57 et seq.). Form requirements are constructed in a similar way under ESTONIAN law (LOA § 11(3)). Under POLISH law, the contract for the assumption of a debt is void unless concluded in writing. The same requirement applies to the consent of the creditor (CC art. 522). In CZECH law the contract for the assumption of a debt needs to be made in writing but writing is not required for the consent of the creditor (CC § 531.2 and Švestka/Jehlička/Škárková, *OZ*⁹, 672). In SLOVAK law written form is required for the contract of assumption (CC § 531(3)), unlike the form of the creditor’s consent in case of the “discharging” assumption of the debt (see Judgments of the Supreme Court of SR 5 Obo 167/2001; 4 Obo 138/95; 4 Obo 163/95).

III. *Distinctions between different types of agreement*

5. In all legal systems providing express rules on the substitution of a new debtor for the original debtor such substitution may be arranged in different ways: either by an agreement between the creditor and the third party to which the original debtor may or may not have to agree; or by an agreement between the original and the new debtor to which the creditor consents. Everywhere, the creditor's consent is mandatory for the release of the original debtor, but systems differ on the question whether the debtor's consent is necessary to create the effects of substitution.
6. The GERMAN CC provides two rules for the creation of an assumption of debt: § 414 concerns the agreement between the creditor and the third person stepping in as the new debtor to which neither the co-operation nor consent of the original debtor is required (see BAG 20 March 2002, NJOZ 2002, 365 and Staudinger (-Rieble), BGB [2005], § 414, no. 25; such a juridical act is seen as a contract in favour of the debtor as a third party, which opens for the debtor a right to reject, see *Schlechtriem and Schmidt-Kessel*, *Schuldrecht, Allgemeiner Teil*⁶, no. 820); and § 415 provides for the practically more important agreement between the debtor and the person who is to replace the debtor. This needs approval by the creditor to have the effect of replacing the debtor (see *Rieble*, loc. cit., nos. 41 et seq.). For equivalent provisions under ESTONIAN law, see LOA § 175(1) and (2) accordingly. If the contract between the debtor and the third party faces refusal by the creditor, the debtor is deemed to have the right to require timely satisfaction of the creditor's claim from the transferee of the obligation (LOA § 175(4)).
7. Under AUSTRIAN law CC § 1405 provides for the case in which the debtor and the third person agree to have the debt transferred to the latter and states that the creditor's assent is necessary to replace the debtor, whereas CC § 1406(1) provides for the assumption of a debt by agreement between the third party and the creditor, which does not need the debtor's consent to be valid. CC § 1406(2), however, supposes that such an assumption rather counts as a cumulative one. The regulation in the SLOVENIAN law (LOA § 427) is the same.
8. In FRENCH law CC art. 1274 deals with the situation where the agreement is between the creditor and the third party. It provides that a novation by substitution of the new debtor can operate without the concurrence of the first debtor. CC art. 1275 deals with delegation, by which the debtor finds another debtor who undertakes an obligation to the creditor. This does not release the original debtor by novation unless the creditor expressly declared that discharge was intended. A *cession de dette* may result from an agreement between the original debtor, the new debtor and the creditor (*Terré/Simler/Lequette*, *Les obligations*, no. 1306). Basically the same rules apply under BELGIAN law.
9. Under the PORTUGUESE CC art. 595(1) a debt may be transferred either by a contract between the original and the new debtor, which the creditor ratifies, or by a contract between the new debtor and the creditor to which the original debtor may or may not consent. A similar solution is provided by the GREEK CC art. 471: a bilateral agreement between the creditor and a third person willing to assume the debt is deemed to be sufficient for replacing the original debtor who may not necessarily become part of this agreement.
10. Under DANISH law the agreement of the creditor, the debtor and the third person is generally required but the creditor may approve of a substitution in advance (see *Go-*

mard, Obligationsret III, 143 ff). In the ITALIAN CC arts. 1268-1271 deal with cumulative delegation (*delegazione cumulativa*, where the debtor assigns to the creditor a new debtor who undertakes an obligation to the creditor) and art. 1272 deals with expromission (*espromissione*, where the third party, without delegation by the debtor, assumes the debt). In both cases the original debtor is not released unless the creditor expressly grants a release. Art. 1273 deals with assumption of debt (*accollo*) by an agreement between the debtor and the third person to which the creditor may adhere. *Accollo* is considered as a contract in favour of a third person (see Cass. 7/8/1941, no. 2776, Foro it., I, 916 but, for a contrary opinion, Cass. 28/9/1971, no. 2663, Giur. it., 1971, I, 1, 302). The adhesion of the creditor imports the release of the original debtor only if this constitutes an express condition of the agreement or if the creditor expressly grants a release. (See generally, Bianca, 665-666; Mancini, La delegazione, 512; Gazzoni, Manuale di diritto privato¹², 618; see also Cass. 7/7/1976, no. 2525, Foro it. 1977, I, 708; Cass. 21/2/1983, no. 6935, Giust.civ. 1983, 2376).

11. Under ENGLISH and IRISH law a substitution by novation requires the assent of all three parties.
12. According to POLISH law, if the assumption takes place by a contract between the creditor and the third party, and the debtor has refused consent, the contract is deemed not to have been concluded (CC art. 521(1)). On the other hand, in the case of an assumption of a debt by a contract between the debtor and the third party, the refusal by the creditor results in the person who under the contract was to assume the debt being bound to indemnify the debtor against the creditor's requiring the debtor to effect performance (CC art. 521(2)). The consent of the creditor is ineffective if the creditor did not know that the person assuming the debt was insolvent (CC art. 519(2)(ii)).
13. In SLOVAKIA the assumption of debts is concluded through a contract between the debtor and a third party that will replace the debtor's contractual position, if the creditor consents. This can be done towards either party to the contract (CC §531(1)), and the creditor may agree in advance or subsequently (see Judgment of the Supreme Court of SR 5 Obo 167/2001). If, however, the contract is concluded between the creditor and a third party, the third party becomes a debtor together with the original debtor (CC § 531 (2)).

III. – 5:203: Consent of creditor

- (1) The consent of the creditor is required for the substitution of a new debtor, whether complete or incomplete.
- (2) The consent of the creditor to the substitution of a new debtor may be given in advance. In such a case the substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new and the original debtor.
- (3) The consent of the creditor is not required for the addition of a new debtor but the creditor, by notice to the new debtor, can reject the right conferred against the new debtor if that is done without undue delay after being informed of the right and before it has been expressly or impliedly accepted. On such rejection the right is treated as never having been conferred.

Comments

A. Consent of creditor required for complete or incomplete substitution

It is clearly essential that the creditor should have to consent to the complete substitution of an existing debtor by a new debtor. The existing debtor may be solvent and reliable: the proposed new debtor may be insolvent or unreliable. The same applies, although with less force, to incomplete substitution. Here the creditor retains the original debtor but only in a subsidiary capacity. There is no reason to force such a downgrading of the original debtor on an unwilling creditor who may not wish to have the trouble of proceeding first against an unsatisfactory new debtor.

Where consent is required it need not be given expressly, but it must be definite and unequivocal. It should not be lightly accepted that consent has been given. The policy should be the same as that underlying II. – 4:204 (Acceptance) paragraph (2) – “Silence or inactivity does not in itself amount to acceptance”. As long as the creditor’s assent has not been declared, an agreement between the original and the new debtor cannot have the effect that the debtor is replaced by the third party.

Illustration 1

A has borrowed € 100 000 from Bank B. Shortly thereafter C buys something from A for a price of € 120 000 and agrees with A to take over, in part payment, A’s debt to Bank B thereby replacing A as debtor. B declares its assent to this agreement. As a result, C is substituted for A as debtor to B.

If the creditor does not assent to an agreement between the original debtor and the third person whereby the third person is to take over the obligation, the agreement has legal effects only between the debtor and that person. This does not mean, however, that the third person automatically joins the debtor in the obligation to the creditor, so as to give the creditor a right to require performance from either. Whether the creditor acquires a right against the third person will depend primarily on the terms of the contract between the debtor and that person. It is perfectly possible for them to agree that the third person is to be added as a debtor, if the creditor will not agree to a substitution, but whether or not that is the effect of the agreement will depend on its terms.

B. Consent may be given in advance

Paragraph (2) makes it clear that assent may be given in advance by the creditor. In this case, the substitution will take effect only when the creditor is given notice of the agreement between the new and the original debtor. Since the creditor must know whether and when the substitution will take effect, the requirement of notice is not limited to cases where the new debtor has not yet been identified at the time of the advance assent.

Illustration 2

A is about to sell a building to C, but urgently needs a loan from Bank B. A asks Bank B to agree in advance to C taking over responsibility for repayment of the loan after the conclusion of the contract for the sale of the building. B agrees. C later agrees also and notifies B accordingly. As from the moment when the notice reaches B, C is substituted for A as the debtor.

The legal analysis of the advance consent situation is that the indication of advance consent by the creditor is the equivalent of an offer to the third party to accept the third party as the new debtor. The notification to the creditor is the equivalent of the communication of an acceptance of this offer. A contract therefore results. There is no need to regard the indication of advance consent as an actual offer or the third party's act as an actual acceptance because the process of conclusion of a contract need not be analysed into offer and acceptance (II. – 4:211 (Contracts not concluded through offer and acceptance)). Notice may be given by any appropriate means (I. – 1:109 (Notice) paragraph (2)). There is no need for any particular form. For example, if the obligation involves payment by instalments and if the new debtor sends a letter with a first payment saying "Having now taken over this debt, I enclose payment for the current month" that would be a sufficient notification.

It is important that there should be a contract because it is this contract which insulates the creditor from any defects in the agreement between the original debtor and the new debtor (see III. – 5:205 (Effects of complete substitution on defences, set-off and security rights) paragraph (3) and III. – 5:207 (Effects of incomplete substitution) paragraph (1)).

C. Consent of creditor not required for addition of new debtor

The consent of the creditor is not, however, required for the addition of a new debtor. The creditor loses nothing by such an addition. The principle of solidary liability means that, although the creditor has the advantage of an additional debtor, the creditor can simply ignore the new debtor if so inclined and proceed against the original debtor as if nothing had happened. However, as anyone can refuse a benefit, the creditor has the right to reject the right conferred against the new debtor if this is done promptly. The approach taken here – that the agreement of the creditor is not required but that the creditor has a right to reject – is consistent with the approach taken elsewhere in the model rules (see II. – 4:303 (Right or benefit may be rejected) and II. – 9:303 (Rejection or revocation of benefit)).

Notes

1. In all European legal systems the consent of the creditor is necessary before the debtor can be replaced. Some provide expressly for the giving of consent in advance. Some provide that a new debtor can be added without the consent of the creditor. The details and the terminology vary. See the Notes to the preceding Article.

III. – 5:204: Complete substitution

A third person may undertake with the agreement of the creditor and the original debtor to be completely substituted as debtor, with the effect that the original debtor is discharged.

Comments

A. Scope

This Article deals only with the complete substitution of a new debtor for the original debtor, with the effect of discharging the original debtor. Later Articles deal with incomplete substitution and the addition of a new debtor.

B. The concept of complete substitution

It is a widely accepted principle that a person (the “third person” or “new debtor”) may accept the debt of another person (the “debtor” or “original debtor”), thereby being substituted for the debtor.

An agreement between the third person and the debtor cannot by itself have the effect of discharging the debtor from the obligation to the creditor. To achieve that result the creditor has to consent to the substitution.

C. Relationship to other concepts

Assignment. Substitution is to some extent the antithesis of assignment. Assignment results in a new creditor. Substitution results in a new debtor. Assignment, however, does not require the agreement of the debtor, whereas substitution requires the agreement of all three parties.

Novation. “Novation” is used in different senses in different legal systems. Generally it means the replacement of a contract by a new contract, perhaps between the same parties but perhaps with a change of debtor. Substitution under the present Article, on the other hand, involves a change in the debtor, the contract (if the obligation is a contractual one) remaining in force and unchanged in other respects. It is this preservation of as much as possible of the contractual relationship which is the key distinction between substitution and novation. Novation remains possible as a technique under the model rules but is not specifically regulated. It is left to the principle of party autonomy. The parties to a contract can always agree to bring the relationship to an end. They, or one of them and another party, can freely conclude a new contract.

Stipulation in favour of a third party. In the case of a stipulation in favour of a third party the focus of attention is the contract between the two original parties and the right or

benefit conferred on the third party. In the case of the substitution of a new debtor the focus of attention is not the contract between the creditor and the new debtor nor the benefit conferred on the original debtor but rather the original contract and the change in the parties to it by the replacement of the original debtor. The standpoint from which the legal arrangements are viewed is different. Moreover, all three parties must agree to a substitution (even if it is actually beneficial to one or more of them) but a third party beneficiary need not agree to the acquisition of a right under a contract between two other parties.

Performance by a third person. The rules in III.–2:106 (Performance entrusted to another) and III.–2:107 (Performance by a third person) do not involve a change of debtor. They involve performance by a third party, who does not become a party to the contractual relationship between the debtor and the creditor.

Methods of payment. The rule in III.–2:108 (Method of payment) to the effect that a creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured and that the creditor may not enforce the original obligation to pay unless the order or payment is not honoured is closely akin to a substitution of a new debtor subject to a resolutive condition. However, the rules of this Section are not intended to apply to bills of exchange, cheques and promissory notes and other negotiable instruments (I.–1:101 (Intended field of application) paragraph (2)(d)) and are subject to any special rules relating to such matters as payment by credit or debit cards.

D. Importance of creditor's agreement and new debtor's agreement

The preceding Article and indeed the opening words of paragraph (1) of this Article make it clear that the creditor's agreement to the substitution is essential. Often the substitution will be based on an initial agreement between the debtor and the third person, to which the creditor's assent is required if the debtor is to be discharged.

It is obvious, too, that the agreement of the new debtor must be required before an obligation can be imposed on the new debtor by a private arrangement.

E. Debtor's agreement also required

The question whether the debtor's agreement to a substitution should always be required is more controversial and more difficult. There is no uniform answer in the different European legal systems or international instruments.

Under the PECL art.12:101 the agreement of the debtor was always required. This rule has been criticised. See e.g. Adame-Martínez in *The Principles of European Contract Law Part III* (Vaquer ed., 2005), pp. 253-258. Under the Unidroit Principles of Uniform Commercial Law the consent of the original debtor is not required (art. 9.2.1(b)) although it is noted in Comment 6 to art. 9.2.5 that that debtor cannot be forced to accept

the benefit of the substitution and can refuse to be discharged by the agreement between the creditor and the new debtor.

These model rules follow the PECL approach. The reason for doing so is that the replacement of a debtor by a new debtor cannot safely be regarded as the conferring of a simple unqualified benefit on the original debtor. There may be cases, such as those involving the provision of a service, where the debtor has a strong and legitimate interest in performing the obligation. The debtor's reputation could be affected if the debtor is summarily replaced by another service provider even if – perhaps particularly if – the debtor is paid in full. The debtor may wish to perform in order to keep a skilled workforce employed and to be able to attract future work. The debtor may have concluded ancillary contracts with others, such as suppliers and carriers, to enable the work to be done and may not wish to be forced to try to unravel these contracts. Moreover, even if in theory the debtor's rights are unaffected, in practice things might not be so clear. The rights may be conditional on certain events which the debtor may have a proper interest in continuing to control. In sum, the debtor often has an interest in the security and stability of the contractual relationship and should not be deprived of that interest without consent.

It is true that in the case of a simple obligation to pay, where all other obligations under the contract have already been performed, the debtor may have no interest in not being replaced. It would be possible to frame the rules so as to distinguish between the case where the debtor has an interest in effecting or controlling performance (or in not being replaced) and the case where the debtor has no such interest. However, that would lead to a more complicated set of rules for the achievement of no significant practical advantage. In the “pure benefit” cases the debtor would be very likely to agree to the substitution. Moreover, the debtor would still have to be given the option of promptly rejecting the benefit, in accordance with the general principal that a benefit cannot be forced on a party. The difference between being required to agree and having a right of prompt rejection is significant, and is rightly reflected in other rules, but is not significant enough in the present context to warrant increased complexity. Finally, if the debtor does not agree to the substitution in such a pure benefit case it would still be open to the creditor to accept payment from the third party, with the effect that the debtor would be discharged and the creditor would be liable to the debtor for any loss caused by the acceptance (III. – 2:107 (Performance by a third person) paragraph (3)). This would not amount to the substitution of a new debtor but it means that the creditor would not be prejudiced by the debtor's refusal if the third party is still willing to pay and the debtor would not be harmed by the payment.

In some situations a refusal by the debtor to agree to a substitution desired by the creditor would not do the debtor much good in the longer term. The creditor might have the right to terminate the contractual relationship unilaterally. (See e.g. for services IV.C. – 2:111 (Client's right to terminate)). However, that would bring into operation the rules on termination, which are designed to achieve a fair result for both parties. If the termination was unjustified the debtor would be entitled to damages.

In short, requiring the debtor's consent to a substitution is safer and simpler, more in accordance with the principle of contractual security, and not harmful to the interests of any of the parties involved.

F. Matters left to implication

The Article does not provide expressly for the substitution of a new debtor in relation to only part of the obligations under the contract. This, however, is not excluded by the Article and if the obligations are divisible, substitution may take place in relation to any part of them identifiable as a separate obligation. As the creditor must agree to the substitution there is no need for any equivalent of the special protection afforded by III. – 5:107 (Assignability in part) in the case of partial assignments.

Notes

Wide recognition of concept

1. The underlying concept of substituting a new debtor for the original debtor is widely recognised in national legal systems but terminology varies.
2. In the civil codes of AUSTRIA (CC §§ 1405-1410); GERMANY (CC §§ 414-418); PORTUGAL (CC arts. 595-600); ESTONIA (LOA §§ 175-177); SLOVAKIA (CC §§ 531-532); the CZECH REPUBLIC (CC §§ 531-534); SLOVENIA (LOA §§ 427-431); and the NETHERLANDS (CC arts. 6:155-158) there are express rules under headings denoting the assumption, or taking over, of debts. Under GREEK law too (CC art. 471) a third party may assume the debt and thereby release the debtor. Assumption of debt is an expressly acknowledged concept (*Ph. Christodoulou*, in *Kerameus and Kozyris*, Introduction², 118). In these systems assumption of debt is distinguished from novation.
3. Many European systems mention the substitution of a new debtor under the heading of novation, although in some countries doctrine may also recognise a separate concept of assumption of debt without novation. The FRENCH CC, for example, provides (art. 1271(2)) that one of the ways in which novation may operate is when a new debtor is substituted for the original debtor, who is discharged by the creditor. Doctrine has also, however, developed a concept of *cession de dette*. (See *Terré/Simler/Lequette*, *Les obligations*, no. 1305. Note, however, that some authors show scepticism in accepting this concept. Cf. *Malaurie and Aynès*, no. 310; *Aubert*, no. 1). For BELGIAN law, see the Note 2 to III. – 5:202. The ITALIAN CC regards the situation where a new debtor is substituted for the original one who is released as a type of novation (subjective novation, art. 1235). The SPANISH CC, under the general heading of novation, provides in art. 1203(2) that an obligation may be modified by substituting another person for the debtor. The term *asunción* [without extinctive novation] *de deuda* is also, however, well-known in case law and literature (See TS 29 April 2005, RAJ 2005/4550, TS 16 March 2006, RAJ 2006/5724). In ENGLISH and IRISH law novation covers the replacement of one contract by another, with a third person being substituted for one of the existing parties (*Treitel*, *The Law of Contract*¹¹, no. 15-077; *Chitty on Contracts* I²⁹, nos. 19-085-19-087). In FINLAND the substitution of a new debtor for the original debtor is usually shortly mentioned under the general heading of novation: see *Bärlund/Nybergh/Petrell*, 216; *Aurjärvi* 25.24). See further *Anderson* paras. 3.02-3.19.
4. In DANISH law *debitorskifte* means “change of debtors”. Functionally, this concept corresponds to substitution of a new debtor (see *Gomard*, *Obligationsret* III, 143-156). In SWEDEN the substitution of a new debtor for the original debtor is recognised and is

distinguished from novation. That would require an *animus novandi* which is not at hand when the debt in essence remains the same (Rodhe, *Obligationsrätt*, 639 ff).

5. In POLISH law substitution of a new debtor is provided for the heading of “Change of debtor” and is called “assumption of debt” (CC art. 519). It is distinguished from *novatio* (i.e. an agreement according to which the debtor undertakes with the consent of the creditor to effect another performance, or even the same performance but based on a different legal ground, CC art. 506(1)).

III. – 5:205: Effects of complete substitution on defences, set-off and security rights

- (1) The new debtor may invoke against the creditor all defences which the original debtor could have invoked against the creditor.
- (2) The new debtor may not exercise against the creditor any right of set-off available to the original debtor against the creditor.
- (3) The new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor.
- (4) The discharge of the original debtor also extends to any personal or proprietary security provided by the original debtor to the creditor for the performance of the obligation, unless the security is over an asset which is transferred to the new debtor as part of a transaction between the original and the new debtor.
- (5) Upon discharge of the original debtor, a security granted by any person other than the new debtor for the performance of the obligation is released, unless that other person agrees that it should continue to be available to the creditor.

Comments

A. General effect of complete substitution

The general effect of complete substitution follows from earlier Articles. The original debtor is replaced and discharged. The mere transfer of the obligation to a new debtor does not change the content of the obligation. In contrast to “novation”, in its traditional meaning within the civil law tradition, the content of the obligation is not affected by the substitution of a new debtor for the original debtor but remains unchanged. This goes for such matters as the place and time for performance. What is transferred to the new debtor is the original obligation with the same content and accessory rights (for instance, the right to interest) as existed before.

However, any personal or proprietary security for the performance of the obligation granted by a person other than the new debtor is released upon the discharge of the original debtor. If, however, the person having granted the security agrees that it should not be affected by the change in the person of the debtor, the security will remain effective.

Substitution will not transfer to the new debtor any rights which the original debtor had under other ancillary contracts, such as contracts concluded with third parties to facilitate the debtor's performance. It is possible, although probably unlikely, that under such an ancillary contract the third party has incurred an obligation not only towards the original debtor but also towards any person later substituted for the original debtor in the principal contract. Whether that is so will depend on the terms of the contract with the third party as interpreted. If it is so, and the obligation turns out to be more burdensome in relation to the new debtor than it would have been in relation to the original debtor then the third party must nevertheless perform the obligation undertaken. That is a risk which the third party took.

Accessory rights which the creditor may have remain available to the creditor and, subject to later rules, are not affected by the substitution. If the new debtor had granted a security to the creditor before agreeing to be the new debtor, that security will continue to be available to the creditor, who may also take advantage of any additional security provided by the new debtor on or after that time.

B. Defences stemming from the original relationship

The substitution of a new debtor for the original debtor means that the new debtor is put into the same legal position as the original debtor. The new debtor may therefore set up all the substantive and procedural defences against the creditor which the original debtor would have had under the original relationship with the creditor. This applies, for example, with regard to the defence of prescription.

The crucial moment for setting up a defence is the moment of conclusion of the agreement by which the new debtor is substituted for the original debtor. All the objections the original debtor might have been able to raise prior to this time, or based on events which had taken place by this time, may be raised by the new debtor. Defences that became available to the original debtor at a time when the substitution had already been effected cannot be raised by the new debtor.

The new debtor cannot, however, use a right held by the original debtor against the creditor in order to effect set-off. That is not strictly a defence and is something outside the original relationship. For the sake of clarity, this point (which was made in Comment D to art. 12:102 the Principles of European Contract Law but not in the Article itself) is expressed in paragraph (2). It is also expressly made in the Unidroit Principles (art. 9.2.7).

The rule that the new debtor can invoke the defences available to the original debtor is implicitly limited to use pertaining to the obligation taken over. In particular, this rule will not apply whenever the new debtor has accepted an obligation that existed independently from the original obligation.

C. Defences stemming from the relationship between the original debtor and the new debtor

Paragraph (3) makes it clear that the creditor is not affected by any rights or defences which the third person may derive from that person's relationship with the debtor. Even a defect in an agreement for substitution between the original debtor and the new debtor that would make it void or voidable does not change the position of the new debtor in relation to the creditor. The creditor is entitled to proceed against the new debtor even if the creditor knew or could reasonably be expected to have known that the relationship between the original debtor and the new debtor is defective because it lacks consent of the parties, or is of such a kind as would allow the new debtor to raise a defence against the original debtor. The substitution is to this extent regarded as being independent of defects in the underlying relationship between the original debtor and the new debtor. The policy is to protect the creditor. If the creditor has a valid contract with the new debtor whereby the new debtor takes over the obligation of the original debtor, the creditor should not be concerned with defects in the legal relationship between the original debtor and the new debtor. It should be noted, however, that if there is no actual contract between the creditor and the new debtor but just a third party right under a contract between the original debtor and the new debtor a different rule applies and defences under that contract may be asserted against the creditor who is the third party beneficiary. See II. – 9:302 (Rights, remedies and defences) paragraph (b).

Illustration 1

A sells to C an alleged original piece of medieval Chinese art for €20 000 and agrees with C that in exchange C should be substituted for A as debtor of Bank B. Upon notification by A, Bank B contacts C and agrees with C that C will take over the debt. B knows nothing of the underlying sale transaction. Soon thereafter it becomes evident that A – who has meanwhile gone bankrupt – had sold a fake to C. This does not affect the substitution.

If, however, the new debtor's agreement with the original debtor was vitiated by mistake or fraud or some other vice of consent and if that in turn caused the agreement between the new debtor and the creditor to be concluded in mistake then the new debtor may be able to avoid the latter agreement and thereby escape liability. This will be the case, in particular, if the creditor caused the mistake, or knew or could reasonably be expected to have known of the mistake and left the new debtor in error contrary to good faith and fair dealing, or made the same mistake. See II. – 7:201 (Mistake).

Illustration 2

The facts are as in Illustration 1 but B knows that A has defrauded C and remains silent, contrary to good faith and fair dealing, in order to have a new debtor substituted for A who is known to be verging on insolvency. C can avoid the contract with B and escape liability for the debt.

The application of the rules on the involvement of third parties in vitiated consent (II. – 7:208 (Third persons)) may also enable the new debtor to escape liability by avoiding the contract with the creditor. This is discussed in the following Comment.

D. Defences stemming from the relationship between the creditor and the new debtor

It follows from general principles, and does not need to be stated in the Article, that the new debtor can use any defences arising from the contract with the creditor. If, for example, the creditor has by fraudulent means induced the new debtor to take over the obligation there can be no doubt that the new debtor could avoid the contract. It would be the same if there were such a mistake as to justify avoidance. It should be noted in this connection that if the original debtor was, with the creditor's assent, involved in the making of the contract, as might often be the case, and induced the new debtor's agreement by causing a mistake or by fraud, coercion, threats or unfair exploitation, then remedies for the induced vitiation of consent are available against the creditor as if the behaviour in question had been that of the creditor (II. – 7:208 (Third persons) paragraph (1)). Indeed this will also sometimes be the result if the creditor merely knew or could reasonably be expected to have known of the fraud, coercion, threats or unfair exploitation by the original debtor, even if the original debtor did not have the creditor's assent to be involved in the making of the contract between the creditor and the new debtor (III. – 7:208(2)).

Similarly, the creditor could avoid the contract with the new debtor if the new debtor had fraudulently induced the creditor to conclude it and thereby lose the obligation of the original debtor.

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E. Discharge of the original debtor and of third persons with regard to security rights

Under paragraph (4) the original debtor who has granted a security for the performance of the obligation is generally discharged with regard to that security, as soon as the substitution takes effect. Under paragraph (5), any third person who has granted a security for the performance of the obligation by the original debtor is also, as a rule, released. These rules are to be found in a clear majority of European legal systems.

There are however exceptions to these rules. With regard to a security provided by the original debtor the rule does not apply to any security over an asset which is transferred as part of a transaction between the original debtor and the third person stepping in as new debtor. This may have practical importance in the case of a reservation of title clause in respect of goods, for which part of the price had been owed to the creditor by the original debtor.

With regard to a personal or proprietary security granted by any other person for the performance of the obligation, this other person may agree to the continuation of the security in favour of the creditor, but will be released in the absence of any such agreement.

Notes

1. In BELGIAN law it is first of all a question of interpretation whether the substitution of a debtor is a mere substitution (in which case the same rule applies as in the Article) or a novation (in which case the new debtor owes a fully independent debt, only determined by the relationship between the creditor and the new debtor), but the first type is presumed (CC art. 1273). In GERMAN law (CC §§ 417 and 418) the third person is allowed to raise defences against the creditor which arise from the legal relationship between the creditor and the third person. As a consequence of the separation of the obligating from the disposing part of a substitution, the third person cannot, however, raise any defences against the creditor resulting from the obligating relationship to the debtor, but solely defences arising from the disposing contract. The third person is not allowed to use a right of the debtor to effect set-off (see CC § 417(1) sent. 2 and cf. Staudinger (-Rieble), BGB [2005], § 417, no. 29). The CC § 418 states that, in a case of assumption of debt, accessory security interests expire when the debtor changes (Rieble, loc. cit., § 418, no. 1). Only if the person providing security consents to the change of debtor does the security remain, CC § 418(1) sent. 3. The same rule is applicable to non-accessory security interests, because the policy of CC § 418 is to protect the person providing security from being liable to an unknown debtor (Rieble, loc. cit., § 418, no. 12); ESTONIAN law is similar (LOA §§ 176, 177).
2. In GREEK law CC arts. 473, 474 and 475 correspond to paragraphs (1), (3) and (4) of the Article.
3. According to the AUSTRIAN CC § 1407(2), existing rights with respect to the claim are, as a rule, not affected by the change in the person of the debtor. However, Austrian law is the same as paragraph (4) of the Article in that the second sentence of CC § 1407 (2) makes the continuation of sureties and pledges by a third person dependent on that person's consent; and similar to paragraph (1) in that the new debtor may invoke, according to CC § 1407(1), all defences that the original debtor would have had against the creditor (see OGH 21 September 1982, SZ 55/132). The position is the same in SLOVENIAN law (see LOA §§ 428-431).
4. Under SPANISH law there is no problem with the possibility of raising defences based on the relationship between the creditor and the new debtor but there is some uncertainty about other defences and securities (Díez-Picazo, Fundamentos II, 848-849). There is no case law available.
5. In ITALY, in the case of *espromissione*, the third person cannot set up against the creditor defences connected with the third person's relationship with the original debtor (CC art. 1272(2)) but may raise against the creditor all the defences which the original debtor could have raised against the creditor unless such defences are personal to the original debtor or are derived from acts subsequent to the expromission. According to CC art. 1272(3), the third person cannot exercise against the creditor a right to set-off which might have been exercised by the original debtor, even if the requirements for set-off were satisfied before the expromission. A similar position can be found in art. 598 of the PORTUGUESE CC. In ITALY, in the case of *accollo*, the third person is, in every case, bound to the creditor who adhered to the stipulation up to the limits within which the third person assumed the debt, and can set up against the creditor the defences founded on the contract on the basis of which the assumption took place: CC art. 1273(3). So far as security rights are concerned, the CC art. 1275 provides that in all cases where the

creditor releases the original debtor all guarantees attached to the right are extinguished unless the person who furnished them agrees specifically to continue them.

6. As a consequence of the rule in DANISH law that a change of persons in a contractual relationship is not to affect adversely any of the persons involved, the new debtor may set up against the creditor all defences which the original debtor could have used against the creditor. A registered mortgage is generally unaffected by a transfer of ownership of the immovable property unless otherwise agreed between the original debtor and the mortgagee.
7. Under SWEDISH law whether any security given by the original debtor or another person remains effective depends upon their agreement.
8. Since under the laws of ENGLAND and IRELAND any debt created by the contract is extinguished on novation it follows that accessory rights given by the debtor, such as security for the debt, are also extinguished except where they are over an asset transferred to the new debtor, who will take the asset subject to the security. Novation may also have the unintended consequence of releasing a surety to the original contract unless the surety's consent is obtained or the terms of the guarantee preserve the surety's liability in the event of a novation. In SCOTLAND the release of the original debtor will also release a cautioner for the original debt or the original debtor, *Gloag and Henderson*, *The Law of Scotland*¹¹, no. 3.37. See also *McBryde*, *Law of Contract in Scotland*, no. 25.27.
9. In POLAND the new debtor may not set up against the creditor any defences arising from a legal relation existing between the new debtor and the former debtor; this, however, does not apply to defences of which the creditor knew (CC art. 524(2)). The new debtor is entitled against the creditor to any defences to which the former debtor was entitled, except for the defence of set-off against a claim of the former debtor (CC art. 524(1)). The rule provided in para. (4) of the present Article is expressed in the POLISH CC art. 525.
10. In SLOVAKIA the content of the obligation does not change after the assumption of the debt, except for the securities, as in para. (4) of the present Article (see CC § 532). The defences can be invoked by the creditor in the same way as para. (1) provides, pursuant to CC § 531(4). Although without express statutory statement, the rights between the former and the new debtor may not be invoked against the creditor, if not agreed otherwise. CZECH law is identical (see CC §§ 531 and 532).
11. In FRANCE, in the case of pure delegation or delegation by novation, the new debtor cannot raise the rights of defence arising out of the legal relationship between the original debtor and the creditor, unless the latter knew of the defects vitiating the original debt, which would amount to fraud. The new debtor may, however, set up against the creditor the defence of nullity. In contrast with pure delegation, simple delegation means the addition, not the substitution, of the new debtor. The creditor may pursue two debtors and the new debtor may not raise any defences arising out of the relationship between the original debtor and the creditor, it being the *causa* of the new debtor's obligation. (See *Bénabent*, *Les obligations*¹¹, 540, no. 755).

III. – 5:206: Incomplete substitution

A third person may agree with the creditor and with the original debtor to be incompletely substituted as debtor, with the effect that the original debtor is retained as a debtor in case the new debtor does not perform properly.

Comments

Incomplete substitution is not so potentially dangerous for the creditor as complete substitution because the original debtor is retained as a fall back. Nonetheless the creditor is affected. The liability of the original debtor is reduced to a subsidiary liability. The creditor may have the trouble and expense of proceeding first against the new debtor. If the new debtor seems likely to be unsatisfactory and the original debtor is entirely satisfactory the creditor may prefer to refuse to agree to even an incomplete substitution. The original debtor and the new debtor may then, if they wish, proceed to add the new debtor as an additional debtor with solidary liability.

The position of the original debtor may also be seriously affected by an incomplete substitution. The original debtor may wish to perform the obligation personally and not be reduced to, in effect, the role of a provider of security for someone else's performance. For this reason the solution here is the same as in relation to complete substitution.

Notes

1. The inclusion of this type of incomplete substitution in the model rules was inspired by the Unidroit Principles of International Commercial Contracts, art. 9.2.5.

III. – 5:207: Effects of incomplete substitution

- (1) The effects of an incomplete substitution on defences and set-off are the same as the effects of a complete substitution.
- (2) To the extent that the original debtor is not discharged, any personal or proprietary security provided for the performance of that debtor's obligations is unaffected by the substitution.
- (3) So far as not inconsistent with paragraphs (1) and (2) the liability of the original debtor is governed by the rules on the liability of a provider of dependent personal security with subsidiary liability.

Comments

In so far as the new debtor takes over the obligation, the position in relation to the defences and rights which the new debtor can invoke against the creditor is the same as for a complete substitution. This is provided for by paragraph (1).

The position in relation to personal or proprietary security rights is, however, different. The original debtor is not discharged but retains a subsidiary liability which may come into full effect in the event of non-performance by the new debtor. There is no reason therefore to deprive the creditor of the benefit of any security provided for the performance of the original debtor's obligation. It will generally be much less likely than before the substitution that the security will be called upon but that is only to the advantage of the security provider. It will be noted that the security does not become a security for performance by the new debtor: it remains unaffected by the substitution and therefore is merely security for the performance of the original debtor's obligation.

Paragraph (3) deals with the subsidiary nature of the original debtor's liability. In effect the original debtor has become a provider of a dependent personal security with subsidiary liability. The rules of Book IV, Chapter 3, Section 2 are therefore applied. The effect is that the creditor, in order to preserve full rights against the original debtor, is required to proceed first against the new debtor (IV.G. – 2:106 (Subsidiary liability of security provider)). The creditor must also observe certain notification requirements (IV.G. – 2:107 (Requirement of notification by creditor)). The creditor's rights against the original debtor may also be reduced if the creditor's conduct has adversely affected the original debtor's rights of relief against the new debtor (IV.G. – 2:110 (Reduction of creditor's rights)). If the original debtor performs the obligation the original debtor will have rights to reimbursement against the new debtor and is subrogated to the creditor's rights against the new debtor (IV.G. – 2:113 (Security provider's rights after performance)).

Paragraph (3) is only a default rule. It could be modified by agreement between the parties affected by the relevant rights and obligations. In particular, as the original debtor is not someone who is assuming a new liability, but someone whose full liability is being reduced to a subsidiary liability, the new debtor and the original debtor might well wish to agree that the original debtor would have no recourse if the original debtor performs. Similarly, the creditor might be prepared to agree to a downgrading of the liability of the original debtor only if the creditor retained stronger rights against the original debtor than provided by the default rules. But it is useful to have a system of default rules in place.

Notes

1. For the position relating to defences and set-off, see the Notes to III. – 5:205 (Effects of complete substitution on defences, set-off and security rights). For the position relating to the liability of the provider of a dependent personal security, see the Notes to Book IV.G, Chapter 2. In BELGIAN law, a *delegatio solvendi* is equally presumed not to create an independent debt: the delegated debtor is presumed to have engaged itself merely to

the existing debt (“dependant delegation”). However, many cases of *delegatio solvendi* create by their nature or given the circumstances an independent debt, e.g. when a negotiable instrument is issued (perhaps a bill of exchange) or in the case of credit cards, etc. (“independent delegation”). Transfer of money is also analysed as a form of *delegatio solvendi*, by which the bank of the beneficiary takes up an independent debt.

III. – 5:208: Addition of new debtor

A third person may agree with the debtor to be added as a debtor, with the effect that the original debtor and the new debtor have solidary liability.

Comments

Unlike complete or incomplete substitution, the addition of a new debtor does not discharge the original debtor. Both debtors have solidary liability. As the creditor is not prejudiced, the creditor's consent is not required. However, in accordance with the principle that a person cannot be compelled to accept a benefit, or apparent benefit, the creditor may reject the right against the additional debtor if this is done promptly after learning of it. See III. – 5:203 (Consent of creditor).

The consent of the original debtor is, however, required. The reason is that the addition changes the original debtor's position. The debtor is locked into a set of rules on solidary liability which the debtor may not wish to be locked into. The debtor loses an element of control over the performance of the obligation and becomes a party to a legal relationship with a person not of the debtor's choice. The arguments are similar to the arguments for requiring the consent of the debtor to the substitution of a new debtor. The addition of a new debtor with solidary liability is not necessarily a pure benefit for the original debtor and, particularly in the case of non-monetary obligations, may have disadvantages. If a new debtor is to be brought into the relationship the original debtor ought to have a say on that and on the terms regulating the relationship between the two debtors. The underlying principle is that of party autonomy. A person should be able to choose with whom to enter into a legal relationship and on what terms. In some cases, such as assignment of rights, this principle gives way to the principle of the free marketability of assets, but with important qualifications for the protection of the debtor. There is no such countervailing principle in the present context.

What happens if the creditor and the third person want the third person to become an additional debtor but the original debtor refuses consent? There are several options. If the purpose is the provision of a personal security there is nothing to prevent the third person from providing such a security, without the consent of the debtor, by a contract with the creditor or by a unilateral undertaking in accordance with the rules in Part IV.G. (see IV.G. – 1:103 (Creditor's acceptance)). If the third person simply wants to pay the debtor's debt this can be done under III. – 2:107 (Performance by a third person). There is also nothing to stop the creditor and the new debtor from concluding a contract whereby the new debtor undertakes to pay a sum equal to the amount of the original debtor's debt and

the creditor undertakes, on receipt of payment, to release the original debtor. None of these techniques involves a change in the parties to the original contractual relationship.

The default rule for solidary liability is that the debtors are, as between themselves, liable in equal shares (III. – 4:106 (Apportionment between solidary debtors)) but this can be changed by agreement between the debtors. It does not affect the creditor.

Notes

1. The technique of cumulative assumption of debt is well known in European legal systems. The details, however, vary. See the Notes to III. – 5:202 (Types of substitution or addition).

III. – 5:209: Effects of addition of new debtor

- (1) Where there is a contract between the new debtor and the creditor, or a separate unilateral juridical act by the new debtor in favour of the creditor, whereby the new debtor is added as a debtor, the new debtor cannot invoke against the creditor any rights or defences arising from the relationship between the new debtor and the original debtor. Where there is no such contract or unilateral juridical act the new debtor can invoke against the creditor any ground of invalidity affecting the agreement with the original debtor.
- (2) So far as not inconsistent with paragraph (1), the rules of Book III, Chapter 4, Section I (Plurality of debtors) apply.

Comments

The general effect of the addition of a new debtor, without any discharge of the original debtor and without any agreement that the original debtor is to have only subsidiary liability, is that the new debtor and the original debtor have solidary liability. This is provided for by paragraph (2). The rules on solidary liability already regulate the effect on defences arising out of the debtor-creditor relationship and set-off. So there is no need for rules on these topics. It is also unnecessary to have a rule to the effect that any personal or proprietary security provided for the performance of the original debtor's obligations is unaffected by the addition of the new debtor because that follows anyway from the fact that the original debtor is not replaced or discharged and remains fully liable.

Although the consent of the creditor is not required for the addition of a new debtor there may be cases where the new debtor concludes a separate contract with the creditor assuming liability as an additional debtor. There may also be a simple unilateral undertaking to that effect. The first sentence of paragraph (1) deals with the position where there is such a separate contract or undertaking. It is to the same effect as paragraph (3) of III. – 5:205 (Effects of complete substitution on defences, set-off and security rights). The basic idea is that the creditor's right under that contract or undertaking is regarded as

insulated from the background agreement between the original debtor and the new debtor. Reference may be made to Comment C on that Article. As noted in that Comment there may, however, be cases where a vice of consent affecting the contract between the new debtor and the original debtor will indirectly enable the new debtor to avoid the contract with the creditor on the ground of mistake, particularly if the creditor has been involved in the causing of the mistake or in allowing the contract to be concluded in mistake. This follows from an application of II. – 7:201 (Mistake) and II. – 7:208 (Third persons). These provisions will also apply if there is simply a unilateral juridical act by which the new debtor assumes liability (II. – 7:101 (Scope) paragraph (3)).

The second sentence of paragraph (1) is included because the preceding Article envisages that there may be cases where the mere agreement between the original debtor and the new debtor is sufficient to bring in the new debtor with solidary liability. In such cases there is no separate contract or juridical act in favour of the creditor. There is nothing to insulate the creditor from questions relating to the validity of the contract between the new debtor and the original debtor. It seems reasonable therefore to allow the new debtor to rely against the creditor on any ground of invalidity affecting the contract with the original debtor, such as fraud, mistake, threats or coercion. This will not place the creditor in any worse position than the creditor was in before the addition of the new debtor as the original debtor remains undischarged and will become again solely liable. The rule in the second sentence of paragraph (1) is consistent with the approach taken in the provisions on stipulations in favour of a third party (II. – 9:302 (Rights, remedies and defences) paragraph (b)) – “the contracting party may assert against the third party all defences which the contracting party could assert against the other party to the contract”.

The default rule on solidary liability is that, as between themselves, the co-debtors are liable in equal shares (III. – 4:107 (Recourse between solidary debtors)). This can be varied by agreement between the co-debtors. It does not affect the creditor, who always remains free to claim full performance from either debtor.

Notes

1. For the position relating to defences and set-off, see the Notes to III. – 5:205 (Effects of complete substitution on defences, set-off and security rights). For the position relating to the liability of solidary debtors, see the Notes to Book III, Chapter 4, Section 1 (Plurality of debtors).

Section 3: Transfer of contractual position

III. – 5:301: Scope

This Section applies only to transfers by agreement.

Comments

The rules in this Section apply only to transfers by agreement and not to transfers by operation of law under special rules on such matters as the transfer of undertakings or changes in public bodies.

III. – 5:302: Transfer of contractual position

- (1) A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship.
- (2) The consent of the other party may be given in advance. In such a case the transfer takes effect only when that party is given notice of it.
- (3) To the extent that the substitution of the third person involves a transfer of rights, the provisions of Section 1 of this Chapter on the assignment of rights apply; to the extent that obligations are transferred, the provisions of Section 2 of this Chapter on the substitution of a new debtor apply.

Comments

A. General remarks

Whereas an assignment is limited to the transfer of rights to performance and a substitution of a new debtor for the original debtor concerns only a change in the person owing a debt, the present Article deals with the transfer of the entirety of contractual rights and obligations from a contracting party to a third person. Given that contracts of long duration, and take-overs or amalgamations of businesses, are common, the rules on transfer of an entire contract are of great practical importance. The Article makes it clear that these rules will be displaced by any special rules on transfer by operation of law.

Agreements for the transfer of an entire contractual position are often concluded with regard to tenancy agreements, loan arrangements, labour contracts and other types of contract of long duration. Some situations are regulated by special rules. Book IV.B. on the lease of goods contains a special rule to the effect that a change in the ownership of

the goods results in the new owner becoming a party to the lease; the former owner remains subsidiarily liable for non-performance of the obligations under the contract as a personal security provider (IV. B. – 7:101 (Change in ownership and substitution of lessor)).

The transfer of an entire contractual position must not be confused with novation. Novation implies the extinction of the old contractual relationship and the constitution of a new one with a different object or a different source, whereas in a transfer of the entire contractual position the relationship remains the same. The contractual bond is the same, but it is transferred from the first party to the incoming third party.

B. Substitution of a party in respect of the entire contractual relationship

Either party to a contract can, with the necessary consent of the other, substitute a third person in the entire relationship arising from a contract, so that the third person assumes both the benefit and the burden of the contract in place of the first party. The third person takes over both the first party's rights to performance and the first party's contractual obligations to perform.

Illustration

A concludes a contract for the construction of a prefabricated house with Company B for a certain price and pays a first instalment. B becomes bankrupt soon thereafter. Provided A agrees, Company C may step into the contractual relationship in place of B with all the contractual rights and obligations which were previously B's.

C. The importance of the other party's assent

For the introduction of a new party to the relationship the consent of the existing other party is necessary. This consent may be given in advance, a situation which is common and important in practice.

If the other party does not consent, the transfer has no effect. Neither obligations nor rights will be transferred. Of course it would then often be possible for the first party (a) to assign rights to the third party (which would not require the other party's consent) and (b) to entrust the performance of duties to the other party. But the latter would only be effective in accordance with III. – 2:106 (Performance entrusted to another) and the original party would remain responsible for proper performance of the obligations.

D. Applicability of rules on assignment of rights and substitution of new debtor

A transfer of the contract is more than a mere combination of assignment of rights and transfer of obligations. It is a uniform transaction, transferring a whole structure of rights, obligations, legal positions, and duties, which can appropriately be regarded as more than

a mere combination of single acts transferring rights and obligations. In practice, however, the most important result of such a transaction is the transfer of all contractual rights including collateral ones, as well as the acceptance of all contractual obligations by the incoming party. It follows from the application of the rules on the substitution of a new debtor that the transfer may take the form of a complete substitution (with the original debtor being discharged) or an incomplete substitution (with the original debtor remaining subsidiarily liable). It has already been noted that the latter solution is the one which has been chosen in the case of a lease of goods where the ownership changes. (IV.B. – 7:101 (Change in ownership and substitution of lessor)).

The situation where the parties wish the outgoing party to remain solidarily liable for the obligations under a contract is not dealt with in this Article. There would not be a true transfer in such a case. The parties would however be free to adopt such a solution if they so wished.

Notes

I. Provisions in recent codifications

1. The transfer of an entire contractual position is expressly acknowledged in some recent codes. See e.g. the ITALIAN CC arts. 1406-1410; the PORTUGUESE CC arts. 424-427; the ESTONIAN LOA § 179; the SLOVENIAN LOA §§ 122-124; and the DUTCH CC art. 6:159 (discussed in Asser (-Hartkamp), *Verbintenissenrecht* I, nos. 610-612).
2. Under the ITALIAN CC art. 1406 “each party can substitute for himself a third person in the relationships arising from a contract for mutual counter-performances, if these have not yet taken place, provided that the other party consents thereto”. It is a multilateral contract, and the consent of the three parties involved is essential. (See Cass. 14 May 1962, no. 999, *Giust.civ.* 1962, I 1906; Cass. 18 October 1971, no. 2929, *Riv.Notar.* 1972, 278). The ITALIAN CC art. 1408(1) and (2) states that, as the transfer becomes effective, the transferor is released from the obligations to the original contracting party, unless the latter refuses to release the transferor. Art. 1409 empowers the original contracting party to raise against the transferee all defences arising out of the contract, (for instance a defence based upon non-performance) but not those based on other relationships with the transferor, unless the contracting party expressly reserved a right thereto on consenting to the transfer. According to a certain doctrinal opinion the transferee acquires every right arising from the contract, save the right to avoidance and rescission (Alpa and Bessone (-Fusaro), *La responsabilità civile* IV, 249; for a contrary opinion see *Galgano*, 121).
3. In PORTUGUESE law the *transmissão da posição contratual* is expressly acknowledged by CC arts. 424-427. This concept is essentially the same as what is provided for in the present Article, although the express provision of a rule similar to paragraph (2) is not considered necessary in Portuguese law. It is the predominant opinion that the transfer of a whole contractual position cannot be seen as a mere accumulation of transfers of rights and duties (see *Antunes Varela*, *Obrigações em geral* II⁷, 415 ff; *Pinto*, 387 ff). Under the CC art. 427 the remaining party may raise against the transferee all the defences which might have been raised against the transferor. However, the defence of set-off that is

available in the context of assignment may not be raised in the case of a transfer of a whole contractual position (see *Antunes Varela*, *Obrigações em geral* II⁷, 406).

4. Under the ESTONIAN LOA § 179 a party to a contract may, with the consent of the other party, transfer the party's rights and obligations arising from the contract to a third party on the basis of a contract entered into with the third party (assumption of the debt). This transaction is seen as a transfer of an entire contractual position, substitution of the party to a contract, with a core element being assumption of debt (*Varul/Kull/Kõve/Käerdi* (-*Käerdi*), § 179, no. 1, 4.1.1). Upon assumption of a contract, all rights and obligations arising from the contract are deemed to have transferred to the new party to the contract (LOA § 179(2)), except for the obligations that have fallen due before the assumption of the contract, while these are personal obligations of the former party, no longer related to the contract (Supreme Court Civil Chamber's decision from 17 January 2005, civil matters no. 3-2-1-163-04). The provisions of assignment of rights and assumption of obligation apply *mutatis mutandis* to the assumption of contracts.

II. Concept acknowledged by practitioners and doctrine

5. In those countries lacking a statutory provision on the matter, the possibility of transferring a party's contractual position as a whole is nonetheless generally recognised.
6. Thus, in AUSTRIA the transfer of an entire contractual position is conceived, by courts and writers, as a uniform transaction requiring the agreement of all the three parties involved; see e.g. OGH 10 January 1984, JBl 1986, 131 (note *Krejci*); OGH 10 May 1988, JBl 1988, 720; OGH 17 January 1990, JBl 1990, 717; *Bydlinski*; *Koziol* 137; *Krejci*; *Schima*, 319.
7. The GERMAN CC does not expressly provide for a transfer of the entire contractual position of a party apart from special cases of transfers of undertakings or of a flat, see CC §§ 566 et seq., 613a. Nevertheless, the concept is acknowledged as a general concept by the Federal Court; cf. BGH 27 November 1985, BGHZ 96, 302, see *Staudinger* (-*Rieble*), BGB [2005], § 414, nos. 93 et seq. The uniform concept of transfer of the whole contractual position is needed to terminate the relationship to the original contracting party in its entirety. This solution cannot be achieved by a mere assumption of debt, since certain rights the original debtor may unilaterally exercise remain intact, such as the right to avoid or terminate.
8. In FRENCH and BELGIAN law, in the absence of an express provision in the CC, the traditional doctrinal position was to see a transfer of a party's contractual position as a mere combination of an assignment and a cession of debt. In FRENCH law, it has become the dominant opinion that it is the transfer of the entirety of rights and duties stemming from the original contract. (See *Aynès*, *Cession*, D. 1998; *Malaurie & Aynès* no. 510; *Terré/Simler/Lequette*, *Les obligations*, no. 1310; cf. *Cass.civ. I*, 12 December 1982, *Bull.civ. I*, no. 360). Unless otherwise provided for by a specific text, the *Cour de Cassation* makes the former party's agreement a requirement and accepts that the agreement may be given in advance in the first contract (*Cass.com.*, 6 May 1997, *Bull.civ. IV*, N° 117, note *Mazeaud*, *Def.* 1997, 977; note *Mazeaud*, D. 1997, 588; note *Billiau and Jamin*, *RTD civ* 1997, 936, Note *Mestre*. See also *Cass.com.*, 6 May 1997, *Bull.civ. IV*, no. 118 and *Aynès*, D. 1998, *chron.* 25 ff). BELGIAN law sticks to the more traditional approach and distinguishes the imperfect transfer of contract, under which the transferor remains liable for the debts towards the other party, and which can take place even

without the consent of the other party, and the perfect transfer of contract, which requires the consent of the other party or an express statutory provision. Such provisions are found e.g. for transfer of some types of leases by the lessee, of insurance contracts by an insurance company, etc.

9. There is a similar situation under SPANISH law. Although it was once a matter of discussion whether, given that the CC contains no provision, a contractual relationship as a whole could be transferred, today the predominant view is in favour of such a possibility, arguing on the basis of CC art. 1255 (freedom of contract; *Diez-Picazo*, *Fundamentos* II, 842-843; TS 6 November 2006, RAJ 2006/9425). Some special Acts contemplate the possibility (insurance contracts, labour contracts, leases).
10. No express provision on the transfer of an entire contractual position can be found in the GREEK CC. Nevertheless, the combination of an assignment of the rights arising from a contract and the substitution of a new debtor is acknowledged by the writers (see *Papantoniou*, *Genikes Arches tou Astikou dikaïou*; *ErmAK (-Sourlas)*, art. 455, no. 3; *Georgiades* and *Stathopoulos (-Kritikos)*, art. 455 no. 39) and the Courts: (see A.P. 1002/1991; *EllDik* 33 (1992) 829; 1369/1993, *ibid.* 36 (1995) 304, at 306; 681/1995, *NoB* 45 (1997) 607, at 606-607; 734/1998 *EllDik* 39 (1998) 1589; 479/2001 *EEN* 2002, 575).
11. In SCOTTISH law the notion of the transfer of an entire contractual position is recognised. It is called assignation of the contract. The consent of the other contracting party is required if the transferor is to be released from liability. Many of the cases are concerned with determining whether the advance consent of the other contracting party can be inferred. (See *McBryde*, *Law of Contract in Scotland*, nos. 12.33-12.41; *Anderson*, nos. 3.28-3.37.)
12. No general statutory provisions on transfer of a contractual position exist under DANISH law but the problems are discussed in the context of the sale of an enterprise. Basically, the position is similar to that provided by the present Article. All three parties must agree to the transfer. There are, however, exceptions provided by a number of statutory provisions, and even by customary rules. Thus, if a newspaper or other periodical is transferred the subscribers will immediately get a right against the new owner, whereas the old owner remains liable until the contract with the subscribers could have been terminated by notice (see *Gomard*, *Obligationsret* III, 155).
13. With regard to FINNISH law the Article corresponds with doctrinal thinking.
14. Under SWEDISH law an agreement between the original parties and the new party is required to create the effects of a transfer of an entire contractual relationship. Clauses permitting a person to substitute as a new party a legal entity within the same group of companies as the original party (often with the replaced party remaining as guarantor) are frequently contained in contracts. Unless otherwise agreed, the new party assumes all the rights and obligations of the original party (in accordance with the main principle on assignment as expressed in *Promissory Note Act* § 27; cf. *Supreme Court*, *NedJurA* 1997, 886 concerning an arbitration clause; “special circumstances”, however, may bar the substituted party from invoking the clause against the remaining party (see *Ramberg*, *Stockholm Arbitration Report* 1999:1, 26).
15. ENGLISH law deals with the transfer of an entire contractual position under the heading of novation (*Chitty on Contracts* I²⁹, nos. 19-085-19-087). It is important in relation to the amalgamation of companies, business take-overs, the commodity markets, credit card transactions and in other contexts. In theory, however, novation results in a new contract. The possibility of novation is often provided for contractually in advance.

16. In general, POLISH law does not recognise the transfer of an entire contractual relationship (i.e. mutual rights and obligations) in one juridical act. Only by way of exception, some statutory rules provide that a third party enters into an existing contractual relationship and undertakes rights and obligations of the former party to a contract (e.g. lease – CC arts. 678, 691; contract of sale of future farm products – CC arts. 625, 626).
17. Similarly, in SLOVAK law, there is no express rule on the transfer of the entire contractual position other than those described in the notes to earlier articles. There is, however, no legal hindrance to such agreements: they would have to meet the requirements for an assignment as well as for the assumption of a debt. A specific regulation of such a situation is known in certain types of contracts (e.g. sale of business under CC §§ 476-488 – with concrete rights and obligations that may differ from the general provisions on assignment).
18. Under CZECH law also, it is recognised that the transfer of an entire contractual position can be achieved by a combination of the rules on the assignment of a right and the rules on the substitution of a new debtor, see Holub (*-Eliáš*), OZ II, 816.

Section 4:

Transfer of rights and obligations on agent's insolvency

III. – 5:401: Principal's option to take over rights in case of agent's insolvency

- (1) This Article applies where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract.
- (2) If the agent becomes insolvent the principal may by notice to the third party and to the agent take over the rights of the agent under the contract in relation to the third party.
- (3) The third party may invoke against the principal any defence which the third party could have invoked against the agent and has all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal.

Comments

A. Situations covered

This Article applies where an agent has concluded a contract with a third party on the instructions of and on behalf of a principal but has done so in such a way that the agent, and not the principal, is a party to the contract. This can happen in two ways. First, the agent may be acting under a mandate for indirect representation. This is defined as a mandate under which the agent is to act in the agent's own name or otherwise in such a way as not to indicate an intention to affect the principal's legal position (IV. D. – 1:102 (Definitions) paragraph (1)(e)). The third party with whom the agent contracts may or

may not know that the agent is acting for a principal: the important point is that the agent contracts in such a way as not to bind the principal. Secondly, the agent may be acting under a mandate for direct representation (where the agent is authorised to act as the principal's representative and to bind the principal directly) but may in fact, although having authority to bind the principal, contract in such a way as not to bind the principal. (See II. – 6:106 (Representative acting in own name)). The agent may, for example, simply not disclose the fact that there is a principal. The key point for the application of the present Article is therefore not whether the agent is a direct representative or an indirect representative but simply whether the agent in fact contracts in such a way as to bind the agent but not principal. The Article applies in such cases and only in such cases.

B. Purpose of provision

The purpose of the provision is to enable the principal to step in when the agent is insolvent and take over the agent's rights under the contract. Those rights, although held by the agent, are regarded as being earmarked for the principal from the beginning. It is almost as if they are held in trust for the principal. It would be unfair to enable a principal to take over the rights under the contract without the obligations. So the third party is given a counter-option by the following Article whereby the third party can exercise the third party's rights under the contract against the principal instead of the agent.

C. History of the provision

This provision has had a chequered history. The Principles of European Contract Law had a set of Articles in its Chapter 3 (Authority of Agents) dealing with indirect representation. The agent in this situation was called the intermediary. The Articles gave the principal an option to take over the intermediary's rights not only in the case of the intermediary's insolvency but also, if the intermediary "commits a fundamental non-performance towards the principal or if prior to the time for performance it is clear that there will be a fundamental non-performance" (PECL art. 3:302). The third party was given a similar (but not identical) right if the intermediary became insolvent or committed a fundamental non-performance towards the third party or if it was clear that there would be such a fundamental non-performance (PECL art. 3:303).

The Study Group, having considered criticisms of the PECL provisions by stakeholders and others, decided to limit the provisions to the case of the agent's insolvency and to limit the third party's right to a sort of counter-option to be exercised only if the principal opted to take over the agent's rights. It was considered that the question of non-performance of the agent's obligation to the principal was a matter entirely between principal and agent and should not expose the third party to a change of creditor. One practical consideration was that it could be difficult for the third party to know whether there had in fact been a fundamental non-performance of an obligation owed by the agent to the principal. The third party could therefore be exposed to great uncertainty about which party had the right to demand performance. In this respect the situation was different

from assignment. If the agent was not insolvent there was no reason why the principal should not be left to seek a remedy against the agent with whom the principal had chosen to contract. In the converse situation it was considered that there was no justification for, in effect, enabling a third party, who had been content to contract with the agent alone, to bring in the principal as a sort of security provider if things began to go wrong. This argument was thought to be particularly strong if the third party had not even known that there was a principal.

D. Location of provision

The provision, along with the following Article on the third party's counter-option, proved rather difficult to place. Its former location in the PECL Chapter on the authority of agents had been rightly criticised. To locate it in a Chapter on representation in a Book on contracts and other juridical acts would have been open to even stronger criticism. To locate it in the Part of Book IV dealing with mandate contracts would have been inappropriate as only a small part of it (the right to obtain the third party's name) had anything to do with the internal relationship between principal and agent. The essence of the provision is a right to bring about a change of party to the contractual relationship. It was therefore decided to place it here.

E. Obtaining name and address of third party

The principal may not know who the third party is. However, under the rules on mandate contracts the principal has a right to obtain the name and address of the third party from the agent on demand (IV.D. – 3:403 (Communication of identity of third party)).

F. The principal's option

The principal's option to take over the rights under the contract is exercisable only in the event of the agent's insolvency. "Insolvency" is not defined but a functional rather than a technical approach would be appropriate, given that the model rules are intended to have a uniform application across different legal systems (see I. – 1:102 (Interpretation and development) paragraph (3)(a)). This would suggest that the test should be whether the agent's financial position is such that the agent is unable to meet the agent's debts. The duty to exercise rights in accordance with good faith and fair dealing would suggest that the principal would have to give the third party credible evidence of this state of affairs (see III. – 1:103 (Good faith and fair dealing)). In practice this would mean that there would have to be some overt indication of insolvency.

The option is exercisable by notice to both the third party and the agent, both of whom have an interest in knowing when the principal takes over the rights under the contract. The transfer will take place at earliest when the second notice reaches the addressee but the notice might fix a later time (see I. – 1:109 (Notice) paragraph (3)).

G. Defences and protections for third party

Paragraph (3) enables the third party to invoke against the principal any defence which the third party could have invoked against the agent and gives the third party all the other protections which would be available if the rights had been voluntarily assigned by the agent to the principal. The first part is self-explanatory. The second part means, for example, that the principal could not take over a right to performance of such a personal nature that the third party could not reasonably be required to render it to anyone except the agent (III. – 5:109 (Assignability: rights personal to the creditor)). Similarly, if the agent has concluded one contract on behalf of many principals the third party would be protected against having the obligation made significantly more burdensome by a need to perform in parts (III. – 5:107 (Assignability in parts)).

Notes

1. These Notes to this and the following Article deal only with the situation where the agent has contracted in such a way as not to bind the principal, but only the agent.
2. The Geneva Convention on Agency of 1983 provides in art. 13(2)(a) that the principal can take over the agent's rights if the agent "fails to fulfil or is not in a position to fulfil his obligations to the principal".
3. In the NETHERLANDS under CC art. 7:420 the principal can assume the agent's rights under the main contract, if the agent does not perform the obligations towards the principal or goes bankrupt or if the third person does not perform its obligations.
4. BELGIAN and LUXEMBOURG law provide that in the case of the agent's bankruptcy the principal is entitled to proceed directly against the third party, but may claim only any outstanding part of the purchase price of the goods which the agent had sold on the principal's behalf (Belgium: Bankruptcy Act of 1997 art. 103(2); Luxembourg: Ccom art. 567(2)).
5. If a DANISH or SWEDISH commission agent has acted in the course of business (*handelskommission*), the principal may claim directly from the third party if the latter has failed to fulfil its obligations in due time or the commission agent has failed to render due accounts or has acted fraudulently against the principal or has been adjudged bankrupt (Commission Agents Act § 57(2)).
6. In ITALY and PORTUGAL the principal is generally entitled to exercise the agent's rights arising from the execution of the mandate against third persons (Italy: CC art. 1705(2)(sent. 2); Portugal: CC art. 1181(2)).
7. In FRANCE, BELGIUM and LUXEMBOURG the principal may sue the third party by an *action oblique* (CC art. 1166). If the agent fails to proceed against the third party, the principal may exercise the agent's rights, but may not acquire the results of that action personally since such an action is for the benefit of the agent (Cass.civ. 16 June 1903, D. P. 1903.I.454; Cour Paris 12 June 1946, D. 1947.I.112). In general, many French legal writers are in favour of direct relations and corresponding direct actions between the principal and the third party if the agent is a commission agent (Hamel (-Starck), *Le contrat de commission*, 164 ff.; Ripert and Roblot, *Droit Commercial* II¹¹, no. 2635, 2672. The courts, however, explicitly disallow such actions (France: Cass.civ. 20 July

1871, D.P. 1871.I.232; Luxembourg: Cour Supérieure de Justice 19 March 1920, Pas. luxemb. 11, 84).

8. The undisclosed principal doctrine of ENGLISH, IRISH and SCOTTISH law enables the principal to sue the third party without any conditions. A similar rule applies in DENMARK and SWEDEN when a commission agent is not acting in the course of business (i.e., in a *civilkommission*). The principal may then proceed against the third party at any time (Commission Agents Act § 57(1)).

III. – 5:402: Third party's counter-option

Where the principal has taken over the rights of the agent under the preceding Article, the third party may by notice to the principal and the agent opt to exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent has against the third party.

Comments

The idea underlying this provision is that if the principal chooses to take over the rights under the contract by a unilateral act which, unlike a voluntary assignment by the agent, would not be even potentially challengeable by the agent's creditors, the principal should be prepared to take over the obligations under the contract as well. It would not be sufficient to rely on the argument that the third party could withhold performance to the principal until the agent performed. The third party may have already performed and may then discover that a remedy (e.g. a claim for damages for non-conformity) needs to be exercised against the other party to the transaction. The reason for giving the third party a counter-option, rather than simply limiting the principal's option to one to take over both rights and obligations, is that there may be rare cases where the third party might prefer to keep the agent as debtor.

If the third party brings in the principal as debtor under the contract between the third party and the agent (the principal having already opted to take over the agent's rights under that contract) the principal may invoke against the third party any defences which the agent would have had against the third party. This does not, of course, affect any defences which the principal might have against the agent under the mandate contract, if for example the agent claimed remuneration under that contract. It is unnecessary to provide for this.

Notes

1. Some systems give the third party an independent right to bring in the principal as debtor under the contract with the third party, rather than just giving the third party a counter-option exercisable only if the principal chooses to take over the rights. This is the position, for example, under the Geneva Convention on Agency: the third party's

right to sue the principal is admitted under the same conditions as the corresponding right of the principal to sue the third party (art. 13(2)(b)).

2. In the NETHERLANDS the third party may exercise the agent's rights against the principal in case of the agent's bankruptcy or non-performance (CC art. 7:421(1)).
3. Under SPANISH commercial law the third party may be entitled to sue the principal in a very specific situation, namely if a factor, who according to Ccom art. 284 should act in the principal's name, did in fact act in the factor's own name (Ccom art. 287).
4. A similar, but more general rule prevails in FRANCE. Indirect representation is treated as a special case of simulation (*prête-nom*, cf. CC art. 1321). If the third party acquires knowledge of the fact that the agent, its contracting party, was acting on behalf of a principal, it may bring a declaratory action for a judicial statement of simulation (*action en déclaration de simulation*). On the strength of such a judicial decision, the third party has the choice either to rely on the hidden contract and sue the principal or, on the other hand, sue the agent on the basis of the "simulated" contract. The third party may not act against both the agent and the principal. By contrast, the principal may not proceed directly against the third party on the basis of the dissimulated act. This is not the interpretation given to BELGIAN law which does not treat indirect representation, including *prête-nom*, as a form of simulation, at least not in the law of obligations (different questions may arise under property law). The view taken is that the agent is indeed engaging itself into an obligation towards the other party; thus there is no simulation at all (See *Foriers*, JT 1980, 417 ff; *Storme*, *Proces & bewijs* 1994, 53). The third party has the contracting party it has contracted with and has in general no right against the principal.
5. Under the undisclosed principal doctrine of ENGLISH, IRISH and SCOTTISH law the third party may sue the principal without any preconditions. Therefore the third party has the choice to proceed against either the principal or the agent.
6. In DENMARK and SWEDEN in general the third party may not proceed against the principal.

Chapter 6: Set-off and merger

Section 1:

Set-off

III. – 6:101: Definition and scope

- (1) "Set-off" is the process by which a person may use a right to performance held against another person to extinguish in whole or in part an obligation owed to that person.
- (2) This Chapter does not apply to set-off in insolvency.

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