
Roberta Peleggi*

Assignment of Contracts: Italian Law and the UNIDROIT Principles of International Commercial Contracts in Parallel**

Abstract

In contemporary business relations, the possibility for one party to a contract to transfer all of its rights and obligations under the contract to a third party by way of a voluntary act is of great utility. While the possibility to do this generally exists in jurisdictions across Europe, the rules by which it must be done can differ under the relevant national laws, not to mention the fact that a specific legal regime is not articulated in most civil codes. Against this background, this paper compares the approaches taken in Italian law and the uniform rules elaborated at an international level in the UNIDROIT Principles of International Commercial Contracts.

Keywords: legal comparison, contract law, assignment of contracts, Italian law, UNIDROIT Principles of International Commercial Contracts

The possibility for a party to an existing contract to be substituted by a third party by way of a voluntary act (which will be referred to throughout this paper as ‘the assignment’ or ‘transfer of a contract’) has great practical and economic relevance in contemporary business relations, especially with respect to long-term contracts. While the ability to substitute a party is generally permitted in the various legal systems across Europe, such a practice is not regulated in a uniform manner, not least because it often lacks specific prescription in continental civil codes.

* Roberta Peleggi (PhD) is associate professor at University La Sapienza of Rome, Faculty of Law, Department of Legal Sciences, and editor-in-chief of the UNILEX database (www.unilex.info) (e-mail: roberta.peleggi@uniroma1.it).

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This paper reviews the requirements for the assignment of contracts in Italian law and in the system of the UNIDROIT Principles of International Commercial Contracts 2016 ('the UNIDROIT Principles' or 'the Principles'). To this end, it will consider key aspects of the matter such as the legal nature and process of assigning a contract, the scope of its application, and the legal consequences for the parties involved.

The analysis will address Italian law first (sections I.1–5), and then turn to the Principles (sections II.1–5). This will allow similarities and divergencies between the two approaches to be grasped easily.

I The Assignment of Contracts under Italian Law

1 Introduction

It is important to note at the outset that the Italian Civil Code 1942 ('Code') contains one of the first codifications in Europe on the assignment of a contract.¹ It is therefore fair to say that it represents a model of particular importance.

Far from being comprehensive, the approach in the Code has been supplemented and enriched over time by scholars and judges' decisions in case law, whose contributions have also been essential to settling controversial aspects of the law that were left unanswered by the legislator. Furthermore, the rules on the assignment of contracts have been gradually applied to new situations that the legislator could not have imagined at the time the Code was enacted.²

From a diachronic perspective, it is worth recalling that the substitution of a party to a contract – like the assignment of contract right – was not permitted under classical Roman law, as it was at odds with the understanding of a contract implying a highly personal relationship between the parties and, as such, a contract being inextricably bound to the original creditor-debtor(s).³

¹ Another example is offered by the Portuguese Civil Code (see Arts. 424–427). In the Dutch Civil Code, special rules on the transfer of contracts have been inserted with the revised edition promulgated in 1992 (see Art. 6:159 BW).

² For example, rules dealing with the substitution of a party under contract have been applied to new situations such as the sale of shareholdings, the transfer of contracts for the performance of sporting services, and time-shares.

³ See Heinz Kötz, 'Assignment' in Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann with Andreas Stier (eds), *Max Planck Encyclopedia of European Private Law* (Oxford University Press 2012, Oxford, 75–78) 75. However, it should be added that, to cope with the increasing demand for the credit circulation, Roman lawyers started to use two other legal mechanisms to achieve results akin to those produced by assignment, namely, novation and procedural representation: see generally Reinhard Zimmermann, *The Law of Obligations, Roman Foundations of the Civil Tradition* (Oxford University Press 1996, Oxford) 58ff.

The Italian Civil Code of 1865, being a copy of the Napoleonic Code, did not contain general provisions on the subject,⁴ and at that time no doctrinal consensus was reached on whether the transfer of a contract was actually possible as an autonomous legal act. The choice by the legislator in 1942 to include explicit rules on the matter in the new Code, as prompted by the contractual practice that had emerged especially within the trade of agricultural commodities,⁵ served to overcome that uncertainty.⁶

Furthermore, this served to challenge⁷ (and almost unanimously reject) the approach inspired by the German *Zerlegungskonstruktion*, under which the assignment of a contract was viewed, both theoretically and in practical terms, as the result of the simultaneous combination of legal schemes by which a transfer of rights and an assumption of obligations can be achieved: *cessione del credito* and *accollo dei debiti*, respectively.⁸

In the Code, the assignment of a contract is actually understood as a distinctive legal procedure⁹ and a device of general application,¹⁰ which allows a contract – or, more

⁴ In the 1865 Italian Civil Code, the only relevant provision was Art. 1573, which dealt with the assignment of lease contracts. In France, even though the Napoleonic Code remained silent on the point, French courts (more openly than scholars) were inclined to understand the assignment of a contract (*cession du contrat*) as a legal device of general application. The recent reform of the law of obligations in France has finally introduced new rules on the matter, which partially coincide with the rules in the Italian Civil code (see Arts. 1216-1216-3 of the French Code civil).

⁵ Mauro Paladini, 'Della cessione del contratto' in Emanuela Navarretta, Andrea Orestano (eds), *Commentario del Codice civile*, Vol. 3, *Dei Contratti in generale* (UTET Giuridica 2012, Milano, 255–266) 256; Antonio Albanese, 'Della cessione del contratto' in Commentario del Codice civile Scialoja-Branca (Zanichelli 2008, Bologna; Soc. ed. del Foro italiano 2008, Roma) 28ff.

⁶ The Ministry's official document accompanying the enactment of the new Code ('Relazione del Ministro Guardasigilli Grandi al Codice civile del 1942') at para. 141, stated that the introduction of specific rules on the matter was to be seen as a victory of commercial practice over the rigid approach taken, so far, by legal scholarship. It is relevant to recall that the new Code brought about, at least formally, the fusion of civil law and commercial law matters into one single legal text.

⁷ See Francesco Anelli, 'La cessione del contratto' in Pietro Rescigno, Enrico Gabrielli (eds), *Trattato dei contratti, I Contratti in generale*, Vol. II, (2nd edn, UTET 2006, Torino, 1309–1351) 1309ff.

⁸ This opinion is expressed, for example, by Enrico Redenti, 'Dei contratti nella pratica commerciale' (CEDAM 1931, Padova) 149ff; Francesco Ferrara, *Teoria dei contratti* (Jovene 1940, Napoli), 304ff. For further consideration on the issue, see also Renato Clarizia, 'La cessione del contratto' in Pietro Schlesinger (ed), *Il Codice civile commentato* (Giuffrè 1991, Milano) 6ff.

⁹ In the terminology used by some of first commentators of the new provisions, the legal institution was qualified as sale of a contract ('vendita di contratto'), thus conveying the idea that the transfer could only be done for consideration: see Leonardo Mossa, 'Vendita di contratto' in *Rivista di Diritto commerciale* 1928, II, 633–643; Salvatore Puleo, *La cessione del contratto* (Giuffrè 1939, Milano).

¹⁰ See Albanese (n 5) 10. There are, however, contracts that, due to their object or the character of the parties involved, are not capable of assignment: see further consideration of this in Anelli (n 7), 1331ff.

correctly, a contractual position¹¹ – to circulate.¹² To put it differently, as opposed to the mere assignment of rights, or the assumption of debts, where only isolated obligations or rights are transferred, the assignment of a contract constitutes a contractual form of succession of the whole bundle of rights, duties, and legal positions, arising from one side of the relationship.¹³

This conclusion is reinforced by the fact that the rules governing the matter partially differ from those regarding the transfer of rights and assumptions of debts, even though, to solve certain issues (like, for example, a conflict among a plurality of assignees), recourse must be had to provisions on the assignment of rights.¹⁴

2 Notion, Legal Structure, Scope of Application

The rules on assignment of contracts ('cessione del contratto') are in Book 4 of the Code, from Art. 1406 to Art. 1410. The Code regulates contract assignment based on the parties' intention. Thus, transfers of a contract by operation of law, of which various examples are found in other Code provisions, are excluded.¹⁵

Whilst the heading of the first article in the Code on the matter is termed 'notion', and so suggests that it will provide a definition of the phenomenon,¹⁶ the text focuses on the

¹¹ It has been rightfully pointed out by scholars that a contract, as a juridical fact, is not capable of being transferred: see for example Albanese (n 5) 10; Marcello Andreoli, *La cessione del contratto* (CEDAM 1951, Padova). Interestingly, both the Portuguese and the Dutch Civil codes use the expression 'assignment of a contractual position' to describe this act (see Art. 424 CC and Art. 6:159 BW, respectively). In a similar vein, Art. 1216(1) of the French Civil Code describes assignment of a contract as the transfer of the *status* of 'party' to a contract.

¹² Guido Alpa, Vincenzo Mariconda, 'Commento all'art. 1406' in *Codice Civile Commentato* (IPSOA 2013, Milano, 751–774), 751 highlight that the choice of the legislator to regulate the assignment of contracts in an express manner was due to a change in the way a contract was conceived, namely not only as the principal means by which wealth can be transferred but also as a source of wealth itself. This evolution was perfectly in tune with the process of dematerialization of economic wealth in modern capitalistic society. For similar considerations see also Albanese (n 5) 10ff.

¹³ See Cesare Massimo Bianca, *Diritto Civile*, Vol. 3 – *Il Contratto* (3rd edn, Giuffrè Francis Lefeuve 2019, Milano, 673–685) 674; Giorgio De Nova, in Rodolfo Sacco, Giorgio De Nova (eds), *Il Contratto* (UTET 2016, Torino) 1729–1746, 1729–1730. Interestingly, it is argued by scholars that, since the assignee's role is that of continuing the original contract in place of the assignor, the assignee should be bound by the way in which the assigned contract was interpreted as between the assignor and the other party to the contract: see in this respect Valerio Pescatore, 'Cessione del contratto e interpretazione' in *Rivista trimestrale diritto e procedura civile* 1999, 583–604.

¹⁴ For the assignment of rights, see Arts. 1260–1267 Civil Code; for assignment of debts, see Art. 1273 Civil Code.

¹⁵ The legal transfer of a contract is mainly the result of the transfer of its object: see, for example, Art. 2558(1) of the Code regarding the transfer of a business, Art. 1599 of the Code regarding lease contracts, Art. 1918(1) of the Code regarding insurance contracts.

¹⁶ Art. 1406 of the Code (Notion): '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' (English translation). The English versions of all provisions in the Code used in this essay are taken from Susanna Beltramo, *The Italian Civil Code and Complementary Legislation* (Thomson West 2012, St. Paul, Minn.)

effects resulting from the transfer, described in terms of a ‘substitution’, *viz.*, a replacement, or a change of parties on either side of the relationship. It is unanimously recognised,¹⁷ however, that the expression ‘contract assignment’ in Italian law covers not only the legal effects deriving from a transfer of a contract but also the juridical act itself by which a party may assign its entire contractual position to a new party who steps into the contract originally stipulated for the former.

Interestingly, the debate surrounding the correct legal structure for the assignment of a contract – a matter which is not without practical significance¹⁸ – has continued even after the enactment of the 1942 Code. According to current scholarly opinion,¹⁹ which is shared by the Italian courts,²⁰ contract assignment qualifies as an agreement that involves three parties: the withdrawing party (*assignor*), the new party (*assignee*), and the other original contracting party (*other party*).²¹ This means that, in order for an assignment to occur, not only is agreement between the assignor and the assignee necessary but also consent by the other party. This appears sound, as the other party is the one who remains a party to the contract and whose position is most affected by the change of the original counterparty.²²

However, some authors who are still influenced by legal opinion developed prior to the Code being approved, hold that the assignment of a contract – if not in all cases, then in at least certain situations – qualifies as a bilateral contract (between the assignor and the assignee only), with the consent of the other party not amounting to an essential element of the transaction. Rather, the other party’s consent is merely a requirement for the effectiveness of, or is a condition precedent, to the assignment (i.e., a ‘suspensive condition’).²³

As far as the scope of application of the assignment of a contract is concerned, Art. 1406 of the Code, taken at face value, suggests that it can only be carried out with bilateral contracts that remain unperformed. Hence, whereas contracts involving instantaneous performance are excluded from being capable of being assigned, long-term contracts are the most typical type of contracts in respect of which assignment can occur.

¹⁷ See Bianca (n 13) 673; Vincenzo Roppo, ‘Il Contratto’ in Giovanni Iudica, Paolo Zatti (eds), *Trattato di Diritto privato* (Giuffrè 2011, Milano) 553ff.

¹⁸ See for more details Sec. 4, below.

¹⁹ See for example, Bianca (n 13) 680; Alessio Zaccaria, ‘Cessione del contratto e garanzia della sua validità’ in *Rivista di Diritto civile* (1958) 241ff, (258ff); Franco Carresi, ‘Cessione del contratto’ in *Novissimo Digesto Italiano* (UTET 1957, Torino) 147ff; Ugo Natoli, ‘Alcuni aspetti della cessione del contratto secondo il nuovo codice civile’ in *Giurisprudenza complementare della Corte di Cassazione* (1946) I, 314ff.

²⁰ See for example the decisions in the Italian Court of Cassation, 30525 (22 November 2019); and Italian Court of Cassation, 6157 (16 March 2007).

²¹ The prevailing doctrine defines contract assignment as a plurilateral – or, more correctly, a trilateral or triparty – agreement where the parties do not have a common purpose, and with translative effects [see, also for further references, Clarizia (n 8) 33ff].

²² It may indeed happen that the financial situation of the new party is not as solid as that of the assignor.

²³ See Raffaele Cicala, *Il negozio di cessione del contratto* (Jovene 1962, Napoli) 245ff. On the similar approach adopted by French law, see Olivier Deshayes, Thomas Genicon, Yves-Marie Laithier, *Réforme du droit des contrats, du régime general et de la prevue des obligations* (LexisNexis 2016, Paris) 463.

In the past and until the seventies, Art. 1406 was interpreted by commentators and applied by the Courts in this restrictive way. However, a more flexible approach has gradually prevailed, leading to an extension of the original scope of application of the practice of the assignment of a contract. Under current prevailing opinion, there are no good reasons to deny assignment where a contract entails obligations on one party only (provided that this is an onerous contract²⁴),²⁵ and where either party has already performed its obligations partially²⁶ or even totally,²⁷ and also in relation to contracts involving obligations of a personal nature.²⁸

Moreover, the assignment of a contract that has real effects has long been controversial.²⁹ Relying on a narrow interpretation of Art. 1406 of the Code, national courts, in agreement with some commentators, have been for a long time inclined to deny the validity of an assignment of this type of contract. The main objection is that mere consensus between the parties to the contract is sufficient for the contract to be transferred ('regola del consenso traslativo').³⁰ However, a more liberal approach has gradually gained acceptance,³¹ with the consequence that where the assignor is the buyer under the contract, the act of assignment is considered as capable in itself of producing the transfer of ownership from the assignor to the assignee.

Lastly, two other issues deserve mention. First, though it is true that, upon assignment, it is the contract in its original shape that continues to apply, case law³² and scholars³³ acknowledge that the parties may agree on some changes to the original contract, provided

²⁴ This maybe the case in Italy for a loan or a deposit agreement.

²⁵ De Nova (n 13), 1735; Vincenzo Carbone, 'La cessione del contratto' in Mario Bessone (ed), *Trattato Diritto privato*, Vol. 13, (Giappichelli 2000, Torino), 294; *contra* Enrico Colagrosso, *Teoria generale delle obbligazioni e dei contratti*, (2nd edn, Ed. Stamperia nazionale 1948, Roma), 316; Franco Carresi, *La cessione del contratto* (Giuffrè 1950, Milano), 45.

²⁶ See for example, De Nova (n 13), 1735; *contra* Messineo (n 28), 47. This is the case of contracts that are to be performed over a period of time, in respect of which an assignment produces only *ex nunc* effects, meaning that it will not affect the performance of obligations that have already been made under it.

²⁷ Scholars emphasize, to reinforce a position in favour of the assignment of the contract, even in the case where one party has already performed all of its obligations, that due performance does not necessarily cause the contract's effects to cease. Therefore, an assignment may still be possible: see for example Alpa, Mariconda, 753–754.

²⁸ See for example Clarizia (n 8), 26; De Nova (n 13) 1736, Anelli (n 7) 1332. *Contra* Carresi (n 25) 51; Francesco Messineo, 'Il contratto in genere' in *Trattato Cicu-Messineo* (2nd edn, XXI Giuffrè 1972, Milano) 39.

²⁹ For further references see Ilaria Riva, 'Cessione del contratto ed effetti reali' (2002) *Rivista Trimestrale di Procedura Civile*, 635–650; see Flaminia Besozzi, 'La cessione del contratto a effetti reali' in *Contratti I*, (2000) 979–983.

³⁰ From this perspective, an assignment on the part of the seller would qualify as an assignment of a right to payment, while an assignment by the buyer would simply amount to a transfer of the obligation to pay the price: see for example Messineo (n 28) 11; Giuseppe Mirabelli, *Delle obbligazioni. Dei contratti in generale* (Arts. 1321–1469), (3rd edn, UTET 1980, Torino)

³¹ See the decisions of the Italian Court of Cassation (2 June 2000); Anelli (n 7) 1319 ff; 271; Besozzi (n 29) 983.

³² See for example Italian Court of Cassation, 8098 (9 September 1990).

³³ See Bianca (n 13) 674; Roppo (n 17) 556; De Nova (n 13) 1732.

that those changes do not significantly alter the original contractual terms.³⁴ Second, at least according to some legal commentators and court decisions,³⁵ an assignment can be partial, meaning that it can be limited to certain obligations or rights under the contract.

3 Contract Assignment and Similar Figures

Leaving aside the disputed issue regarding the determination of the so-called 'causa' (cause) of the assignment of a contract which is mainly of academic relevance,³⁶ it is useful to distinguish assignment from other three-party legal devices in Italian law that appear functionally akin to it. These include the actions of subcontracting, contracting where persons are to be named, and contracting in favour of third persons.

In relation to subcontracting,³⁷ the main difference with it compared to contract assignment is the fact that with the former a new contract is formed between one of contracting parties and a new party with the same object as the first contract, in which the new contracting party, as subcontractor, assumes a new (and opposite) role compared with that it had in the first contract.

In relation to a contract for which persons are to be named,³⁸ it differs from a contract assignment essentially because it involves a party reserving, upon stipulation, the power to subsequently name who will acquire the quality of a party to the contract from the very beginning.³⁹

³⁴ Changes significantly altering original contractual terms would be those that affect essential elements in the agreement. Those changes are precluded because the agreement would then qualify as a novation, the latter resulting in the extinction of the original contractual relationship and in the simultaneous replacement by a similar, yet new contract: see Anelli (n 7) 1327; Alpa, Mariconda (n 12) 754.

³⁵ In the affirmative, Bianca (13) 674; De Nova (13) 1733; Italian Court of Cassation, n. 7676 (10 July 1991) published in *Giustizia Civile*, 1992, I, 2177.

³⁶ Since the *causa* – in simplest words, the socio-economic function of the contract – is among those requirements for the contract's validity under Italian law (see Art. 1325 of the Code), it will suffice here to observe that according to prevailing opinion, the cause of contract assignment is a typical one, yet consisting either of the very transferring of the entire contractual position ('organismus') from one party to the new party [see Clarizia (n 8) 48ff], or of the subjective modification of the contractual relationship [see Guido Alpa, Andrea Fusaro, 'La cessione del contratto' in *Digesto delle discipline privistiche*, Sez. civ., II (UTET 1988, Torino) 339; Giovanni Criscuoli, 'Il negozio di sostituzione e la cessione del contratto' in 1957 *Giustizia Civile* 1605; Andreoli (n 11) 29]. According to other authors, however, the *causa* is generic and variable, meaning that, to determine such a requirement, one should look either at the cause of the underlying assigned contract [see Emilio Betti, *Teoria generale delle obbligazioni*, III, 2 (Giuffrè 1955, Milano) 37ff; Carresi (n 19) 148] or at the concrete function that gave reason to the contract assignment under the circumstances (e.g., a sale, donation, or settlement): see Cicala (n 23) 888ff; Bianca (n 13) 677ff; Roppo (n 17) 557.

³⁷ It is interesting to note that the Code does not contain a general subcontracting procedure, yet it is referred to in specific instances (see Arts. 1594, 1656, 1770, and 1929 of the Code).

³⁸ See Art. 1401ff. of the Code.

³⁹ In some cases it may be difficult to distinguish between the two: see Alpa, Mariconda (n 12) 761.

Additionally, a contract in favour of a third party⁴⁰ diverges from an assignment of a contract because it does not imply the transfer of an already existing contractual position. Also, with the former, the third party ('beneficiary') remains extraneous to the contract, unlike with the proposed assignee under an assignment.

To conclude on this point, and before addressing further aspects with respect to assignment of a contract, it is significant to note that the line of demarcation between contract assignment and transfer of credits is not clear-cut. In theory, there are visible differences between the two. First, the assignment of a right/claim (i.e., a transfer of credit) has a more limited effect compared to the assignment of a contract, as the former is concerned only with isolated rights of the assignor. Further, in respect of a transfer of credit, while the ownership of a right remains with the original creditor-assignor, the possibility to enforce it is transferred to the assignee.⁴¹ Also with a transfer of credit, importantly, the assignor can assign its claim even without the consent of the debtor,⁴² and the effects on the assignee will vary depending on whether or not the assignment is made for consideration.⁴³ Notwithstanding all of this, there might be situations where these two actions (an assignment and transfer of credit) are very similar in character. For example, this is the case where a unilateral contract is assigned, or an assignment clause is drafted in such general terms as to allow for the transfer of all existing and future credits under the contract.⁴⁴

4 Form Requirements and the Consent of the Other Party

Despite Art. 1407 of the Code being titled 'form', it does not require formalities to be observed. Rather, it is concerned with the modalities in which the other party's consent can be expressed.⁴⁵ It should not be neglected, however, that certain provisions in the Code and other legislation prescribe formal requirements for the validity of a contract to be assigned.⁴⁶ The prevailing opinion among scholars and in the case law is also that the transfer of an agreement must satisfy the same formal requisites, if any, as for the transfer of the contract that is being transferred.⁴⁷

⁴⁰ See Art. 1411-1413 of the Code.

⁴¹ See, among others, Italian Court of Cassation, 17727 (6 July 2018).

⁴² Cf. Art. 1260 of the Code.

⁴³ Cf. Art. 1266 of the Code.

⁴⁴ Cf. Alpa, Fusaro (n 36) 342.

⁴⁵ Art. 1407(1) of the Code: 'If one party has previously consented that the other substitutes a third person for himself in the relationships arising from a contract, the substitution is valid as to him from the time when he was notified of the substitution or accepted it'.

⁴⁶ This is the case, for instance, for the assignment of a contract hiring a professional football player; a contract for transfer of a business (Art. 2556 of the Code), or the transfer of shares. Furthermore, an assignment concluded by way of a gift needs to be stipulated by a public act (see Art. 782 of the Code).

⁴⁷ By contrast, Art. 1216(3) of the French Civil code provides as follows: 'La cession doit être constatée par écrit, à peine de nullité'.

As to the consent of the party that remains in the contract ('the other party'), this can be given (expressly or tacitly⁴⁸ and without any prescribed form) at the same time, or after, agreement between the assignor and assignee has been reached.

Importantly, consent may be also given in advance to the assignment of a contract,⁴⁹ in which case the transfer becomes effective once the assignment has been notified to the other party, or when the other party has accepted it.⁵⁰ Notification of the other party's consent is the responsibility of the assignor or the assignee. Hence, if the other party performs its obligations *vis-à-vis* the assignor before receiving notification of an assignment, the other party will be released from its obligations under the contract validly.⁵¹ Once the assignment has become effective,⁵² the assignor is no longer a party to the contract. Accordingly, the assignor's creditors cannot pursue claims against the assignor stemming from the assigned contract.

Under the prevailing theory that considers contract assignment a triparty agreement, consent by the other party – regardless of whether it is given in advance or not – is essential. This means that completion of the contractual structure can occur either instantaneously or progressively through a process of successive formation.⁵³ As a corollary, before consent to a transfer is given by the other party, an assignment has no effect.⁵⁴

Conversely, from the perspective of those who view assignment as a bilateral contract, it is natural to consider that the lack of consent by the other party may produce a transfer of the contract between the assignor and the assignee in the form of a transfer of rights and/or

⁴⁸ See for example Italian Court of Cassation, 6157 (16 March 2007).

⁴⁹ See Art. 1407(1) of the Code. Consent in advance can result from the insertion of a specific clause in the contract. However, when such consent is inserted in a clause to a contract between a professional and a consumer, such a clause is presumed to be unfair [see Art. 33(2) Codice della consumazione]. Sometimes consent being given in advance is understood as a pre-condition for the conclusion of the original contract.

⁵⁰ For an equivalent provision see Art. 1216(2) of the French Civil Code. Under Art. 1407(2) of the Code, a special case occurs where a clause 'to the order' (or the equivalent of this) is inserted into a document embodying all the elements of a contract ('contratto all'ordine o stabilito di commercio'). In this case, the consent or the notification to the other party is irrelevant, as an endorsement of the document causes the endorsee to substitute the endorser in the contract.

⁵¹ The knowledge of the substitution that the assigned party derives from the performance by the assignee cannot be considered equivalent to notification.

⁵² Nothing prevents the parties deciding that the effects of the assignment will take place at a later time than that at which the agreement was reached.

⁵³ As rightfully pointed out by scholars, progressive formation of an assignment may occur, in principle, also when the agreement is preliminarily reached between the assignor and the other original contract party, and the option remains open for the assignee to agree to the assignment: see Carresi (n 19) 149.

⁵⁴ The essentiality of the other party's consent helps to resolve in the negative the issue as to whether a provision agreed upon between the parties [for example, that the contract is personal to them] may prevent a contract from being assigned, on the premise that the contractual parties are always free to change their mind: see Carresi (n 19) 148]. Nevertheless, with respect to the prohibitions relating to the assignment of rights, Italian law proceeds from the principle that contractually agreed limitations are valid, but this kind of prohibition will not prevent the assignee from acquiring the claim, if the latter acted in good faith [see Art. 1260(1) of the Code].

an assumption of obligations.⁵⁵ However, other scholars take a middle position and propose that two situations can be distinguished depending on whether an assignment provokes strong or weak effects.⁵⁶ In the first situation, it is argued that consent is essential. This may occur, for example, where, with the assignment, the original obligations assumed by the other party are altered, or payment of a sum of money is owed to the latter in return for its consent to the transfer. The second situation would instead occur when the assignment only affects the subjective dimension of the contractual relationship. In this second case, consent by the other party is not necessary.⁵⁷

5 The Legal Effects on the Parties Involved

The legal consequences flowing from a contract assignment on the parties involved are regulated by the Code, which has regard to the three distinct bilateral segments in which, in abstract terms, an act of assignment can be disentangled.⁵⁸

a) The effects as between assignor and the other party

The natural outcome of a contract assignment is that the assignor is released from its obligations *vis-à-vis* the other party as from the moment when the assignment becomes effective.⁵⁹ However, the other party is free to declare a contrary intention, for example because it does not have sufficient confidence in the new party's solvency. That being the case, the other party is entitled to require performance from the assignor as a subsidiary debtor, meaning that the latter will be bound to perform the contract if the assignee fails to do so. In other words, the other party must necessarily first seek performance from the assignee before addressing the assignor.⁶⁰

⁵⁵ See Cicala (n 23) 230ff. The same conclusion is, however, reached by some scholars who agree with the first approach, at least when it can be demonstrated that such a result is compatible with the parties' intent: see Alpa, Fusaro (n 36) 345.

⁵⁶ See Roppo (n 17) 558ff.

⁵⁷ As a result, if consent is lacking, the effects of a transfer of rights and/or an assumption of obligations will occur. On the contrary, if the other party's consent is given in advance, this should be understood as an authorisation of the transfer agreed upon between the assignor and the assignee only. If consent is given after that substitution has been made, it should be interpreted as approval. In a similar vein, see Bianca (n 13) 676.

⁵⁸ Art. 1408 of the Code deals with the effect as between the assignor and the other party, while Arts. 1409 and 1410 are concerned with the effects between the assignor and the assignee, and the assignee and the other party, respectively.

⁵⁹ See Art. 1408 of the Code; an implicit effect of this provision is that once assignment becomes effective, the assignor is no longer entitled to require performance from the other party. For a similar rule see Arts. 1216-1 French Code civil.

⁶⁰ Non-performance by the assignee is sufficient to trigger the ability to request performance from the assignor. However, as a corollary to the principle of good faith in contract performance, the other party can be required

Interestingly, some of those who look at an assignment as a triparty contract, maintain that the decision not to release the assignor would prevent the assignment from producing effects entirely, as it would amount to a proposal directed to both the assignor and the assignee to change the agreed terms in order to reach a new agreement. Consequently, this view requires the assignor and assignee to adhere to the assignment.⁶¹ According to the opposite opinion, Art. 1408 would instead make sense only where the other party has consented to the assignment in advance, declaring that it does not intend to release the assignor.⁶² Other authors convincingly support the view that the provision would entitle the other party to adhere to the assignment, though modifying *ex uno latere* (i.e. from one side) the effects that would naturally descend from it on the assignor.⁶³

b) The effects as between assignee and the other party

Under Art. 1409, the original party to a contract is entitled to claim all defenses arising from the assigned contract against the assignee that it could have raised against the assignor, regardless of whether the grounds of defence arose before or after that the assignment became effective.⁶⁴ Even if not stated in express terms, it is recognised that the other party is entitled to withhold performance, alleging that the contract is invalid, invoking a liquidated damages clause or an exemption clause in the contract, or alleging that performance was seriously defective to justify termination of the contract.⁶⁵

As a rule, defences based on other relationships with the assignor are precluded, save that the other party has expressly reserved a right to them when it consented to the assignment of the contract.⁶⁶ One example is the defence of set-off.

Although Art. 1409 does not expressly state so,⁶⁷ most scholars and case law maintain that the assignee – which acquires all the assignor’s rights to payment or other performance under the contract and all rights securing performance – can in turn avail itself of all exceptions and actions available to the assignor *vis-à-vis* the other party arising under the assigned contract.⁶⁸

to compensate the assignor for any damage resulting from untimely notice, if they fail to inform the assignor of non-performance within fifteen days from the date on which non-performance has occurred.

⁶¹ See Carresi (n 19) 150; Andreoli (n 11) 66; Carbone (n 25) 330–331. 25

⁶² See Cicala (n 23) 211ff.

⁶³ See Anelli (n 7) 1342.

⁶⁴ Art. 1409 of the Code: ‘The original party can raise against the assignee all defenses arising out of the contract but not those based on other relationships with the assignor, unless he expressly reserved a right thereto when he consented to the substitution’.

⁶⁵ See Carbone (n 25) 337ff. 25

⁶⁶ For a corresponding provision see Art. 427 of the Portuguese Civil Code.

⁶⁷ For a different approach, see Arts. 1216-2(1) French Civil Code.

⁶⁸ See Anelli (n 7) 1345; Carbone (n 25) 339. It has been established by the Courts that, as opposed to the assignee of a claim, in a contract assignment an assignee may even invoke the existence of an arbitration clause or ask for termination of the contract: see for example Italian Court of Cassation, 3034, 10 February 2020.

c) The effects as between the assignor and the assignee

Under Art. 1410 of the Code,⁶⁹ the assignor is bound to guarantee that the contract that is being transferred is valid (cd. *cessione pro soluto*). This provision, however, is not mandatory and may be excluded by the parties, even though debate exists on whether it applies both when the assignment is made for consideration and gratuitously.⁷⁰

Even though Art. 1410 refers exclusively to the validity of the contract, the assignor's guarantee should extend to all cases where the contract turns out to be rescindable or without effects.⁷¹ It is also up to the assignor to decide to guarantee that the contract will be duly performed ('*cessione pro solvendo*') by the other party. By assuming such an obligation, the assignor takes the position of a surety.⁷²

II The Assignment of Contracts under the UNIDROIT Principles

1 Introduction

Sponsored by a prestigious intergovernmental organisation,⁷³ the UNIDROIT Principles are considered one of the most successful attempts to harmonise the law of contracts at an international level.⁷⁴

Started as a project in the 1960s under the ambitious title of 'Progressive Codification of International Trade Law', the Principles were produced by a group of independent experts coming from all major jurisdictions and geo-political areas of the world. The group was chaired by Professor Joachim Bonell.⁷⁵

⁶⁹ Art. 1410 of the Code: 'The assignor is bound to guarantee the validity of the contract. If the assignor undertakes to guarantee the performance of the contract, he is liable as a surety for the obligations of the original party.'

⁷⁰ For those who contest the liberal approach, if an assignment is made gratuitously, the scope of the guarantee would be framed in the stricter limits laid down for the donor in Art. 797 of the Code: see, for example, Bianca (n 13) 679; Carbone (n 25) 348.

⁷¹ See Carbone (n 25) 349.

⁷² See Bianca (n 13) 679.

⁷³ The International Institute for the Unification of Private Law (UNIDROIT) was set up in 1926 as an auxiliary organ of the League of Nations. Due to the demise of the League, the organization was subsequently re-established as an independent intergovernmental organization, seated in Rome, to which 63 countries are currently members.

⁷⁴ See for example Henry D. Gabriel, 'The Role of Soft Law in Institutional International Commercial Law and Why It is a Good Idea' in UNIDROIT (ed), *Eppur si muove: The Age of Uniform Law. Essays in honour of Michael Joachim Bonell* (Rome 2016, 273–285) 284.

⁷⁵ See, for more details, Michael Joachim Bonell, *An International Restatement of Contract Law* (3rd edn, Transnational Publications Inc., Ardsely 2005, New York) 19ff.

Appearing originally in 1994, the Principles are now in their fourth edition, which was adopted in 2016.⁷⁶ Closely following the U.S. Restatements of the Laws model, they are composed of a Preamble and 211 black letter rules ('Articles'), which are subdivided into 11 Chapters, and complemented by extensive Comments and Illustrations.⁷⁷

The Principles have been defined as a novelty with regard to their juridical nature compared to more traditional legal sources.⁷⁸ Also, they are considered an outstanding contribution to comparative legal science and global legal thinking.⁷⁹ Their content can be described as a mixture of tradition and innovation.⁸⁰ They contain, indeed, not only rules that reflect solutions found in the majority of legal systems in the world (which is defined as their 'restatement function'), but they also provide a number of solutions that break with usual paths, chosen by the drafters for being considered the most persuasive or, pragmatically suitable to respond to the special needs of cross-border relations⁸¹ (which is called their 'pre-statement function').⁸²

The rules in the Principles on the assignment of contracts – a total of seven articles – are contained in Section 3 of Chapter 9. Sections 1 and 2 deal with the assignment of rights and the transfer of obligations, respectively.⁸³ When deciding to draft special provisions on

⁷⁶ In addition to the five versions of the Principles which correspond to the official languages of the UNIDROIT (i.e. English, French, German, Italian and Spanish), the Principles have also been translated into Arabic, Chinese, Japanese, Persian, Portuguese, and Russian, among other languages. Being thus able to facilitate communication between parties from different cultural and legal backgrounds significantly, the Principles have been well defined as a contractual *Esperanto*: see Francesco Galgano, Fabrizio Marrella, *Diritto e prassi del commercio internazionale* (3rd edn, CEDAM 2011, Padova) 309.

⁷⁷ While with both the 2004 and 2010 editions, new chapters were added with a view to covering virtually all of the most important topics of general contract law, the latest edition contains only a few additions to the black letter rules and the comments aiming to adapt the Principles to the specific needs of long-term contracts (see for example, Giuditta Cordero Moss, 'The UNIDROIT Principles: Long-Term Contracts' in Pietro Galizzi, Giacomo Rojas Elgueta, Anna Veneziano (eds), *The Multiple Uses of the UNIDROIT Principles of International Commercial Contracts: Theory and Practice* (Giuffrè 2020, Milano) 75ff.

⁷⁸ See Jürgen Basedow, 'Uniform law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 (1) *Uniform Law Review* 129–139.

⁷⁹ See Joseph M. Perillo, 'UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review' (1994) 43 *Fordham Law Review* 281–317.

⁸⁰ See Michael Joachim Bonell, 'The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles' (2018) 23 (1) *Uniform Law Review* 15–41, 22. <https://doi.org/10.1093/ulr/uny001>

⁸¹ These include rules relating to the validity of mere agreement (see Art. 3.1.2), the effects of hardship (see Art. 6.2.3), and the possibility for the parties to agree on the duration of limitation periods (see Art. 10.2), to name a few examples that have made 'inroads' into recent reforms of domestic law.

⁸² On the traditional and more innovative provisions in the Principles, see Bonell (n 75) 33ff.

⁸³ This structure of the Principles was intended to help with their clarity and accessibility. However, the rules in the three sections of the Principles are interrelated, thus cross-references could not be avoided. Also, like other subjects covered by the Principles in respect of which divergent national approaches exist, and the fact that terminology in this area is particularly complex, the drafters aimed to avoid using specific notions and concepts that closely resembled any particular legal system or may create confusion: see UNIDROIT 1999 Study L – Doc. 61, 1-2 (*Assignment of Contractual Rights and Duties – Position Paper*).

the assignment of contracts for the second edition of the Principles, the Working Group observed that ‘The absence of such provisions is often pointed out as a regrettable gap in many civil codes, especially in the light of the solutions available in Italy, Portugal, and the Netherlands.’⁸⁴

Interestingly, sets of rules on the assignment of contracts, though much more limited in number than in the UNIDROIT Principles, are provided both in the Principles of European Contract Law (‘PECL’),⁸⁵ and the Draft Common Frame of Reference (‘DCFR’).⁸⁶ There are many analogies between these rules and the UNIDROIT Principles.⁸⁷ In contrast, the 1980 Vienna Sales Convention (‘CISG’)⁸⁸ does not contain provisions on the matter.

2 The Notion, the Scope of Application, and the Requirements

The opening provision on the assignment of contracts in the Principles usefully defines the assignment of a contract as the transfer from one person (the ‘assignor’) to a new party (the ‘assignee’) of the former’s rights and obligations arising out of a contract with another person (‘the other party’).⁸⁹

Bearing in mind that the UNIDROIT Principles are a soft law instrument, it comes as no surprise that transfers effected by operation of law, like those resulting from mergers or changes in the organisation of a company, do not fall within the scope of application of Chapter 9, Section 3 of the Principles.⁹⁰

⁸⁴ Cf. UNIDROIT 1999 Study L – Doc. 61, 16.

⁸⁵ The Principles of European Contract law, prepared by the Commission on European Contract Law chaired by the renowned Danish scholar Ole Lando, appeared in three different editions in almost the same years as the first and second editions of the UNIDROIT Principles [for more details see Michael Joachim Bonell, ‘The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?’ (1996) 1 Uniform Law Review 229–246]. The rules relating to the transfer of contracts are contained in Art. 12:201 PECL.

⁸⁶ The Draft Common Frame of Reference (the ‘DCFR’) prepared by the Study Group on the European Civil Code and the Research Group on Existing EC Private Law, and published in 2009 in ten Books, has a much broader coverage than the UNIDROIT Principles [see Michael Joachim Bonell, Roberta Peleggi, ‘UNIDROIT Principles of International Commercial Contracts and Draft Common Frame of Reference: A Synoptical Table’ (2009) 14 Uniform Law Review 437–554, <https://doi.org/10.1093/ulr/14.3.437>]. For the assignment of contracts, see Arts. III.-5:301-5:302 DCFR.

⁸⁷ For a comparison between the rules in the UNIDROIT Principles, the European Principles and the DCFR concerning assignment of contracts, see Marcus Baum, ‘Transfer of Contract’ in Basedow, Hopt, Zimmermann, Stier (eds) (n 3) 1670–1673 (1671ff).

⁸⁸ United Nations Convention on Contracts for the International Sale of Goods, opened for signature on 11 April 1980 (entered into force on 1st January 1988). For its text and status see: www.uncitral.org.

⁸⁹ Cf. Art. 9.3.1 of the Principles.

⁹⁰ Art. 9.3.2 of the Principles: ‘This Section does not apply to the assignment of contracts made under the special rules governing transfers of contracts in the course of transferring a business’. However, in the Official Comment, it is clarified that the rules in the Principles may be applied where certain contracts pertaining to a transferred business are assigned individually.

However, even though the Principles are primarily intended to apply to international commercial contracts, it has been persuasively argued that the nature of the contract being transferred is not significant for the purpose of an assignment within their scope. Furthermore, it is considered unnecessary for the assigned contract to state that it is governed by the Principles.⁹¹

According to the UNIDROIT Principles, contract assignment is based on an agreement involving three parties. It firstly requires consent between the assignor and the assignee, with an oral agreement between the two signifying such consent normally being sufficient.⁹² Secondly, for a valid contract assignment to occur, approval of the other party is also required: the other party must give its consent to the transfer, without any formal requirements as to this approval needing to be observed.⁹³

Resembling Art. 1407 of the Italian Code, Art. 9.3.4 of the UNIDROIT Principles provides that the other party's consent may be given in advance of an assignment, including by means of the inclusion of an assignment clause in the original contract.⁹⁴ In this case, the transfer becomes effective when it is notified to the consenting party or when the latter, through an overt sign, demonstrates it has become aware of the transfer.⁹⁵

Where consent by the other party cannot be obtained (for a practical, strategic or any other reason), the parties have the option to agree, alternatively, on a transfer of rights, for which assent is, as a rule, unnecessary.⁹⁶ A party to a contract may also agree with a third-party that the latter will perform its own obligations under a contract.⁹⁷

Since the application of the Principles depends on the choice of the parties, consent by the other party to the transfer needs to extend to the fact that the Principles govern

⁹¹ See Francesca Mazza, 'Comment to Arts. 9.3.1–9.3.7' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (2nd edn, Oxford University Press 2015, Oxford, 1145–1153) 1146.

⁹² This follows from the fact that freedom of form is one of the basic ideas underlying the Principles. However, some formal requirements may be required due to mandatory rules contained in applicable domestic laws.

⁹³ Cf. Art. 9.3.3 of the Principles. Even though the transfer does not become effective until the other party gives its consent, nothing in the Principles prevents the parties on agreeing that the transfer takes effect at a later time after consent is given. Also, the validity of the consent can be challenged, under the rules in Chapter 3, Section 2, of the Principles, in situations where consent has not been freely given by the other party.

⁹⁴ As observed by Eckart J. Brödermann, *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary* (Nomos/Wolters Kluwer 2018, Baden-Baden), 326, the acknowledgment of an advance consent is particularly useful when the parties, in the precontractual stage, sign a letter of intent or a Memorandum of Understanding to permit either of them to transfer the contract to another entity, also within the same group, at a later point in time.

⁹⁵ See Official Comment 2 to Art. 9.3.4.

⁹⁶ See Art. 9.1.7 (*Agreement between assignor and assignee sufficient*): '(1) A right is assigned by mere agreement between the assignor and the assignee, without notice to the obligor. (2) The consent of the obligor is not required unless the obligation in the circumstances is of an essentially personal character.'

⁹⁷ See Art. 9.2.6 (*Third party performance*): '(1) Without the obligee's consent, the obligor may contract with another person that this person will perform the obligation in place of the obligor, unless the obligation in the circumstances has an essentially personal character. (2) The obligee retains its claim against the obligor.'

the agreement.⁹⁸ Nonetheless, if nothing is said to the contrary, it is argued that consent to the transfer implies consent to the application of the Principles, provided that the other party had actual or constructive knowledge that the assignor and assignee agreed on their application.⁹⁹

3 The Effects on the Parties Involved

According to Art. 9.3.5 of the Principles, more options in respect of a proposed assignment of a contract are open to the other party, which will accordingly affect the position of the assignor.¹⁰⁰ First, the other party may decide to discharge the assignor in full,¹⁰¹ second, it may retain the assignor as a subsidiary obligor in case the assignee does not perform or does not perform properly;¹⁰² and third, the other party may discharge the assignor with respect to certain obligations while retaining them as an obligor for others.¹⁰³

However, if the other party does not manifest its choice by communicating it to the new party or the assignor, the default rule is that the assignor and the assignee are jointly and severally liable.¹⁰⁴ It is then in the interest of the assignor to obtain from the other party an express declaration of its intention.¹⁰⁵

In relation to defences available to the other party against the assignee, the guiding principle is that its position must not be worsened by effect of an assignment. Art. 9.1.13 of the Principles (to which Art. 9.3.6 refers)¹⁰⁶ provides that the other party is entitled to

⁹⁸ See Brödermann (n 94) 326.

⁹⁹ Mazza (n 91) 1148. The other party can be said to have constructive knowledge of the choice relating to the application of the Principles if, under Art. 4.2, a reasonable person of the same quality as the other party, in the same circumstances, could not have been unaware of the assignor and the assignee's intention to have the agreement subject to the Principles.

¹⁰⁰ This provision correlates with Art. 9.2.5 of the Principles, concerning the effects of a transfer of obligations on the original obligor.

¹⁰¹ See Art. 9.3.5(1) of the Principles. If the other party decides to discharge the assignor in full, any security granted by the assignor, as debtor, is extinguished, unless the asset given as security is transferred as part of a transaction between the original and the new obligor. The same holds true for a surety given from a third party, unless the third party agrees that it should continue to be available to the obligee. Conversely, if the other party wishes that such a security remains in place, it should make its declaration to discharge the original obligor dependent on the suspensive condition that the third-party consent to the viability of the security: see Mazza (n 91) 1141ff.

¹⁰² See Art. 9.3.5(2) of the Principles.

¹⁰³ This results from the combination of paras. 1 and 2 of Art. 9.3.5(2) of the Principles.

¹⁰⁴ The rules in Chapter 11 dealing with a plurality of obligors will apply accordingly. It is interesting to note that the solution proposed by PECL and the DCFR is different as both provide that the assignor is discharged upon consent by the other party to the transfer.

¹⁰⁵ It goes without saying that the other party may well choose expressly to retain the original debtor and the new one as severally and jointly liable.

¹⁰⁶ Art. 9.3.6(1): 'To the extent that the assignment of a contract involves an assignment of rights, Article 9.1.13 applies accordingly'.

avail itself of all substantive and procedural defences,¹⁰⁷ based on the assigned contract and the relevant applicable law, that it could have raised against the assignor.¹⁰⁸ If a defence (including a right of set-off) is successfully raised against the assignee, the latter will also have a claim against the assignor.¹⁰⁹

Special attention is given to the right of set-off, since an assignment destroys mutuality as a pre-condition for this mechanism to operate. On the strength of Art. 9.1.13(2) of the Principles, the other party, as an obligor, may claim a right of set-off against the assignee, if it was entitled to do so against the assignor at the time the assignment became effective. This means that the requirements for set-off, as specified in Art. 8.1 of the Principles, must be satisfied at that time.¹¹⁰

As to the assignee (which acquires all the assignor's rights to payment or other performance under the contract and all rights securing performance),¹¹¹ it can avail itself of all defences available to the assignor against the other party.¹¹² However, as an obligor, it cannot exercise any right of set-off that the assignor could have raised against the other party.¹¹³ This difference in treatment is justified by the fact that, contrary to the original party to the contract, the assignee, as a new debtor, cannot be treated as holder of a legitimate expectation as to the existence of a right of set-off against the other party. This position is also consistent with the innovative rule chosen by the UNIDROIT Principles' drafters providing that set-off has no retroactive effect.¹¹⁴

4 Partial Assignment and Conflict among a Plurality of Assignees

Like under Italian law, the Principles envisage that a contract may be assigned only in part. However, when assignment involves the transfer of an obligation other than the payment of a monetary sum, partial assignment will be allowed to the extent that performance

¹⁰⁷ The other party may, for example, invoke an arbitration clause in the contract (see Art. 9.1.13, Illustration 2 of the Principles).

¹⁰⁸ Art. 9.1.13: '(1) The obligor may assert against the assignee all defences that the obligor could assert against the assignor'. Except for set-off, the defence is to be considered available even if it comes into existence after that assignment became effective or was notified'.

¹⁰⁹ See Art. 9.1.15(d)(e).

¹¹⁰ Art. 8.1 (*Conditions of Set-off*): '(1) Where two parties owe each other money or other performances of the same kind, either of them ('the first party') may set off its obligation against that of its obligee ('the other party') if, at the time of set-off, (a) the first party is entitled to perform its obligation; (b) the other party's obligation is ascertained as to its existence and amount and performance is due. (2) If the obligations of both parties arise from the same contract, the first party may also set off its obligation against an obligation of the other party which is not ascertained as to its existence or to its amount.'

¹¹¹ See Art. 9.3.7 in combination with Art. 9.1.14 of the Principles.

¹¹² Art. 9.2.7(1) of the Principles: 'The new obligor may assert against the obligee all defences which the original obligor could assert against the obligee'.

¹¹³ See Art. 9.2.7(2) of the Principles.

¹¹⁴ Art. 8.5(3) of the Principles: 'Set-off takes effect as from the time of notice'.

of it is divisible, and the assignment does not render the obligation significantly more burdensome.¹¹⁵

Although quite a rare occurrence, another aspect that deserves mention – and for which the solutions in Italian law and the Principles partially diverge – concerns a potential conflict between the interests of different assignees. In principle, this conflict is resolved, within both systems, by giving priority to the first assignment of which the original debtor/ the other party has been notified.¹¹⁶ However, as clarified in the Official Comment to the Principles, and contrary to Italian law,¹¹⁷ the Principles do not take into consideration the actual or constructive knowledge that the obligor may have had of the assignment(s) in the absence of notice of their existence being given to it. This approach is prompted by the wish to encourage giving notice as a tool to ensure more certainty in the context of international trade relations.

5 The Rules on Assignment of Contracts in Practice

As is well known, the Principles do not have the force of law by themselves; nevertheless, their ‘soft’ legal nature carries more advantages than shortcomings.¹¹⁸

One advantage is that, in accordance with their Preamble, the Principles may be used in different contexts and by different actors: they may apply directly to a legal relationship by the decision of either the parties or the adjudicators; they may serve as an interpretative tool (i.e., for interpreting and supplementing existing international rules or domestic laws); and they may function as a model for national and international lawmakers,¹¹⁹ or for drafting contracts or specific clauses.

The UNILEX database provides a compilation of decisions handed down by arbitral tribunals and national courts worldwide that refer in some way or other to the UNIDROIT Principles.¹²⁰

¹¹⁵ This follows from the rule in Art. 9.1.4 of the Principles.

¹¹⁶ The solution is to be drawn for the rules governing assignment of rights. For Italian law, see Art. 1265 of the Code, where it is stated that if the same claim has been the subject of more than one assignment to different persons, the first assignment of which the debtor has been notified or that which has first been accepted by him, prevails, even if it is of a later date; for the Principles, see Art. 9.1.11: ‘If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received.’

¹¹⁷ See Paladini (n 5) 274; Alpa, Fusaro (n 36) 235.

¹¹⁸ See, also for numerous references, Michael Joachim Bonell, ‘Towards a Legislative Codification of the UNIDROIT Principles?’ (2007) 12 Uniform Law Review 233–245, <https://doi.org/10.1093/ulr/12.2.233>

¹¹⁹ For an accurate analysis of the role of the Principles as model for domestic legislators, see Angelo Estrella Faria, ‘Influence of the UNIDROIT Principles of International Commercial Contracts on National Laws’ in UNIDROIT (ed), *Eppur si muove*, 1318–1349.

¹²⁰ The UNILEX database, which also contains a selection of decisions relating to the CISG handed down by national courts and arbitral tribunals worldwide, is available for free at www.unilex.info.

Out of a total of 554 reported cases,¹²¹ only a smaller number (about 90) are decisions in which the Principles have been applied as the governing law, either as exclusive source of law (and then only rarely¹²²), or in conjunction with a particular domestic law or international set of rules (like, for instance, the CISG¹²³ or the *lex mercatoria*¹²⁴).

Admittedly, this number might still appear rather limited, except if one considers, on the one hand, that the Principles, as a set of a-national rules, cannot be chosen as a veritable *lex contractus* in front of State courts, the traditional and still prevailing view being that the parties' freedom of choice of law for a contract is limited to a particular domestic law;¹²⁵ on the other hand, that arbitral awards – decided on the basis of applying the Principles, by the choice either of the parties or the arbitrators,¹²⁶ – remain to a large extent unpublished.

As determined from the recorded decisions, the provisions in the UNIDROIT Principles on the assignment of contracts have only been applied in a limited number of cases so far. An arbitral award made by the Permanent Court of Arbitration to solve a controversy arising from a supply contract concluded between a Lebanese company and the Food and Agricultural Organization of the United Nations (FAO) deserves mentioning.¹²⁷ In this case, the arbitral tribunal decided to apply the Principles to the merits of the dispute, on the strength of a choice-of-law in the contract asking adjudicators to decide according

¹²¹ Last accessed 20 February 2023.

¹²² See Camera di Arbitrato Nazionale ed Internazionale di Milano, 1 December 1996, <http://www.unilex.info/principles/case/622>; ICC International Court of Arbitration, Paris, n.8331/1996, <http://www.unilex.info/principles/case/647>; *Centro de Arbitraje de México* (CAM), 30 November 2006, <http://www.unilex.info/principles/case/1149>; *Chinese European Arbitration Centre* (CEAC), 30 April 2018, <http://www.unilex.info/principles/case/2285>.

¹²³ See the relevant cases reported in UNILEX, Preamble, under issue 2.4.1; for an analysis of the relationship between the Vienna Convention and the Unidroit Principles, see Bonell, *An International Restatement cit.* (n 75) 318ff.; Pilar Perales Viscasillas, 'Interpretation and Gap-Falling under the CISG: Contrast and Convergence with the UNIDROIT Principles' (2017) 22 *Uniform Law Review* 4–28, <https://doi.org/10.1093/ulr/unw060>.

¹²⁴ See the relevant cases reported in UNILEX, Preamble, under issue 2.1.2.

¹²⁵ See Genevieve Saumier, 'Designating the UNIDROIT Principles in International Dispute Resolution' (2012) 17 *Uniform Law Review* 533–547, <https://doi.org/10.1093/ulr/17.3.533>. This results in any reference to the Principles as being considered merely as an agreement to incorporate them into a contract. Exceptions are represented by the reforms recently passed in Paraguay and Uruguay. Influenced by the liberal approach enshrined in the 2015 Hague Principles of Choice of Law in International Commercial Contracts, both the new regimes empower the parties to an international contract to choose not only a particular domestic law as the law governing their contract but also, to quote Art. 3 of the Hague Principles, the 'rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules'. For a detailed analysis of the Paraguayan legislation see José Antonio Moreno Rodríguez, 'The New Paraguayan Law on International Contracts: Back to the Past' in UNIDROIT (ed), *Eppur si muove*, 1146–1178.

¹²⁶ It is worth recalling that in arbitral proceedings the arbitral tribunal may refer to the Principles whenever the parties have agreed that their relationship(s) be governed by 'general principles of law, the 'lex mercatoria' or the like, or in the lack of a choice by the parties as to the applicable law, whenever an arbitral tribunal considers them to be the most appropriate rules of law under the circumstances.

¹²⁷ Permanent Court of Arbitration, 30 April 2009, <https://www.unilex.info/principles/case/1881>.

to ‘the general principles of law to the exclusion of any national legal system’. Having to determine whether a contract had been validly transferred from a claimant to a third party, the tribunal decided no, noting that the defendant had never consented to the assignment. Regrettably, the tribunal did not expressly mention Art. 9.3.3 of the Principles in its reasons for the decision.

Another example is an arbitral award rendered by the ICC International Court of Arbitration, in which the Court had to decide, among other things, whether a party could assign a contract to a third person and, if so, when the assignment became effective *vis-à-vis* the other party. In its reasoning, the Court considered that the relevant provision in the Italian Civil Code (namely, Art. 1407), which was applicable to the merits of the dispute, embodies a ‘similar mechanism of that enshrined in Arts. 9.3.3 and 9.3.4 of the Principles’.¹²⁸

These two cases are examples of two different uses of the UNIDROIT Principles. More precisely, while in the first mentioned case the Principles provided the normative basis for the decision, the second case falls within a group of decisions – more than 100 cases reported in UNILEX¹²⁹ –, in which the Principles were not applied directly, yet were referred to as an international benchmark to corroborate solutions adopted under the applicable law. Whilst admittedly a reference in decisions to the Principles often appears to be no more than a purely ornamental remark, devoid of real impact on the final outcome of the case, their utility should not to be underestimated, especially in cases where at least one of the parties involved is confronted with a foreign law virtually unknown to it. A resonance with internationally accepted standards in a decision, such as those contained in the Principles, may, in fact, render the decision more acceptable and sound to the party whose law did not apply to determine the matter.¹³⁰

The role that the Principles have increasingly acquired as ‘global background law’¹³¹ is testified by another range of cases – 221 decisions in UNILEX – in which they were referred to, mainly by domestic courts, to support an evolvement in the law. In other words, they were cited to add clarity to unclear aspects in the applicable law;¹³² to reveal a rule implicit

¹²⁸ ICC International Court of Arbitration, 12745/2005, <https://www.unilex.info/principles/case/1691>.

¹²⁹ See the cases reported in UNILEX, Preamble, under issue 2.3.1.

¹³⁰ In this sense, see OLAF MEYER, ‘The UNIDROIT Principles as a Means to Interpret or Supplement Domestic Law’ (2016) 21 *Uniform Law Review* 599-611, <https://doi.org/10.1093/ulr/unw051>

¹³¹ Ralf Michaels, ‘The UNIDROIT Principles as Global Background Law’ (2014) 19 *Uniform Law Review* 643-668, <https://doi.org/10.1093/ulr/unu033>.

¹³² Rechtbank Amsterdam, 30 April 2020, <http://www.unilex.info/principles/case/2259>

in the applicable legal system;¹³³ to aid the adoption of one of several possible solutions under the applicable domestic law;¹³⁴ and even to openly revisit the current law of a country.¹³⁵

Even though at present there are no examples of the indirect application of the rules in the UNIDROIT Principles on the assignment of contracts to develop the law of a particular jurisdiction, it may well happen that these rules will be inspirational for national courts in the near future. For example, they may inspire the courts in Hungary in the way they interpret the recently-adopted regime for the assignment of contracts.¹³⁶

¹³³ See for example Federal Court of Australia, 8 April 2015, <http://www.unilex.info/principles/case/1921>

¹³⁴ This was the case in some Italian decisions relating to restitutory claims: for more details see Anna Veneziano, E. Finazzi-Agrò, 'The Use of the UNIDROIT Principles in Order to Interpret or Supplement National Contract Law' in Michele Graziadei (ed), *Annuario di diritto comparato e di studi legislativi*, Special edition (ESI 2018, Napoli, 39ff).

¹³⁵ Of relevance in this regard are some English decisions that discuss two peculiar and well-established doctrines of the law of contracts, namely: the so-called exclusionary rule (i.e., the traditional approach which opposes the examination of negotiations to interpret written contracts); and the well-known distinction between penalty clauses and liquidated damages clauses. On the first doctrine, in 2009 when the House of Lords precluded recourse to negotiations for contract interpretation, it did so by invoking the Principles in what can be termed an anti-model key. On that occasion, the Supreme Court noted that, although the Court of Appeal had previously referred to Art. 4.3 of the Principles, which allow recourse to negotiations for contract interpretation, in support of a change of approach in English law (see *Proforce Recruit Limited v. The Rugby Group Limited* [2006] EWCA Civ 69, <http://www.unilex.info/principles/case/1119>), the approach that the Principles take is not globally agreed on, but specifically reflects the French philosophy of contract interpretation, and as such is incompatible with English law (*Chartbrook Limited v Persimmon Homes Limited* [2008] EWCA Civ 183; [2009] UKHL 38 (<http://www.unilex.info/principles/case/1373>, at para 39 per Lord Hoffman). With regard to the second doctrine, recourse to the Principles again served to justify a decision not to make changes to the system, but this time on the basis of a different consideration. While recognising that the penalty rule is an antiquated doctrine of which doctrine is increasingly critical, the Supreme Court judges ruled out its abolition and this represented 'a proper course to take' (see *Cavendish Square Holding BV v El Makdessi – Parking Eye Ltd v Beavis*, [2015] UKSC 67, <https://www.unilex.info/principles/case/1933>). In deciding this, the Court noted that the English solution is part of a converging trend towards recognising judicial control over manifestly excessive and disproportionate penalty clauses. This trend is evident in many foreign jurisdictions, as well as in 'influential attempts to codify the law of contracts internationally, including the UNIDROIT Principles of International Commercial Contracts.'

¹³⁶ A recent survey demonstrated that while the Principles have been used as a model for the reform of the Hungarian Civil Code and are well known in the academic community, no decisions are known, to date, that refer in one way or the other to them: see Miklós Király, 'The UNIDROIT Principles as Reference for the Uniform Interpretation of National Laws: Report on Hungarian Law' in Alejandro Garro, José Antonio Moreno Rodríguez (eds), *The Unidroit Principles as a Common Frame of Reference for the Uniform Interpretation of National Laws*, (Springer 2021) 195ff, <https://doi.org/10.1007/978-3-030-54322-8>