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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
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RECEIVABLES FINANCING

Comments of the Permanent Bureau of the Hague Conference on Private International Law

Note by the Secretariat

1. At its twenty-fifth session, the Working Group on International Contract Practices noted that the Hague Conference on Private International Law planned to prepare and submit to the Working Group for consideration at its twenty-sixth session a paper on conflict-of-laws issues on assignment and related aspects of insolvency law (A/CN.9/432, para. 269).

2. Following the twenty-fifth session of the Working Group, the Secretariat received from the Permanent Bureau of the Hague Conference on Private International Law a set of comments relating to chapter V (conflict of laws) and to the scope of application of the draft convention (A/CN.9/WG.II/WP.87). The document in question is attached to the present note in the form in which it was received by the Secretariat.

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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Draft uniform rules on assignment in receivables financing

Comments of the Permanent Bureau of the Hague Conference on Private International Law on chapter V — *Conflict of laws* — and on the scope of application of the rules

Introduction

1. At the last meeting of the Working Group on International Contract Practices, held in New York from 8 to 19 July 1996, the experts did not have time to examine articles 21 to 23 of the draft uniform rules on assignment in receivables financing, articles which make up chapter V on the subject of conflict of laws. The observer from the Hague Conference on Private International Law informed the Working Group that the Permanent Bureau intended, with a view to future discussion, to submit comments on this chapter, possibly together with other comments on the effects of the conflict rules on the scope of application and implementation of the uniform rules.[1]

2. The comments set out below are of necessity brief and incomplete. In the first place, they are intended to introduce the discussions which will be focusing on chapter V of the draft rules and do not presume to anticipate the outcome of more advanced collaboration between UNCITRAL and the Hague Conference aimed at drafting, if need be, more elaborate and detailed conflict rules pertaining to assignment of receivables. But first and foremost, because of the considerable broadening of the scope of application of the uniform rules with respect to the types of assignment covered by the drafts[2] — a broadening which may have a direct effect in some cases on the content of the conflict rules—the comments given below must necessarily be confined, at the present stage of the work, to observations of a general nature. While it seems to have been accepted at the last meeting of the Working Group that the scope of application of the uniform rules—which until that point had pertained only to receivables arising from a contract—was being extended to cover non-contractual receivables (but whether all such receivables should be covered was not clear) and to certain assignments of a legal nature, no conclusion was reached regarding receivables arising from family law, the law of succession or any other source.

3. To be sure, if the instrument under preparation is intended to contain only conflict rules strictly limited to the aspect of *assignment of receivables*, along the lines of article 12 of the *Convention on the Law Applicable to Contractual Obligations*, adopted in Rome on 19 June 1980,[3] the broadening of the scope of application of the uniform rules should have scant effect on the conflict rules which might be adopted. However, if the Working Group were to consider it worthwhile — as the current drafting of articles 21 to 23 would appear to suggest — to adopt detailed conflict rules pertaining specifically to the choice of the law applicable to the legal relationship between the parties involved in an assignment of receivables, then the content of chapter V could not possibly be discussed before the precise scope of application of the uniform rules was established.

Before examining articles 21 to 23 in greater detail, the Permanent Bureau would like to make a few general remarks.

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[1] See Doc. A/CN.9/432 of 25 July 1996, para. 269.

[2] *Ibid.*, paras. 14-25.

[3] See *infra*, Comment No. 15.

General remarks

4.A In the draft rules, paragraphs 1 and 2 of article 21 and also article 22 itself begin with a phrase which the Permanent Bureau finds somewhat puzzling, namely "With the exception of matters which are settled in this Convention (...),". If we have correctly understood the purpose of this introductory phrase, it would appear that the only aim envisaged in adopting conflict rules is to establish the law which will apply to the *gaps* in the uniform rules, while the conflict rules rendering applicable either the uniform law itself or else the convention would be left to the national law of each State.

5. The Permanent Bureau of the Conference is, quite frankly, surprised at such a proposition, the motive for which it fails to understand. In the first place, this limitation would seem to be incompatible with article 1, paragraph 1 (b) of the draft under discussion, a provision which specifically provides for the implementation of the uniform rules through the provisions of private international law. If it is intended at this early stage to introduce conflict-of-law rules into a set of rules pertaining to substantive law (an intention which the Permanent Bureau of the Conference finds regrettable), this should at least be done in a comprehensive manner and should not leave the main conflict rules, i.e. the rules which will implement the convention or the model law, out of the envisaged unification process.

6. Moreover, this phrase has a perverse effect in that it introduces into the uniform rules a type of *semi-renvoi*. By this, we mean that it obliges the court, whenever it notes a gap in the uniform rules, to apply the conflict-of-laws provisions of chapter V, provisions which may be different from those it will have applied in order to implement the convention or the model law. In general terms, however, *renvoi* is widely rejected, as we know, in comparative law in all contractual spheres. And what is even more to the point, the unification of the conflict rules by conventional means must necessarily lead to the exclusion of *renvoi*: there would seem to be little point in attempting, in a particular area, to unify the conflict rules while at the same time allowing that the designated law—which in our case we would assume to be either the convention or the model law of UNCITRAL—incorporate the conflict rules of the law chosen, with the risk that those conflict rules might refer back to the law of a third State which has not adopted the unified substantive law.

7. For all these reasons, the Permanent Bureau suggests that this formulation of articles 21 and 22 be deleted and that, if a chapter on conflict of laws is retained in the draft, such a chapter should encompass all the relevant conflict rules.

8.B Although the Permanent Bureau considers that, if conflict rules have to be adopted in the future convention or model law, they should remain as simple as possible and not go beyond the assignment of receivables (along the lines of the Rome Convention or article 145 of the Swiss Federal Act on Private International Law of 18 December 1987), it might be worthwhile at this point to give a brief overview of comparative law relating to the various problems raised by any assignment of receivables and to the distribution of such problems among the different laws applicable.[4]

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[4]In order to prevent a proliferation of notes, the main (but not all) sources consulted by the Permanent Bureau in preparing these Comments are given below:

Roland Beuttner, *La cession de créances en droit international privé* (Berne and Frankfurt, 1971); Pierre Mayer, *Droit international privé*, 4th ed. (Paris, 1991); Henri Batiffol & Paul Lagarde, *Droit international privé*, vol. II, 7th ed. (Paris, 1983); Dicey & Morris, *The Conflict of Laws*, vol. 2, 11th ed. (London, 1987); Gerhard Kegel, *Internationales Privatrecht*, 6th ed. (Munich, 1987); Bernard Dutoit, *Commentaire de la loi fédérale du 18 décembre 1987* (Basel and Frankfurt, 1986); Mario Giuliano & Paul Lagarde, Report on the [Rome] Convention on the Law Applicable to Contractual Obligations (*Official Journal of the European Communities*) (Doc. C 282 of 31 October 1980).

9. Any assignment of receivables involves at least three parties, and this tripartite relationship is based on two separate and distinct legal relationships:

(a) The legal relationship between the assignor and the debtor, which may be of a contractual nature (as will normally be the case), but may also be non-contractual or may derive from, say, family law or the law of succession. It is this relationship which gives rise to the receivable to be assigned, and we submit that it is governed by what we shall henceforth refer to as the *law governing the assigned receivable*;

(b) The legal relationship between the assignor and the assignee, this being an almost exclusively contractual relationship in the course of which the receivable is transferred from the assignor to the assignee; the area of law applicable here is the *law governing the assignment contract*;

(c) There is no direct legal relationship between the assignee and the debtor. However, the action undertaken by the assignee of a *contractual* receivable *vis-à-vis* the debtor in respect of whom a receivable has been assigned is considered to be *contractual* in character, even where there is no contract directly linking the parties. In fact, such action is based on the contract linking the assigning creditor to the debtor.

10. This being the case, there is good reason on the one hand to make clear distinctions according to the different categories of legal relationship between the parties and, on the other, to make a further distinction according to hypothetical cases of insolvency, questions of form, the obligation or otherwise to notify the debtor, and other such criteria.

11. It is generally allowed that the following are governed exclusively by the law governing the assigned receivable: in the first place, the *assignability* of the receivable or, in other words, whether the receivable arising from the legal relationship between the assignor and the debtor is capable of being assigned to a third party. The law governing the assigned receivables also governs all the relationships between the *assignee* and the debtor, in particular the conditions under which an assignment shall have effect *vis-à-vis* the debtor, the discharging effect of the payment of a debt by the debtor, the effectiveness of defences raised by the debtor in respect of a receivable assigned and the question, lastly, of priority among several competing assignments. This last connecting factor, which is unanimously allowed by doctrine and case law, is summarized succinctly in rule 123 of *Dicey & Morris*: "The priority of competing assignments of a debt [...] is governed by the proper law of the debt". It is also allowed that the question of whether or not the assignment is abstract or causal in nature is subject to the particular body of law governing the assignment, in other words the law governing the assigned receivable.

12. The law governing the assignment contract, however, prevails in respect of all issues pertaining exclusively to the relationship between a former and a new creditor, in particular the *intrinsic validity* of the assignment in relations between assignor and assignee, i.e., assignability, questions of *culpa in contrahendo*, fraud, and so forth. This law also governs the validity of the *transfer* of the receivable. Lastly, and this is a point which is expressly stated in article 145 of the Swiss Act, it is allowed that the form of the receivables assignment is governed by the law applicable to the agreement concluded between the assigning creditor and the assignee.

13. With regard to the law governing the formalities to be completed in notifying a debtor of an assignment, it is generally allowed, especially in France, that the relevant law in this case is not that pertaining to the assigned receivable, but that of the habitual residence of the debtor or his main place of business. The obligation or otherwise to notify the debtor of the assignment is seen as a publicity measure and, as such, subject to the law of the place where the measure is to be taken, namely the law of the habitual residence or main place of business of the debtor. This solution is challenged, however, in some countries where the requirement to notify the debtor of the assignment is regarded as a question pertaining to the

substance rather than the form of the assignment. Moreover, the need for notification is not necessarily seen universally as a publicity measure. According to this particular doctrine or case law, which holds sway in Germany and Switzerland, the obligation to notify derives from assigned receivable law.

14. Lastly, in the case of insolvency on the part of either the assignor or the debtor, some of the connecting factors we have just noted are modified. It is accepted, for example, that the effectiveness of the assignment *vis-à-vis* the insolvency administrator should depend on the law governing the insolvency: according to *Batiffol and Lagarde*, this solution seems to be fair since the issue at stake is that of the effects of the insolvency due to its nature and not merely incidental to the assignment of receivables. Moreover, it is desirable that the insolvency regime be unified. For the same reasons, it would appear that the question of priorities among several competing assignments should be evaluated by the administrator in the bankruptcy in conformity with the law applicable to such bankruptcy.

After this brief look at the different solutions offered by private international law, the Permanent Bureau would like to make the following comments on the drafting of articles 21 to 23 of the draft uniform rules.

Article 21 — Law applicable to the relationship between assignor and assignee

15. An important preliminary remark should be made at this point. This article defines the law applicable to the legal relationship between assignor and assignee, a legal relationship in which the assignment of receivables is merely an *accessory* element. This legal relationship may take the form of different contracts (sale, guarantee, loan, financing, etc.) for which conflict rules already exist in the different States, conflict rules which often have a conventional source. The Permanent Bureau takes the view that it should not be the function of a set of substantive rules which are confined to international assignments of receivables to incorporate a conflict rule relating to the determination of the law applicable to all the possible types of contract linking assignor and assignee. If it is intended to include conflict rules among the substantive rules envisaged by UNCITRAL, then such conflict rules should be strictly limited to questions concerning the actual assignment of receivables. The only conceivable formula, therefore, and the only one that does not undermine the various conflict systems already established in the contractual sphere, would have to be a solution similar to the one to be found in article 145 of the Swiss Act on Private International Law, in other words, a formula whereby the agreement between assignor and assignee is governed by the law applicable to the legal relationship on which the assignment is based.

16. With this qualification, therefore, the following comments may be made on paragraphs 1 to 4 of article 21:

(a) This paragraph renders the *transfer* of a receivable between the assignor and the assignee subject to the law applicable to the receivable being assigned. The Permanent Bureau believes this connecting factor to be mistaken and to be in conflict with all the systems of private international law of relevance.[5] The authors of this paragraph appear to have confused the transfer of a receivable with its assignability. As we saw above under *General remarks*, the assignability of a receivable is subject to the law governing the assigned receivable, whereas the transfer of the receivable is subject solely to the law governing the assignment contract. This is what emerges from article 12, paragraph 1, of the Rome Convention, in connection with which provision it is interesting to recall some comments made by the rapporteurs of the Convention. *Giuliano and Lagarde* wondered why the authors of the Rome Convention had used the formula "the mutual obligations of assignor and assignee [...] shall be governed by the law [...]", instead of saying

[5]See *supra*, Nos. 11 and 12.

more simply that the transfer of a receivable by agreement should be governed in the relationship between assignor and assignee by the law applicable to their agreement. This formula had been adopted originally, but was abandoned owing to a problem of interpretation to which it might have given rise in German law, where the term "transfer" of a receivable encompasses the effects of the assignment *vis-à-vis* the debtor, a possibility which was expressly ruled out, however, by article 12, paragraph 2. The authors of the Report take pains to stress that it was precisely to avoid a formulation which might suggest that the law applicable to the assignment agreement, in a system of law where it is viewed as *Kausalgeschäft*, also determines the conditions for validity of the assignment with respect to the debtor that the present wording was finally adopted. The Permanent Bureau believes that, for the same reasons, the UNCITRAL draft should avoid any reference to "transfer of receivables".

17. Regarding the acknowledgement of freedom of choice in this connection, and subject to the comments made above,[6] the Permanent Bureau has no objection to article 21, paragraph 2, except for the clause "including, but not limited to, the validity of the assignment (...)", a phrase whose meaning it finds somewhat obscure. If the intrinsic validity of the assignment does indeed derive from the law governing the assignment contract, other problems will also be subject to that law and isolating the validity issue could lead to confusion.

18. As regards paragraphs 3 and 4, the reference to the law of the country with which the *assignment* is most closely connected (a phrase which the commentary quite correctly points out as having been drawn from the Rome Convention) would not appear to be an adequate connecting factor; since assignment is an accessory element of the contract agreed between the assignor and the assignee, it is not the law of the country with which the *assignment* is most closely connected but rather the law of the country with which the assignment *contract* is most closely connected that should be chosen. If, for example, the assignment contract is a sale contract, then the law of the country with which this *sale* is most closely connected should be chosen. This, moreover, is the solution adopted by the Rome Convention in its article 12.

As for the other connecting factor adopted—the law of the State in which the assignor has its place of business—this is ruled out for the reasons stated above.[7]

Article 22 — Law applicable to the relationship between assignee and debtor

19. The Permanent Bureau would suggest retaining the words contained within the first set of square brackets, i.e., retaining the law governing the receivable to which the assignment relates, a connecting factor which has the support of doctrine and case law in almost all the different States. The law of the State where the debtor has its place of business seems particularly ill-suited to governing the relationship between assignee and debtor, especially where account is to be taken of the defences which the debtor might exercise against the assignee, defences which can only arise under the basic contract forming the basis of the assignment.

20. As in the case of article 21, the Permanent Bureau has serious misgivings about the clause in article 22 beginning with the phrase "including, [...]". The circumstances listed in this clause are not exhaustive, and the reference to "the right of the assignee to notify the debtor" would appear to derive from a different law

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[6]See *supra*, No. 15.

[7]See *supra*, No. 15.

from that governing the receivable.[8] Moreover, what is relevant here is not the *right* of the assignee so much as the legal *obligation* on the part of the assignee to notify the debtor.

Article 23 — Law applicable to priority

21. In the light of the comments made above under *General remarks*, this article warrants careful consideration with regard to two points: firstly, the connecting factor to be selected and, second, the case of bankruptcy. We have seen that the question of priority among different assignees is generally governed by the law applicable to the receivable assigned. It is a question, in fact, of the unity of the regime governing the receivable assigned: given that the law applicable to the receivable assigned governs the two important points of the assignability of that receivable on the one hand and, on the other, the defences that the debtor might exercise against the assignee, it would appear logical for the question of priority to be subject to the same law. For *Dicey & Morris* this is indeed the only law that comes into consideration (rule 123).[9]

22. As for the case of bankruptcy, this implies a solution which is virtually mandatory: the administrator in the bankruptcy must apply the same law—namely that applicable to the bankruptcy—to all questions of priority, whether among different creditors in respect of the same receivable or among the insolvent person's creditors bearing claims to different receivables. Here it is not merely a question of the unity of the bankruptcy and the need to apply the same regime to all the creditors, but it is also a matter, in some countries, of *ordre public*.

Relationship between conflicts of law and the scope of application of the substantive rules

23. At the last meeting of the Working Group in July 1996, during the discussion on the scope of application of the future uniform rules, a question was raised as to the application of those rules to parties located in States which had not adopted them. In the face of the complexity of this problem, an ad hoc Working Group was set up, which submitted the results of its discussions in a *Memorandum* dated 9 July 1996. This *Memorandum* has not yet been formally discussed by the Working Group, but will be examined at future meetings.

24. This *Memorandum* identifies seven hypothetical cases which might give rise to problems and regarding which the ad hoc group puts a number of questions. We propose here to look at one of the cases envisaged, the line of argument developed being valid for the other six:

25. The first case is that of the insolvency of the assignor. The first question posed is whether or not the rules of the convention should apply in determining the relative rights of the administrator in the bankruptcy and the assignee in relation to the assigned receivables. The second question asked is whether or not the reply to the first question depends on the fact that the debtor's domicile is located in a contracting State. The Permanent Bureau takes the view that these two questions are not of the same order and cannot have any influence on one another.

26. It is one thing to determine the content of the substantive rules and quite another to know when the rules will apply in specific cases. There seems to be no good reason why the reply to the first question should depend on whether or not the debtor is resident in a contracting State. Given the considerable intellectual effort and substantial financial resources involved in the elaboration by UNCITRAL of unified substantive

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[8]See *supra*, No. 13.

[9]See *supra*, No. 11.

rules relating to the assignment of receivables, it is probably desirable that this process of unification should encompass most, if not all, of the problems raised by such assignment, in particular the insolvency of the creditor or debtor, the question of priority among assignees, the issue of subsequent assignments, and so forth.

27. However, the issue of whether these substantive rules will, in a given case, apply to one of the questions raised by assignment of a receivable is a different matter altogether. Whether the substantive rules take the form of a uniform law or a convention (it has been decided to opt for a convention, it being understood that when the Working Group has completed its work this decision could be reviewed), the unified rules formulated by UNCITRAL will govern the different relationships involved in an assignment of receivables only if, through the application of the conflict rules by the court hearing the particular case, the law declared applicable is that of a State which has either adopted the uniform law or ratified the convention. To come back to the bankruptcy example, the administrator in a bankruptcy will only apply the unified rules if the law applicable to the bankruptcy is that of a State Party to the convention or one which has adopted the uniform law.

28. It therefore seems pointless to contemplate a provision whereby the convention would be applicable by virtue of the fact that the assigning creditor is resident in a contracting State. Such a rule would be inoperative in the case where the debtor was resident in a non-contracting State and where an assignment relationship was governed by the law of the place of residence of the debtor, or where the law applicable to the assigned receivable was not that of a contracting State with regard to all the issues raised by that law. This is one of the major difficulties inherent in adopting the substantive rules in the form of a convention. The Permanent Bureau would like to take the liberty of suggesting that the UNCITRAL Working Group reconsider its decision: if the substantive rules were to be formulated as a uniform law, the situation would be clear: this law, covering the entire range of questions raised by assignment of international receivables, would be applied wherever the conflict rule specified it as being applicable, but only in those specific cases.

29. At the same time, visualizing the scope of application of a convention embracing all the hypothetical cases covered by the *Memorandum* raises some knotty problems. Another solution possibly worth discussing might be that of a convention whose provisions would be applicable only if the parties so wished. Along the lines of the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988), the implementation of the new convention would depend on the will of the parties, since the convention would contain an opting-in clause as a precondition for its applicability. This solution would gain even greater appeal if the future convention were to provide for a centralized system for registering assignments of international receivables. The Permanent Bureau considers that this question of the scope of application of any future convention should be the subject of further consideration.