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HARMONIZATION OF RULES GOVERNING ASSIGNMENTS OF RIGHT TO PAYMENT

Bryan D. Hull*

I. INTRODUCTION

ONE of the tasks given to the UCC Article 1 Drafting Committee was to identify concepts dealt with in a different manner by the various substantive Articles of the UCC and to explore whether the statutes dealing with those identified concepts should be harmonized.¹ On April 6, 1997, the Reporter of the Article 1 Drafting Committee, Professor Neil B. Cohen, submitted a memorandum to the Article 1 Drafting Committee and to Committee Chairs and Reporters of other UCC Drafting Committees in which he addressed several areas where harmonization might be appropriate (hereinafter referred to as the "Harmonization Memorandum").²

One of the areas identified where harmonization might be appropriate was the treatment of assignments of rights to payment. If goods, services, or intangible property rights (such as a license to use software) are sold, leased, or licensed on credit, a right to payment is created for the seller/lessor/licensor. That right might be assigned to a bank or other financial institution, eliminating the need for the seller/lessor/licensor to hold the risk of non-payment.

Professor Cohen noted in his memorandum that assignments of rights to payment arising out of a sale or lease of goods, a software contract, or a license of information were dealt with in UCC Articles 2, 2A, 9, and what was at the time proposed Article 2B.³ He identified three questions

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1. See *Revision of Uniform Commercial Code Article 1 – General Provisions*, Prefatory Note at ¶ 1 (2000 National Conference of Commissioners on Uniform State Laws Draft), available at <http://www.law.upenn.edu/bll/ulc/ucc1/ucc1070500.htm>.

2. See Memorandum from Professor Neil B. Cohen, Reporter, Article I Drafting Committee, to Article 1 Drafting Committee (Apr. 6, 1997), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (listed under the Article 1 materials under the title "Reporter's Memo - April 6, 1997") [hereinafter Harmonization Memorandum].

3. See Harmonization Memorandum, *supra* note 2. It is also possible that a promissory note could be created, which would include UCC Article 3 if the note were negotiable. This Article focuses on situations where no instrument is involved, as does the Harmonization Memorandum. At that time, the relevant provisions read as follows:

Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his con-

tract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

U.C.C. § 2-210(2) (1995).

(2) Except as provided in subsections (3) and (4), a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (5), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (i) the lessor's interest under the lease contract or (ii) the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee within the purview of subsection (5) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor.

(4) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (5).

(5) Subject to subsections (3) and (4):

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 2A-501(2);

(b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract,

(i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and

(ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

Id. § 2A-303(2)-(5).

A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

Id. § 9-318(4).

of interest:

1. If the contract creating the account does not contain a restriction on transfer or assignment, is the assignment effective?
2. If the contract creating the account contains a restriction on transfer or assignment, is the assignment effective?
3. If the contract creating the account contains a restriction on transfer or assignment, does an assignment in violation of the restriction give rise to liability for breach?⁴

Professor Cohen noted that the various UCC Articles dealing with these questions answered them in ways that were not entirely consistent. He concluded that

1. In the absence of an anti-assignment clause, an assignment of the right to payment is effective.
2. Even if there is an anti-assignment clause, an assignment of the right to payment is effective.
3. An assignment of the right to payment in breach of an anti-assignment clause can never give rise to damages owed by the assignor or assignee.
4. The fact that an assignment violates an anti-assignment clause does not, in itself, create a defense to the obligor's duties to the assignee under the assigned contract.⁵

(a) Except as otherwise provided in this section, a party's rights under a contract may be transferred, including by an assignment . . . , unless the [transfer] would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, create a delegation of material performance, disclose or threaten to disclose trade secrets or confidential information of the other party, or materially impair the other party's likelihood of obtaining return performance.

(c) Subject to subsection (a), either party may transfer the right to receive payment from the other party.

(d) A transfer made in violation of this Section is ineffective.

U.C.C. § 2B-502(a)(c) & (d) (Proposed Draft Mar. 21, 1997), *available at* http://www.law.upenn.edu/bll/ulc/ulc_frame.htm (the author has edited the 2B Draft to eliminate what appears to be typographical errors).

(a) Except as otherwise provided in subsection (b), a contractual restriction or prohibition on transfer of an interest of a party to a contract or of a licensor's ownership of intellectual property rights in information that is the subject of a license is enforceable.

(b) The following contractual restrictions are not enforceable:

(1) A term that prohibits a party's assignment[,] transfer of or creation of a security interest in an account or in a general intangible for money due or to become due or which requires the other party's consent to such an assignment, [transfer] or security interest; and.

(2) A term that prohibits creation or enforcement of a financier's security interest except to the extent that creation or enforcement would be precluded in the absence of the term under Section 2B-502 or 2B-504.

(c) A transfer made in breach of an enforceable contractual term provision that prohibits transfer is ineffective.

Id. § 2B-503.

4. Harmonization Memorandum, *supra* note 2.

5. *Id.*

Since Professor Cohen's recommendations, several changes have been made to the UCC. Perhaps most significantly, the revision of Article 9 was completed. In addition, proposed Article 2B was removed from the UCC and was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL) as the Uniform Computer Information Transactions Act (UCITA). The revisions of Articles 2 and 2A have yet to be finalized, but the Article 9 revision includes conforming amendments to those two Articles dealing with assignments of rights to payment.

The revisions to Article 9, including the conforming amendments to Articles 2 and 2A, do harmonize to a great extent the rules governing assignments of the rights to payment along the lines suggested in the Harmonization Memorandum.⁶ The revisions more clearly answer the ques-

6. *See id.* After the 1999 revision to Article 9 and the adoption of UCITA, the following are the comparable sections in UCC Articles 2, 2A, and 9 and UCITA dealing with assignments of the right to payment:

(2) Except as otherwise provided in Section 9-406, unless otherwise agreed, all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.

(3) The creation, attachment, perfection, or enforcement of a security interest in the seller's interest under a contract is not a transfer that materially changes the duty of or increases materially the burden or risk imposed on the buyer or impairs materially the buyer's chance of obtaining return performance within the purview of subsection (2) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the seller. Even in that event, the creation, attachment, perfection, and enforcement of the security interest remain effective, but (i) the seller is liable to the buyer for damages caused by the delegation to the extent that the damages could not reasonably be prevented by the buyer, and (ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the contract for sale or an injunction against enforcement of the security interest or consummation of the enforcement.

U.C.C. § 2-210(2) & (3) (1999).

(2) Except as provided in subsection (3) and Section 9-407, a provision in a lease agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies provided in subsection (4), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective.

(3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an event of default, is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of subsection (4).

(4) Subject to subsection (3) and Section 9-407:

(a) if a transfer is made which is made an event of default under a lease agreement, the party to the lease contract not making the trans-

fer, unless that party waives the default or otherwise agrees, has the rights and remedies described in Section 2A-501(2);

(b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited under a lease agreement or (ii) materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, unless the party not making the transfer agrees at any time to the transfer in the lease contract or otherwise, then, except as limited by contract,

(i) the transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer and

(ii) a court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

Id. § 2A-303 (2)-(4).

[Legal restrictions on assignment generally ineffective.] Except as otherwise provided in Sections 2A-303 and 9-407 and subject to subsections (h) and (i), a rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation:

(1) prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in the account or chattel paper; or

(2) provides that the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

Id. § 9-406(f).

(A) [Term restricting assignment generally ineffective.] Except as otherwise provided in subsection (b), a term in a lease agreement is ineffective to the extent that it:

(1) prohibits, restricts, or requires the consent of a party to the lease to the creation, attachment, perfection, or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

(2) provides that the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

(B) [Effectiveness of certain terms.] Except as otherwise provided in Section 2A-303(7), a term described in subsection (a)(2) is effective to the extent that there is:

(1) a transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term; or

(2) a delegation of a material performance of either party to the lease contract in violation of the term.

(C) [Security interest not material impairment.] The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of Section 2A-303(4) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor.

Id. § 9-407.

The following rules apply to a transfer of a contractual interest:

tions posed in the Harmonization Memorandum, at least if the assignment of the right to payment is within the scope of Article 9. One area where there is still some disharmony, however, is in the relationship between UCITA and the UCC. This Article examines the inconsistencies that existed in the rules dealing with assignments of rights to payment before revisions to the UCC and the extent to which the recommendations on this subject in the Harmonization Memorandum have been followed.

II. ASSIGNMENTS OF RIGHTS TO PAYMENT OUTSIDE OF THE UCC

Before discussing the UCC rules governing assignments of rights to payment, it is useful to explore the general rules of contract law governing assignments. In earlier times, contract rights were not assignable.⁷ While there is some question as to the exact reasons for the historic judicial hostility to assignment of contract rights, some argue that it was because the contractual relationship was personal.⁸ In a contract between

- (1) A party's contractual interest may be transferred unless the transfer:
 - (a) is prohibited by other law; or
 - (b) except as otherwise provided in paragraph (3), would materially change the duty of the other party, materially increase the burden or risk imposed on the other party, or materially impair the other party's property or its likelihood or expectation of obtaining return performance.
- (2) Except as otherwise provided in paragraph (3) and Section 508(a)(1)(B) a term prohibiting transfer of a party's contractual interest is enforceable, and a transfer made in violation of that term is a breach of contract and is ineffective to create contractual rights in the transferee against the nontransferring party, except to the extent that:
 - (a) the contract is a license for incorporation or use of the licensed information or informational rights with information or informational rights from other sources in a combined work for public distribution or public performance and the transfer is of the completed, combined work; or
 - (b) the transfer is of a right to payment arising out of the transferor's due performance of less than its entire obligation and the transfer would be enforceable under paragraph (1) in the absence of the term prohibiting transfer.
- (3) A right to damages for breach of the whole contract or a right to payment arising out of the transferor's due performance of its entire obligation may be transferred notwithstanding an agreement otherwise.
- (4) A term that prohibits transfer of a contractual interest under a mass-market license by the licensee must be conspicuous.

UCITA § 503 (Feb. 9, 2000), available at http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

Throughout this Article, references to UCC sections are to those sections as they existed before the 1999 revision to Article 9 and conforming amendments to Articles 2 and 2A. References to a Revised UCC sections refer to post-revision versions of the law. All citations are to the 1999 official text, which contains both pre- and post-revision versions of the various Articles, since the revisions to Article 9 do not take effect until July 1, 2001. See U.C.C. § 9-701 (1999).

7. See E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.2, at 62 (2d ed. 1990); 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 7.3, at 200 (1965).

8. See GILMORE, *supra* note 8, § 7.3, at 200-01.

A and B, permitting B to assign rights to C would compel A to deal with C, perhaps against A's will. It has also been posited that courts were reluctant to permit assignments of contract rights because of the fear that free assignability would lead to excessive litigation.⁹

As time went by, however, courts began to recognize the assignability of contract rights, especially rights to payment. The principle of free alienability of property, which has been traditionally associated with real property, has carried over to intangible property as well.¹⁰ It is thought to be important to commerce that rights to payment be freely assignable; the modern credit economy would have a difficult time functioning if rights to payment could not be assigned.¹¹ A seller of goods would be reluctant to sell goods on credit if the seller could not discount the right to be paid to a financing institution. Greater availability of credit leads to greater economic growth.

The change in the law governing assignment of debts owed by the United States government demonstrates the potential benefit to the economy from free assignability of debt. Before World War II, the United States embraced a policy of presuming invalid any assignment of a claim against it. Among other things, this policy prevented the government from being exposed to multiple claims and also prevented anyone from accumulating claims against the government that might lead to undue influence on the governmental process.¹² During the war effort, however, defense contractors found it difficult to finance their operations because of their inability to assign their rights to payment from the federal government.¹³ To facilitate financing (and as an alternative to providing government funds to the contractors up front), Congress passed the Assignment of Claims Act of 1940 (ACA), which allowed government contractors to secure financing for their operations by assigning federal payment obligations to a financing institution.¹⁴ By allowing the assignment of federal payables, the ACA made it profitable for investors to finance government contracts, which in turn stimulated economic and

9. See *id.* at 201.

10. See *id.* § 7.6, at 213.

11. Professor Gilmore stated that the belief that free assignability of contract rights was beneficial to society was a "fundamental" proposition that was "instinctive" and that was "beyond demonstration and proof." See *id.* at 212-13. He quoted from Macleod, who said "'If we were asked - who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer—the man who first discovered that a Debt is a Saleable Commodity.'" *Id.* at 213 n.7 (quoting from 1 MACLEOD, PRINCIPLES OF ECONOMICAL PHILOSOPHY 481 (2d ed. 1872)). "And further: 'When Daniel Webster said that Credit has done more a thousand times to enrich nations than all the mines of all the world, he meant the discovery that a Debt is a saleable Chattel: and may be used like Money and produce all the effects of Money.'" *Id.* at 213 n.7 (quoting from 1 MACLEOD, THE ELEMENTS OF ECONOMICS 327 (1881)); see also FARNSWORTH, *supra* note 8, § 11.2, at 61.

12. See Kirk Cypel, *Federal Assignment-Backed Securities (Fast-Backs): Financing Federal Accounts Receivable Through Securitization*, 27 LOY. L.A. L. REV. 1195, 1213 (1994); see also GILMORE, *supra* note 8, § 7.7, at 215 n.1.

13. See Cypel, *supra* note 12, at 1213.

14. See *id.*

technological development.¹⁵

A. RESTATEMENT RULES ON ASSIGNMENTS OF RIGHTS TO PAYMENT
IN THE ABSENCE OF ANTI-ASSIGNMENT CLAUSES

The Restatement (Second) of Contracts contains rules reflecting what the drafters of the Restatement viewed as the prevalent attitude of courts on the issue of assignment of contract rights. If the contract does not contain a restriction on transfer or assignment, the Restatement provides that contract rights can be assigned unless the assignment would (i) materially change the duty or materially increase the burden or risk of the obligor; (ii) materially impair the obligor's chance of obtaining return performance; or (iii) materially reduce the value of the return performance to the obligor.¹⁶

Viewing this rule in light of Professor Cohen's questions posed in the Harmonization Memorandum, the Restatement would permit assignment of a right to payment in the absence of a clause forbidding such an assignment as long as the assignment did not materially change the duty, materially increase the risk of the obligor, or materially reduce the value of the return performance to the obligor.

With respect to whether the obligor's obligation is increased, the Restatement rule is most easily applied in a situation in which the obligor is to perform some service for the assignor. It makes sense to say that the duty of a person under a contract cannot be increased by an assignment, at least not without that party's consent. If A has a contractual right against B to have B paint A's house, A cannot assign that right to C, who has a much larger house.

To what extent is the risk of an obligor increased by an assignment of the right to payment? In most cases, the risk would not change, as it is no more difficult to pay the assignee than to pay the assignor. The obligor might argue that the assignor is a more forgiving creditor than the assignee, and thus more willing to grant extensions of time or forgive some indebtedness, but that argument seems very speculative.¹⁷ In some cases, there may be a practical problem for the obligor in keeping track of whether a contract right has been assigned.¹⁸ There is danger of multiple

15. *See id.*

16. *See* RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981).

17. The argument that an assignee might be harder to deal with and an assignment thus materially increased the burden of the obligor was rejected in *Beachler v. Amoco Oil Co.*, 112 F.3d 902, 908 (7th Cir. 1997). In that case, a franchisee was concerned that when the franchisor assigned the franchise agreement that the assignee might, among other things, raise the franchisee's rent. The court held that since the assignor could have raised the rent, the assignment did not materially increase the burden of the franchisee. *See Beachler*, 112 F.3d at 908. In the case of an assignment of a right to payment, it seems very speculative that the assignor would be easier on the obligor than would an assignee in the event that the obligor was having a difficult time making payment. *See also* *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998). In the dissenting opinion in *Clark*, Judge Cole argues that the obligor should have been permitted to show that the assignee actually charged higher prices to the obligor than did the assignor. *See id.* at 396-98 (Cole, J., dissenting).

18. *See* GILMORE, *supra* note 8, § 7.6, at 214.

liabilities if the wrong party is paid.¹⁹ There may also be disputes as to whether a right to payment has actually been assigned, with two parties claiming a right to payment. It would seem that these types of problems could be resolved fairly easily through careful bookkeeping practices and requirements that assignments be reasonably proved by the assignee.²⁰ The problems are probably outweighed by the overall benefits to the economy of permitting assignments of rights to payment.²¹

Another possible impediment to the right to assign would be whether the assignment would materially impair the obligor's right to return performance. This issue arises where the right to payment is assigned before the assignor has rendered performance. Using a sale of goods example, if the seller assigns the right to payment and is paid by the assignee before the goods are delivered, there is perhaps not as much of an incentive for the seller to make the delivery.

In this situation, the seller's non-performance will not cause a problem for the buyer unless the buyer has signed a contract containing an enforceable "waiver of defense" clause, where the buyer agrees not to assert any defenses that the buyer has against the seller against an assignee of the seller.²² Without such a clause, the buyer may raise the defense of failure to deliver against the assignee, and the assignment would not increase the buyer's risk.²³ If the buyer signed a contract containing a waiver of defense clause, the buyer assumes the risk of not being able to assert defenses against an assignee.

Additionally, in most cases the seller's ability to assign the right to payment will actually make it more likely that the buyer will obtain full performance. It is through assignments of rights to payment that the seller obtains some of the financing necessary to stay in business. Thus, assignments of rights to payment should not be considered as increasing the obligor's burden nor should they be considered as reducing the chance of the receipt of return performance. While the Restatement rules do not clearly spell this out, they should be construed as permitting assignments of rights to payment in the absence of a clause in the contract forbidding such an assignment.²⁴

19. *See id.* For an example of the problem of paying twice if the assignor becomes insolvent, see *Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co.*, No. CIV.A.89-255-CMW, 90-311-CMW, 1991 WL 226775 (D. Del. Oct. 30, 1991).

20. *See* U.C.C. § 9-318(3) (1995); U.C.C. § 9-406(c) (1999).

21. *See supra* note 11.

22. *See* U.C.C. § 9-206 (1995); U.C.C. § 9-403 (1999).

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981).

24. RESTATEMENT (SECOND) OF CONTRACTS § 317 cmt. d (1981) states that "The clause on material impairment of the chance of obtaining return performance operates primarily in cases where the assignment is accompanied by an improper delegation But in cases of doubt, adequate assurance of due performance may prevent such an impairment."

B. EFFECT OF RESTATEMENT RULES IN THE EVENT OF AN
ANTI-ASSIGNMENT CLAUSE

Sometimes a contract may contain a provision forbidding the assignment of rights arising out of the contract. Through such a clause, parties may express their desire not to deal with third persons for the reasons stated above.²⁵

In this area, the notion of freedom of contract goes up against (WOULD "CONFLICTS WITH" SOUND BETTER THAN "GOES UP AGAINST"????) the policy of free alienability of property and the view that assignability of rights to payment is beneficial to the economy.²⁶ The Restatement (Second) of Contracts sides with freedom of contract, providing that a contractual right can be assigned unless "assignment is validly precluded by contract."²⁷

Professor Grant Gilmore noted the rule that parties might contractually bar the right of assignment, but also noted that courts generally avoided enforcing such contractual prohibitions by interpreting the contract in such a way as to validate the assignment.²⁸ The Restatement also reflects a preference for interpreting the contract to validate the assignment. It states that "unless a different intention is manifested," a contract term prohibiting assignment of rights under the contract "does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation" and "gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective."²⁹ Parties may thus make assignments of rights to payment ineffective, but they must be very clear about their intention to do so for the contract provision to be given that effect. There is a preference for finding that the assignment is effective and that the obligor must pay the assignee, but the assignor is liable for damages for breach of the anti-assignment clause.

What harm is done to an obligor under a contract when a right to payment is assigned contrary to an anti-assignment clause? The assignment of the right to payment does not change the fact that the obligor owes the money due under the contract. Unless the obligor has waived defenses against an assignee, which seems unlikely when there is an anti-assignment clause in the contract, any defenses arising out of the contract that

25. See *supra* notes 17-24 and accompanying text.

26. Professor Gilmore, who sides with assignability, stated:

Freedom of contract cuts both ways: to the freedom of a debtor to restrict or prohibit transfer of claims against him may be opposed the freedom of a creditor to transfer rights whose value is attested by the fact that the transferee is willing to pay for them or lend money on their security. The social or economic utility of permitting creditors to transfer rights is believed to outweigh the utility of permitting obligors to forbid the transfer.

GILMORE, *supra* note 8, § 7.6, at 212.

27. RESTATEMENT (SECOND) OF CONTRACTS § 317(2)(c) (1981).

28. See GILMORE, *supra* note 8, § 7.6, at 211.

29. RESTATEMENT (SECOND) OF CONTRACTS § 322(2) (1981).

could be asserted against the assignor could also be asserted against the assignee.³⁰

As noted above, the obligor might have to pay twice in the event that an assignment was not properly documented on the obligor's books.³¹ And it could be argued that the assignor might be easier for the obligor to deal with than the assignee, meaning that payments might be delayed in some situations to the benefit of the obligor.³² Additionally, an obligor could argue that an anti-assignment clause gives the obligor leverage to negotiate a better deal in consideration for agreeing to an assignment.³³

The problem in enforcing anti-assignment clauses, however, is that there is a chilling effect on the assignment of rights to payment, which, as noted above, are generally accepted as being beneficial to the economy. This is true even if the only remedy available to the obligor is to sue the assignor for damages. If anti-assignment clauses are effective in preventing the assignment at all, there is a practical problem for assignees of rights to payment in bulk in having to review all of the contracts assigned to see if there is an anti-assignment clause and then to seek consent from the obligors.³⁴ Losses suffered by obligors due to violations of anti-assignment clauses seem highly speculative and preventable, and are probably outweighed by the benefits of assignability of rights to payment.³⁵ Therefore, Professor Cohen's recommendation that anti-assignment

30. See RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981).

31. In *Paccom Leasing Corp. v. E.I. du Pont de Nemours & Co.*, CIV.A.89-255-CMW, 90-311-CMW, 1991 WL 226775, at *7 (D. Del. Oct. 30, 1991), the court held that an assignment of a right to payment made in violation of an anti-assignment clause might give rise to a damages claim against the assignor or might render the assignment ineffective, depending on the intent of the parties. The problem for the obligor, du Pont, was that the assignor was insolvent. Assuming that the assignor was solvent, the obligor should be able to recover the amount paid to the assignor as unjust enrichment.

32. See *supra* note 17 and accompanying text.

33. Such was the argument made by the obligor in *Garden State Bldgs v. First Fid. Bank*, 702 A.2d 1315 (N.J. Super. Ct. App. Div. 1997). In that case, the obligor on a loan agreement containing an anti-assignment clause argued that it could have negotiated a discount on the amount it owed if the anti-assignment clause had been honored. When the loan was assigned to a third party at a discount, the obligor contended that it could have refused the assignment and forced the assignor to deal with it instead and offer the obligor the same deal it offered the third party. The lender was under pressure from investors and bank regulators to sell its problem loans, of which the obligor's loan was one. See *id.* at 1319. The obligor had a right to prepay the loan, but not without paying a prepayment penalty. Nevertheless, the court held that the obligor should have had an opportunity to prove its damages arising out of the violation of the anti-assignment clause, which could be determined based on the discount that the assignee received when purchasing the obligor's loan. See *id.* at 1324.

It can be questioned as to whether the debtor should have been permitted to extort a discount from the lender in this way, knowing that the lender was being pressured to sell problem loans. It is also unclear that the lender would have been willing to modify the loan agreement with the debtor to let the debtor off the hook without the prepayment penalty.

34. For a discussion of the practical problems faced by financiers who are interested in taking assignments of contract rights in light of anti-assignment clauses, see Marijane Browne & John Francis Hilson, *Practical Problems in Taking Security Interests in "Nonassignable" Contracts*, 28 UCC L.J. 184 (1995).

35. See *supra* notes 17-24 and accompanying text.

clauses not be enforceable, even if the only remedy sought by the obligor is damages from the assignor, seems sound.³⁶

III. UCC TREATMENT OF ASSIGNMENTS OF RIGHTS TO PAYMENT BEFORE 1999 REVISIONS TO ARTICLE 9

Under the pre-1999 revision text of UCC Article 9, if goods were sold or leased on unsecured credit and no instrument or chattel paper was given, an "account" was created in favor of the seller/lessor.³⁷ If a written lease was executed in connection with a lease of goods, "chattel paper" was created.³⁸ If software was licensed and no instrument or chattel paper was created, the right to payment under the license would be characterized as either an "account" or a "general intangible."³⁹

Assignment of an account, chattel paper, or general intangible as security for a loan was generally within the scope of pre-revision UCC Article 9.⁴⁰ Likewise, most sales of accounts or chattel paper were within Article 9's scope.⁴¹ Thus assignments of rights to payment arising out of sales or leases of goods implicated Articles 2, 2A, and 9 before the Article 9 revision. Before it was removed from the UCC, an assignment of a right to payment arising out of a software license would have implicated Article 2B.⁴²

A. ASSIGNMENTS OF RIGHTS TO PAYMENT UNDER THE PRE-REVISION UCC IN THE ABSENCE OF ANTI-ASSIGNMENT CLAUSES

Pre-revision Article 9 labeled "ineffective" any term in a contract between an account debtor and an assignor to the extent that it "prohibited an assignment of an account or prohibited creation of a security interest in a general intangible."⁴³ The official commentary to pre-revision sec-

36. See Harmonization Memorandum, *supra* note 2.

37. See U.C.C. § 9-106 (1999).

38. See *id.* § 9-105(1)(b).

39. See *id.* § 9-106.

40. See U.C.C. § 9-102 (1995). The following transactions would be exempt from Article 9:

a sale of accounts or chattel paper as part of a sale of a business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a preexisting indebtedness.

U.C.C. § 9-104(f) (1999).

41. See U.C.C. § 9-102 (1995).

42. See U.C.C. §§ 2B-103, 2B-502 & 2B-503 (Proposed Draft Mar. 21, 1997), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2b397.htm>.

43. U.C.C. § 9-318(4) (1999). Note that pre-revision Article 9 did not address anti-assignment clauses in chattel paper. Professor Gilmore noted that this did not mean that the drafters intended by negative implication to validate such clauses when chattel paper was involved. The problem of anti-assignment clauses apparently was most acute in the area of accounts and general intangibles. As Gilmore said, "the draftsmen were more anxious to hunt down the existing beasts than to bother with hypothetical dragons." GILMORE, *supra* note 8, §12.8, at 392; see also Stephen L. Harris, *The Rights of Creditors Under Article 2A*, 39 ALA. L. REV. 803, 829-50 (1988).

tion 9-318 indicated the drafters' recognition of the "economic need" to make rights to payment freely assignable, and one could perhaps take from this provision that if rights to payment are assignable despite an anti-assignment provision, they are certainly assignable if no such provision exists in the contract.⁴⁴

Another view is that the drafters of Article 9 did not address assignability other than stating that anti-assignment clauses were not effective in cases within the scope of Article 9.⁴⁵ Pre-revision Article 9 did not cover all cases. For example, sales of general intangibles and transfers of some accounts were not covered.⁴⁶ In addition, pre-revision section 9-318(4) may have been simply deferring to other UCC Articles for a determination of whether claims could be assigned in the absence of an anti-assignment clause.⁴⁷

In looking at this issue in a sale of goods case, pre-revision section 2-210 indicated that rights under a contract could be assigned "unless otherwise agreed" and "except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance."⁴⁸ Pre-revision section 2-210 provided a clear rule that a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of the entire contract could be assigned despite contrary agreement.⁴⁹

Pre-revision section 2-210 left open the question of whether an assignment of a right to payment by a seller who had not performed its obligations materially impaired the buyer's chance of obtaining return performance and was therefore not assignable. As argued above, the answer to this question should be "no", but the question was not definitively answered by pre-revision 2-210.⁵⁰

Pre-revision Article 2A did not address the question of assignment of rights to payment in the absence of an anti-assignment clause. It did indicate that a contract clause forbidding the creation of a security interest in a lessor's right to payment was unenforceable, unless it was accompanied by a delegation of the lessor's duty to perform under the lease.⁵¹ It stated that creation of a security interest in the lessor's right to payment did not materially impair the prospect of the lessee obtaining return performance.⁵² One can reasonably infer from this section that since an assign-

44. See U.C.C. § 9-318 com. 4 (1999); Harmonization Memorandum, *supra* note 2.

45. See Harmonization Memorandum, *supra* note 2.

46. See U.C.C. § 9-106 (1999).

47. See Harmonization Memorandum, *supra* note 2.

48. U.C.C. § 2-210(2) (1999).

49. See *id.*

50. See Harmonization Memorandum, *supra* note 2; see also *supra* notes 17-24 and accompanying text.

51. See U.C.C. § 2A-303 (1999). Section 2A-303 was revised in 1990 to make interests under a lease agreement more freely assignable. For a discussion of the state of the law before the 1990 revisions, see Harris, *supra* note 44.

52. See U.C.C. § 2A-303(3) (1999).

ment of the right to payment by the lessor was permitted even when there was a clause forbidding assignment, an assignment made when there was no such clause would also be effective. But it might also mean that the assignment was subject to whatever rules would govern in the absence of an anti-assignment clause, which rules were not clearly stated in pre-revision Article 2A.⁵³

The March 1997 draft of proposed Article 2B indicated that in the absence of an anti-assignment clause, a right to payment could be assigned unless the assignment would “materially change the duty of the other party, materially increase the burden or risk imposed on the other party, create a delegation of material performance, disclose or threaten to disclose trade secrets or confidential information of the other party, or materially impair the other party’s likelihood of obtaining return performance.”⁵⁴ This provision was similar to the Restatement rule and again left open the question of whether an assignment before the licensor had completed performance materially impaired the licensee’s likelihood of obtaining return performance. As stated above, the answer to that question should be “no”, but the statute as written at that time did not expressly state an answer.

In summarizing the various UCC sections (including the proposed 2B sections) as they existed at the time of the drafting of the Harmonization Memorandum, none of the provisions clearly addressed the question of whether unearned rights to payment could be assigned where the contract did not contain an anti-assignment clause. There certainly appeared to be a preference for assignability in that anti-assignment clauses appeared disfavored (as discussed in the next section), but the statutes were not explicit as to what should happen in the absence of such a clause.

B. ENFORCEABILITY OF ANTI-ASSIGNMENT CLAUSES UNDER THE UCC BEFORE REVISION TO ARTICLE 9

The pre-revision UCC clearly addressed the effect of anti-assignment clauses, at least if the assignment was within the scope of Articles 9, 2A, or 2B. As noted above, former section 9-318(4) invalidated an anti-assignment clause to the extent that it prohibited an assignment of an account or prohibited creation of a security interest in a general intangible.⁵⁵ The March 1997 draft of Article 2B labeled “unenforceable” any provision prohibiting creation of a security interest in an ac-

53. See Harmonization Memorandum, *supra* note 2. As noted below, the same argument can be made with respect to post-revision Article 2A. Given that the UCC indicates that creation of a security interest does not materially impair the lessee’s right to return performance, the assignment should be enforceable under general contract principles as outlined in the Restatement. See *infra* notes 74-75 and accompanying text.

54. U.C.C. §2B-502(a) (Proposed Draft Mar. 21, 1997), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2b397.htm>.

55. See *supra* notes 44-47 and accompanying text.

count or general intangible.⁵⁶ As noted above, Article 2A also invalidated contractual provisions prohibiting creation of security interests in a lessor's right to payment, provided that there was no accompanying material delegation of duties by the assignor.⁵⁷ Presumably, these statutes would also not permit an action for damages for violation of an anti-assignment clause, since the clauses are "ineffective" or "unenforceable."⁵⁸

Pre-revision Article 2, however, did not invalidate assignments of rights to payment except in situations where the contract had been fully performed or where the assignment was of a right to damages arising out of the whole contract.⁵⁹ Thus, in situations where a right to payment for goods to be delivered in the future was assigned despite an anti-assignment clause, the buyer could argue under Article 2 that the assignment was ineffective or was at least a breach of contract giving rise to an action for damages. This argument seems inconsistent with the Article 9 approach, at least if the assignment is within the scope of Article 9. The inconsistency was noted long ago by Grant Gilmore, and to the knowledge of the author, has never been dealt with in a decided reported decision.⁶⁰

As Professor Cohen noted in the Harmonization Memorandum, the inconsistency between Article 2 and the other UCC Articles needed to be clarified.⁶¹ Article 2 needed to be brought along with the other UCC Articles on the issue of enforceability of anti-assignment clauses.

IV. THE TREATMENT OF ASSIGNMENTS OF RIGHTS TO PAYMENT UNDER REVISED ARTICLE 9

Since the Harmonization Memorandum was circulated, the revision of Article 9 was completed, which included conforming changes to Articles 2 and 2A relating to assignments. In addition, Article 2B became UCITA.

Under Revised Article 9, a transfer of a right to payment arising out of a sale of goods, a lease of goods, or a license of software will likely be a transfer of an account or chattel paper.⁶² Most of these transactions will be within the scope of Revised Article 9, with a few exceptions.⁶³

56. See U.C.C. §2B-503(b)(1) (Proposed Draft Mar. 21, 1997), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc2b397.htm>.

57. See *supra* notes 50-51 and accompanying text.

58. See Harmonization Memorandum, *supra* note 2.

59. See U.C.C. § 2-210(2) (1999).

60. See GILMORE, *supra* note 8, §12.8 n.4, at 392.

61. See Harmonization Memorandum, *supra* note 2.

62. See U.C.C. § 9-102(a)(2), (11) (1999).

63. See *id.* § 9-109. The following transactions would be exempt: a sale of accounts or chattel paper as part of the sale of a business out of which they arose, an assignment of accounts or chattel paper for collection only, an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract and an assignment of a single account to an assignee in full or partial satisfaction of a preexisting indebtedness. See *id.* § 9-109(d)(4)-(7).

The approach taken under Revised Article 9 and the conforming amendments to Articles 2 and 2A is to refer to Article 9 for questions of assignability of rights to payment if the transaction is within the scope of Revised Article 9 and an anti-assignment clause is involved.⁶⁴ UCITA also yields to Article 9 to the extent that there is any conflict between UCITA and Article 9.⁶⁵ The revisions to Article 9 and conforming changes to other Articles for the most part answer the questions raised in the Harmonization Memorandum in the manner suggested by that Memorandum, with a few remaining gaps. In particular, the provisions of UCITA are not as clear as some of the UCC provisions.⁶⁶

A. THE RIGHT TO ASSIGN IF NO RESTRICTION ON ASSIGNMENTS
EXISTS IN THE CONTRACT

Revised section 2-210 provides that in the absence of a contractual provision prohibiting assignment, a right to payment can be assigned except where the assignment would materially change the duty of the obligor, or increase materially the burden or risk imposed on the obligor, or impair materially the obligor's chance of obtaining return performance.⁶⁷ The statute goes on to say that creation of a security interest does not materially change the duty of the obligor or materially impair the buyer's chance of obtaining return performance, unless enforcement of the security interest results in a delegation of material performance by the seller.⁶⁸ Even in that case, the assignment of the right to payment is effective, but the buyer has a cause of action against the seller for damages and a court may grant equitable relief in proper cases.⁶⁹ As was the case with the pre-revision version of section 2-210, revised section 2-210 states that a "right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise."⁷⁰

Revised section 2-210 thus makes clear that if the assignment of the right to payment is within the scope of Article 9, it will be effective, whether the seller has fully earned the right to payment or not. The revision to Article 2 is continuing, but the draft considered at the most recent annual meeting of NCCUSL contains a version of section 2-210 similar to the one approved in connection with the revision of Article 9.⁷¹

Only in situations where the assignment of the right to payment arising out of a sale of goods is outside Article 9 will some question remain as to whether there is a material change in the duty of the obligor or a material

64. *See id.* §§ 2-210, 2A-303.

65. U.C.I.T.A. § 103(c) (2000).

66. *See infra* notes 78-82 and accompanying text.

67. *See* U.C.C. § 2-210(2) (1999).

68. *See id.* § 2-210(3).

69. *See id.*

70. *Id.* § 2-210(2).

71. *See* U.C.C. § 2-210 (Proposed Draft 2000), available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc20600.htm>.

impairment of the chance of obtaining return performance. For example, sales of accounts or chattel paper in connection with a sale of a business out of which the accounts or chattel paper arose are exempt from Article 9.⁷² In those situations, a court would have to analyze whether there is a material change or impairment without reference to the Article 9 provisions. As noted above, mere assignment of the right to payment should not constitute a material change or impairment.⁷³ A court should not invalidate such an assignment unless it is accompanied by a delegation of performance, which might well be the case if a business is sold.

With respect to Article 2A, the revisions to Articles 2A and 9 still do not specifically address the question of assignments in the absence of contractual provisions prohibiting assignments.⁷⁴ As was the case with pre-revision Article 2A, however, revised sections 2A-303 and 9-407 invalidate anti-assignment clauses and make the creation of security interests in rights to payment effective unless there is also a delegation of the lessor's performance. Revised section 9-407 explicitly states that creation of a security interest in the lessor's interest under the lease contract is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty imposed on the lessee, unless it results in a delegation of material performance by the lessor.⁷⁵ Thus one can reasonably infer from these rules that assignment of a right to payment would also be permitted in the absence of such a clause.⁷⁶ As is the case with Article 2, the revision process of Article 2A continues, but the version of section 2A-303 in the most recent annual meeting draft reflects the conforming amendments made when Article 9 was revised without significant change.⁷⁷

UCITA section 503 follows UCC revised section 2-210's formulation in stating that a contract right is assignable unless assignment would "materially change the duty of the [obligor], materially increase the burden or risk imposed on the [obligor] or materially impair the [obligor's] property or its likelihood or expectation of obtaining return performance."⁷⁸ Again similar to revised section 2-210, UCITA section 503 indicates that "a right to damages for breach of the whole contract or a right to payment arising out of the transferor's due performance of its entire obliga-

72. See U.C.C. § 9-109(d)(4) (1999).

73. See *supra* notes 17-24 and accompanying text.

74. See U.C.C. § 2A-303 (1999); U.C.C. § 9-407 (2000 Revision).

75. See *id.* § 9-407(c) (1999).

76. Since no explicit statement is made in Article 2A about assignments of contract rights in the absence of an anti-assignment clause, general contract principles might apply by virtue of UCC § 1-103. Under general contract principles discussed above, the right to payment could be assigned unless there was a material increase in the obligor's burden or material impairment of the lessee's right to receive return performance. See *supra* notes 16-24 and accompanying text. Since the UCC clearly states that the mere assignment of a right to payment does not cause material increase in burden or impairment, the right to payment is assignable in the absence of an anti-assignment clause.

77. See U.C.C. § 2A-303 (Proposed Draft 2000); available at <http://www.law.upenn.edu/bll/ulc/ucc2a/2a00500.htm>.

78. U.C.I.T.A. § 503(1)(B) (2000).

tion may be transferred notwithstanding an agreement otherwise.”⁷⁹

There is a difference between the UCITA rule and revised section 2-210, however, in that nothing is stated about whether transfer of a right to payment materially changes the duty of the obligor or materially impairs the likelihood or expectation of obtaining return performance. Revised Article 9 also does not speak to this issue in the context of a UCITA transaction (e.g. a license of computer software). The official commentary to UCITA section 503 indicates that “impairment may occur if the transfer is made by a party owing executory or ongoing performance and the transfer shifts that performance to a third party or otherwise undermines its occurrence.”⁸⁰ Nothing is said about the transfer of a right to payment without a delegation of performance.

The commentary to section 503 notes reasons why transfers of rights under a license of computer information should be treated differently from transfers of rights under a sale of goods contract. The differences, however, have to do with protecting a licensor’s rights in confidential information from transfers by a licensee.⁸¹ In addition, a licensee’s right to receive ongoing performance from a licensor would seem similar to a lessee’s right to receive ongoing performance from a lessor. If a lessor’s transfer of the right to payment without delegating duties does not materially impair the lessee’s right to receive return performance, the licensee’s transfer of the right to payment should likewise not in itself impair the licensee’s right to receive return performance. Without amendment to UCITA or Article 9, however, the issue is not expressly settled by the statutes.

Another issue not expressly settled by UCITA is whether a transfer that materially increases the burden or risk of the other party or the likelihood of obtaining return performance is ineffective or, instead, simply a breach of contract. UCITA section 503(2) renders transfers made in violation of an anti-assignment clause ineffective, with some exceptions, which will be discussed later.⁸² It would seem that since UCITA section 503(1) states that a right may be transferred unless it materially increases the burden on the obligor, a contrary transfer may not be made and is ineffective.⁸³

One of the problems of spinning UCITA out of the UCC is that some inconsistencies may arise that are not supported by policy reasons. Licensing of software raises a number of policy issues not relevant to transactions in goods, but in the area of assignments of the right to payment, it does not appear that policy reasons support different treatment of assignments in UCITA as compared to UCC Articles 2 and 2A. The relevant UCITA provisions do not necessarily call for different treatment of as-

79. *Id.* § 503(3).

80. *Id.* § 503 com. 3b.

81. *See id.*

82. *See id.* § 503(2); *see also infra* notes 90-91 accompanying text.

83. *See* U.C.I.T.A. § 503(1).

signments of rights to payment, and in fact should not be so construed. But it would be easier for courts and practitioners if the UCITA statutory language on this issue were consistent with the UCC.

In summarizing the revisions to the UCC on the question of assignability of rights to payment in the absence of an anti-assignment clause, the provisions of Articles 2, 2A, and 9 have been made more consistent and basically support assignment of the right to payment. This statement applies to transactions within the scope of Article 9. If a transfer of a right to payment is outside the scope of Article 9, Articles 2 and 2A do not themselves clearly address the question of assignability of a right to payment, leaving courts to decide whether the assignment materially increases the burden on the obligor or materially impacts the obligor's chance of obtaining return performance.

B. THE RIGHT TO ASSIGN IF A CONTRACTUAL RESTRICTION ON ASSIGNMENTS EXISTS

To the extent that a transfer of a right to payment arising out of a sale of goods contract or a lease is within the scope of Revised Article 9, both Articles 2 and 2A yield to Revised Article 9 on the question of enforceability of anti-assignment clauses.⁸⁴ As was the case before revision, Revised Article 9 makes anti-assignment clauses unenforceable, with few exceptions.⁸⁵ It clarifies that such a clause may also not constitute an event of default on a contract, meaning that damages could not be recovered for making an assignment in violation of such a clause, unless there is a delegation of material performance accompanying the assignment.⁸⁶ In the event of a delegation of material performance arising out of the assignment, Articles 2, 2A, and 9 provide that the assignment is effective, but that the obligor may have a cause of action for damages against the assignor or may obtain equitable relief if appropriate, including possibly an injunction against enforcement of the security interest.⁸⁷

The revisions to Article 9 and section 2-210 resolve the prior inconsistency between former section 2-210 and revised Article 9 on the effect of anti-assignment clauses. As noted above, there was previously a question as to whether assignments of unearned rights to payment could be made despite an anti-assignment clause.⁸⁸ The revisions to section 2-210 and Article 9 make it clear that Article 9 resolves the question if the assignment is within its scope as section 2-210 states that it is subject to section 9-406.⁸⁹ If the assignment of the right to payment is outside the scope of Article 9, questions remain as to the effect of an anti-assignment clause. Articles 2 and 2A prohibit anti-assignment clauses only with respect to

84. See U.C.C. §§ 2-210(2), 2A-303(2) (1999).

85. See *id.* §§ 9-406(d), 9-407. The rule is subject to contrary rules other than in Article 9 for consumer account debtors. See *id.* § 9-406(h) (1999).

86. See *id.* §§ 9-406(d)(2), 9-407(a)(2).

87. See *id.* §§ 2-210(3), 2A-303(2).

88. See *supra* notes 59-60 and accompanying text.

89. See U.C.C. § 2-210(2) (1999).

assignments of rights to damages for breach of the whole contract or rights arising out of the assignor's due performance of the entire obligation. Thus it may be that assignments of rights to payment for amounts not yet earned can be prohibited by contract if the assignment is not within Article 9.

UCITA yields to Article 9 to the extent that there is a conflict between the two laws, therefore, if a transfer of a right to payment arising out of a UCITA transaction is within the scope of Revised Article 9, an anti-assignment clause would be ineffective.⁹⁰ Because Revised Article 9 defines rights to payment arising out of a software license as an "account" and because Article 9 generally covers sales of accounts, restrictions on the right to assign a payment stream would normally be unenforceable in a UCITA transaction.⁹¹

The fact that an anti-assignment clause is ineffective does not necessarily mean that the right to payment under UCITA is assignable. It may simply mean that the assignment needs to be tested under UCITA section 503(1) to determine if there is a material increase in the obligor's obligation or material impairment of the likelihood or expectation of return performance. This situation is similar to that existing under pre-revision section 2-210 and Article 9; ineffectiveness of the anti-assignment clause did not necessarily make an assignment effective if it materially changed the obligor's duty or materially reduced the likelihood or expectation of receiving return performance.⁹²

If the transfer of the right to payment is not within the scope of Revised Article 9, UCITA provides that a "right to damages for breach of the [entire] contract or a right to payment arising out of the [assignor's] due performance of the entire obligation may be transferred despite an anti-assignment clause."⁹³ For unearned rights to payment, an anti-assignment clause is not effective with respect to a transfer of those rights as long as the transfer would not materially change the duty of the obligor or materially impair the obligor's likelihood or expectation of obtaining return performance.⁹⁴

As was discussed in the prior section, the statutory language of UCITA is inconsistent with the rules dealing with assignments of rights to payment arising out of sales or leases of goods. The answers to the questions posed in the Harmonization Memorandum are less clear. It does not appear that a different result is intended under UCITA than under Articles 2, 2A and 9, but it will be up to the courts to decide whether rights to unearned payments can be effectively assigned in UCITA transactions.

90. See U.C.I.T.A. § 103(c) (2000); U.C.C. § 9-406(d) (1999).

91. See U.C.C. §§ 9-102(a)(2), 9-109, 9-406(d) (1999).

92. See *supra* notes 59-60 and accompanying text.

93. U.C.I.T.A. § 503(3) (2000).

94. See *id.* § 503(2)(b).

V. OVERALL ASSESSMENT OF THE REVISIONS TO THE UCC AND CONCLUSION

The revisions to UCC Article 9 and conforming amendments to Articles 2 and 2A indicate the continued faith of the drafters in the doctrine that free assignability of rights to payment is good for the economy and overrides freedom of contract principles. The revisions make the answers to the questions posed by Professor Cohen in the Harmonization Memorandum much clearer, at least if the assignment is within the scope of Revised Article 9. The revisions side with the recommendations made in that Memorandum.

The process also indicates the usefulness of looking at all of the Articles of the UCC and asking the question of whether certain concepts should be treated differently in each Article. When different drafting committees draft the Articles at different times, rules may be stated differently without any good reason. Among other problems, inconsistent rules require costly litigation over the issue of the scope of the various Articles of the UCC; if one Article applies, one result is achieved while if another Article applies, a different result is achieved.⁹⁵ These inconsistencies can result in confusion, making the UCC less user-friendly and resulting in inconsistent judicial decisions contrary to the entire purpose of the UCC of providing uniform, certain rules.⁹⁶

The continuing inconsistent treatment of rights to payment in UCITA may indicate that separation of UCITA from the UCC was an unfortunate decision. The inconsistencies between UCITA and the UCC are not great on this question, and do not indicate that different results are intended. Courts should enforce assignments of rights to payment arising out of UCITA transactions in the same way that such assignments are enforced in UCC transactions. But it would be easier for courts if the language in the statutes were the same.

The political difficulties faced in including UCITA in the UCC are well known and extensively documented.⁹⁷ It is a much-criticized law, and its widespread enactment is subject to question. Many of the issues that it deals with, however, are common to other Articles of the UCC, especially Articles 2 and 2A. It should be held to the same light as those Articles with respect to common concepts, and the rules should be different only where unique policy considerations so dictate. In the area of assignments of rights to payment, there are some inconsistencies as noted above, and it does not appear that the different rules in UCITA are justified by any policy consideration unique to the transactions covered by that law. NC-

95. See *Paul v. Chromalytics Corp.*, 343 A.2d 622 (Del. Super. Ct. 1975) (litigating whether Article 9 applied to determine whether an anti-assignment clause was effective or not).

96. For an argument that the UCC should be more user-friendly, see Lary Lawrence, *What Would be Wrong With a User-Friendly Code?: The Drafting of Revised Articles 3 and 4 of the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 659 (1993).

97. For criticisms of UCITA, *gf* <http://www.4cite.org>.

CUSL should make conforming amendments, or at least provide commentary suggesting why the rules need to be different in UCITA.

Questions also remain for assignments of rights to payment that are outside the scope of Revised Article 9. It might be useful to revise Articles 2 and 2A to further reflect that assignments of rights to payment are enforceable, whether an anti-assignment clause exists or not, for assignments outside the scope of Revised Article 9 unless there is also a delegation of a material obligation by the assignor. In non-Article 9 transactions, courts should analyze assignments in light of the legislative approval of the doctrine of free assignability of rights to payment reflected by adoption of both pre- and post-revision Article 9. Unless the particular transaction being considered raises questions that do not arise in the typical Article 9 transaction, rights to payment should be assignable irrespective of the existence of an anti-assignment clause and no damages should be recoverable for violation of that clause.