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RECEIVABLES FINANCING

COMMENTS BY THE OBSERVER OF THE COMMERCIAL FINANCE ASSOCIATION

Note by the Secretariat

1. At the twenty-fourth session of the Working Group on International Contract Practices, reference was made to the relevance and utility of information, in particular relating to the experience and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group (A/CN.9/420, para. 203).
2. Following the twenty fifth session, the Secretariat received from the Commercial Finance Association, an international trade and finance association with over 260 member organizations active in the field of receivables financing, a note discussing certain issues addressed in document A/CN.9/WG.II/WP.89. The text of the note is reproduced in the annex to this note as it was received by the Secretariat.

ANNEX

Introduction

The Commercial Finance Association (CFA) has followed with interest the work being conducted by the Working Group on International Contract Practices of the United Nations Commission on International Trade Law (UNCITRAL) regarding the drafting of uniform rules for the assignment of receivables. CFA firmly believes that, unless a framework is adopted which provides certainty and ease in securing rights in international receivables, the primary objectives of providing access to new and increased sources of credit in international markets will not be achieved. It is with the goal of providing to the Working Group the experience of CFA members that the following comments and suggestions are provided to aid in the establishment of a system which will greatly enhance the availability of credit and reduce the cost of obtaining that credit:

(1) CFA Position - Article 1:

The Rules to be adopted should take the form of a Convention rather than a Model Law. A Convention will enable the lender to avoid the cost and time necessary in reviewing state law variations which would result from implementation of a Model Law. The additional costs associated with a state-by-state review of state law, which would be required by implementation of a Model Law, would be passed on to the assignor and could considerably reduce the number of states where receivables would be acceptable to the lender as collateral.

(2) CFA Position - Articles 1 and 2:

The scope of coverage of the Convention should be drafted as broadly as possible. It should not be drafted in a way which creates ambiguity as to the application of the Convention. Lenders will not be willing to advance against any international receivable if there is a possibility that the international receivable upon which the lender is relying on to support its loan would not be covered by the Convention. Drafting the scope of the Convention broadly increases the receivables which can be considered as collateral by the lender increasing the amount of money the lender will be able to advance to the assignor. Therefore, CFA supports a Convention which would apply both to the domestic assignments of international receivables and to international assignments of domestic receivables and a Convention which will cover consumer as well as commercial receivables. This will not only lead to greater availability of credit but will enhance the ease of administration of a lending programme because the assignor will not have to maintain separate records of "consumer" and "commercial" receivables which would be necessary if the Convention were limited to only "commercial" receivables.

(3) CFA Position - Article 3:

CFA supports a Convention which would provide a definition of "writing" that encompasses data messages capable of being reproduced in tangible or similar form. A Convention which will allow for electronic communication will increase efficiency, accuracy and give greater flexibility to the registration process.

(4) CFA Position - Article 9:

The Convention must apply to bulk assignments and to assignments of single receivables and must in all instances apply to existing and future receivables. In order to expedite the lending process and reduce costs to the lender which will be passed on to the assignor, a framework must be created which will reduce the documentation needed to support an accounts receivable loan. If the Convention does not adopt the language currently set forth in Article 9 and if new documents are required to be executed by the assignor each time a new receivable covered by the Convention comes into existence, costs of administering a lending programme will increase dramatically and the time needed to obtain properly executed assignment documents and to review the documents will slow the lending process to the detriment of the assignor.

(5) CFA Position - Article 10:

The Convention should invalidate any clause in agreements between the assignor and the debtor prohibiting or restricting assignments of receivables. CFA strongly believes that such an approach is required to prevent the extraordinary costs and time delays which would result if lenders were required to review each agreement which supported a receivable to make certain that the agreement between the assignor and the debtor did not contain anti-assignment provisions which would make the account unacceptable as collateral.

(6) CFA Position - Articles 21-24:

The Convention must provide a framework which will enable the lender to know with certainty its priority in respect to other assignees in the receivables assigned. It is for this reason that CFA strongly supports an Article which will provide that where a receivable is assigned by the assignor to several assignees, the first assignee to register the assignment will have priority. This form of rule to determine priorities is far superior to a rule which would set priorities based either on the first to obtain an assignment of the receivable or the first assignee to notify the debtor. A rule which would set priorities based on the first to obtain assignment will not enable the lender to know with certainty its position with respect to the receivable and a rule which sets priority based on the first assignee to notify the debtor places a burden on the lender to notify debtors. This can require considerable time and money and delay the extension of credit to the assignor, causing a negative impact on and increasing costs to the debtor. If a lender cannot be certain of its priority rights to the receivables, it will not advance funds against the receivable.

CFA recognizes that many countries may face practical problems implementing the registration of assignments of receivables. This will especially be true if electronic registers, which are the most efficient means of recording security interests, are to be established. Careful attention will have to be given to these problems. CFA would be pleased to cooperate with and support the efforts of UNCITRAL as the commission addresses the issue of electronic registration.

Conclusion

It is the firm belief of CFA that a Convention on assignment of receivables with an international element is needed to increase the availability of credit. It is the hope of CFA that the above positions will be implemented in order to provide the commercial certainty and simplicity of operations required to meet the goals of UNCITRAL.

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