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RECEIVABLES FINANCING

Commentary to the draft Convention

on Assignment in Receivables Financing (Part I)

Note by the Secretariat

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its twenty-eighth session (1995), decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing. 1/ The Commission, at that session, had before it a report of the Secretary-General entitled “Assignment in receivables financing: Discussion and preliminary draft of uniform rules” (A/CN.9/412). It was agreed that this report, setting forth the concerns and the purposes underlying this project and the possible contents of the uniform law, would provide a useful basis for the deliberations of the Working Group. 2/

2. The Working Group commenced its work at its twenty-fourth session (November 1995) by considering this report of the Secretary-General. 3/ At its twenty-fifth through thirty-first sessions, the

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

2/ Ibid., para. 379. At its twenty-sixth and twenty-seventh sessions, the Commission had considered two other reports of the Secretary-General (A/CN.9/378/Add.3 and A/CN.9/397). For the Commission’s discussion of those reports, see ibid. Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301 and Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214 respectively.

3/ Report of the Working Group on International Contract Practices on the work of its twenty-fourth session (A/CN.9/420).

Working Group considered revised draft articles prepared by the Secretariat, 4/ and, at its twenty-ninth through thirty-first sessions, it adopted the draft Convention on Assignment of Receivables in International Trade (exact title remains to be determined). 5/

3. The Commission, at its thirty-second session (1999), expressed appreciation for the work accomplished by the Working Group and requested the Working Group to proceed with its work expeditiously so as to make it possible for the draft Convention, along with the report of the next session of the Working Group, to be circulated to Governments for comments in good time and for the draft Convention to be considered by the Commission for adoption at its thirty-third session (2000). As regards the subsequent procedure for adopting the draft Convention, the Commission noted that it would have to decide at that session whether it should recommend adoption by the General Assembly or by a diplomatic conference to be specially convened by the General Assembly for that purpose. 6/

4. The Working Group proceeded with its work on the understanding that the Secretariat would prepare a commentary on the draft Convention which would assist Governments in preparing their comments on the draft text and later in their consideration of the draft Convention for adoption. 7/

5. The present note, which for reasons relating to the timely translation and distribution contains only the first part of the commentary, has been prepared pursuant to that understanding (the second part will be prepared soon after the first part). It provides a summary as to the reasons for the adoption of a certain provision, its main objectives, along with explanations and interpretations of particular terms. It does not give a complete account of the *travaux préparatoires*, including the various proposals and draft provisions that were not retained. For the benefit of those seeking fuller information on the history of a given provision, the commentary lists the references to the relevant portions of the eight session reports of the Working Group. 8/

4/ The draft articles prepared by the Secretariat are contained in documents A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89, A/CN.9/WG.II/WP.93, A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.102 and A/CN.9/WG.II/WP.104. The reports of the Working Group are contained in documents A/CN.9/420, A/CN.9/432, A/CN.9/434, A/CN.9/445, A/CN.9/447, A/CN.9/455, A/CN.9/456 and A/CN.9/466.

5/ A/CN.9/455, para. 17; A/CN.9/456, para. 18; and A/CN.9/466, para. [...].

6/ Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17), para. 330.

7/ See, e.g., A/CN.9/456, paras. 40, 58-59, 143, 150 and 215; and A/CN.9/455, paras. 80, 84, 87 and 103.

8/ In order to avoid confusion, no special reference is made to previous article numbers which, in the course of the preparation of the draft Convention, were altered several times. However, any earlier number will be apparent from the relevant discussion in the session report.

6. In preparing the commentary, the Secretariat has taken into account the fact that it is not a commentary on a final text but that its foremost and immediate purpose is to assist the Working Group in reviewing and finalizing the text. After finalization of the text, the Secretariat will prepare a revised commentary to assist Governments in preparing their comments on the draft Convention and later in their consideration of the draft Convention for adoption. In line with the applicable instructions relating to stricter control and limitation of United Nations documents, the text of the draft Convention, commented upon, is not reproduced here. It is reproduced in document A/CN.9/WG.II/WP.104, along with the Secretariat's remarks and suggestions as to how pending issues could be addressed. Such issues are marked in the text of the draft Convention by square brackets around the relevant provisions. The Secretariat has taken the liberty of noting in the commentary additional issues and of making additional suggestions as to how those issues might be addressed.

TITLE AND PREAMBLE

REFERENCES

A/CN.9/420, paras. 14-18
A/CN.9/434, paras. 14-16
A/CN.9/445, paras. 120-124
A/CN.9/455, paras. 157-159
A/CN.9/456, paras. 19-21 and 60-65

COMMENTARY

7. The title and the preamble of the draft Convention have not been adopted yet. The main question is whether the reference to financing will be retained (for arguments in favour of one or the other solution, see A/CN.9/WG.II/WP.104, remarks to the title and the preamble).

8. The preamble is intended to serve as a statement of the general principles on which the draft Convention is based and which, under draft article 7, may be used to fill gaps left in the draft Convention. These principles include: the facilitation of both commercial and consumer credit at more affordable rates, which is in the interest of all parties involved, assignors, assignees and debtors; the principle of debtor-protection, according to which the debtor's legal position is not affected unless expressly stated otherwise in the draft Convention; the promotion of the movement of goods and services across borders; the enhancement of certainty and predictability as to the rights of parties involved in assignment-related transactions; the modernization and harmonization of domestic and international laws on assignment, both at the substantive and the private international law level; the facilitation of new practices and the avoidance of interference with current practices; the avoidance of interference with competition.

* * *

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

REFERENCES

A/CN.9/420, paras. 19-32
A/CN.9/432, paras. 13-38
A/CN.9/434, paras. 17-41
A/CN.9/445, paras. 45-48 and 125-145
A/CN.9/447, paras. 143-146
A/CN.9/455, paras. 41-46 and 160-173
A/CN.9/456, paras. 22-37

COMMENTARY

Structure of chapter I

9. In chapter I, scope-related issues are dealt with in different provisions for the sake of clarity and simplicity in the text; a single provision on scope would be very long and complicated. Draft article 1 defines the substantive scope, only in general terms, as well as the territorial scope of application of the draft Convention. Draft articles 2 and 3 define the substantive scope in more detailed terms (definitions of assignment and internationality respectively). Draft article 5 is not part of chapter I, since the terms defined in this article do not raise scope-related issues but matters of interpretation of various provisions of the draft Convention.

Substantive scope of application

10. Under draft article 1, assignments of international receivables are covered, whether or not the assignments are international or domestic, while assignments of domestic receivables are covered only if the assignments are international. In other words, the assignment of receivables is covered whether or not those receivables arise in the context of international or domestic trade, as long as the assignment itself is international (for comments on internationality, see paras. 40 and 41). Thus, transactions such as factoring and forfaiting of international receivables, as well as securitization of domestic receivables, would be covered (for a non-exhaustive list and a brief description of the practices covered, see paras. 31-39).

11. The draft Convention applies also to subsequent assignments made, for example, in the context of international factoring, securitization and refinancing transactions, provided that any prior assignment is governed by the draft Convention (principle of *continuatio juris*). Under the principle of *continuatio juris*, even a domestic assignment of domestic receivables may be brought into the ambit of the draft Convention if it is subsequent to an international assignment. However, unless all assignments in a chain of assignments were made subject to one and the same legal regime, it would be very difficult indeed to address assignment-related issues in a consistent manner. The draft Convention also applies to subsequent assignments that in themselves fall under draft article 1 (a), whether or not any prior assignment is governed by the draft Convention. As a result, the draft Convention may apply only to

some of the assignments in a chain of assignments. This result is a departure from the principle of *continuatio juris*. However, the Working Group considered it necessary to follow this approach since parties to assignments in securitization transactions, in which the first assignment may be a domestic one, should not be deprived of the benefits that may be derived from the application of the draft Convention. This approach is based on the assumption that it would not unduly interfere with domestic practices (on this matter, see paras. 12, 18, 20 and 30). The Working Group did not adopt a suggestion to limit the principle of *continuatio juris* to those cases in which the internationality would be apparent, since such an approach could introduce an unacceptable degree of uncertainty as to the application of the draft Convention.

12. As a result of covering in the draft Convention international assignments of domestic receivables or even domestic assignments of domestic receivables made in the context of subsequent assignments, business parties in domestic transactions could benefit from increased access to international financial markets and thus to potentially lower-cost credit. At the same time, the interests of domestic assignees would not be interfered with, since, for a conflict between a domestic and a foreign assignee to be covered by the draft Convention, the assignor would need to be located in a Contracting State (draft article 1 (a)) and that State, by definition in a domestic assignment of a domestic receivable (draft article 3) would be the State in which both the domestic debtor and the domestic assignee would be located (for a problem that might arise if reference is made in draft article 24 to the place of central administration rather than to the place of business, see A/CN.9/WG.II/WP.104, remarks 3-5 to draft article 1). In addition, the fact that the assignor chose to assign the receivables to a foreign assignee would not bring the debtor under a new and potentially unknown legal regime, since the draft Convention could apply to the debtor's rights and obligations only if the debtor has its place of business in a Contracting State (draft article 1 (3); for the meaning of location of a debtor, see A/CN.9/WG.II/WP.104, remark 4 to draft article 5). In any case, the debtor's rights would not be prejudiced since the draft Convention establishes a sufficiently high standard of debtor protection (i.e. draft articles 17-23).

Territorial scope of application

13. The territorial scope of application of the draft Convention is defined by reference to the assignor's location (whether place of business, place of incorporation or place of central administration has not been decided yet; for the Secretariat's suggestions on this matter, see A/CN.9/WG.II/WP.104, remarks 4-19 to draft article 5). The provisions dealing with the rights and obligations of the debtor (i.e. chapter IV, section II) have a different territorial scope to the extent that, for those provisions to apply, the debtor too needs to be located in a Contracting State. In order to ensure sufficient predictability with regard to the application of the draft Convention as far as the debtor is concerned, the Working Group has agreed that the debtor's location needs to be defined by reference to the debtor's place of business (A/CN.9/WG.II/WP.104, remark 4 to draft article 5).

14. This approach to the issue of the territorial scope of the draft Convention is based on the assumption that the main disputes that the draft Convention would be called upon to resolve would be addressed if the assignor (and, only for the application of the debtor-related provisions, the debtor too), is located in a Contracting State. Such disputes could arise with regard to: rights of the assignee against the assignor flowing from the breach of a warranty; enforcement of the receivables by the assignee against the debtor; discharge of the debtor; defences of the debtor towards the assignee;

relative rights of the assignee and the administrator in the insolvency of the assignor; relative priority rights of the assignee and a competing assignee; and the effectiveness of subsequent assignments. Additional reasons justifying this approach include: that enforcement would normally be sought in the place of the assignor's or the debtor's location and thus there is no need to make reference to the assignee's location; and that application of the provisions of the draft Convention other than those contained in section II of chapter IV would not affect the debtor and thus there is no need to preclude the application of all the provisions of the draft Convention if the debtor is not located in a Contracting State.

15. As a result of this approach, the territorial scope of application of the draft Convention is sufficiently broad and thus it is not necessary to extend it to cases in which no party may be located in a Contracting State. Such an extension of the territorial scope may be achieved if it is the law of a Contracting State applicable by virtue of the private international law rules of the forum. The Working Group thought that extending the territorial scope in such a way might create uncertainty to the extent that private international law on assignment is not uniform. The Working Group also felt that, in any case, certainty would not be served by such a reference to private international law rules, since parties would not know at the time of the conclusion of a transaction where a dispute might arise and, as a result, which private international law rules might apply. However, the situation is different with regard to the law governing debtor-related issues, since there is a sufficient degree of consensus that those issues should be governed by the law governing the receivable (i.e. the law governing the contract from which the receivable arises). Thus, draft article 1 (3) includes a reference to that law, extending the territorial scope of the debtor-protection provisions of the draft Convention to cover situations in which the debtor might not be located in a Contracting State.

16. Draft article 1 (4) and (5) has not been adopted yet (for the Secretariat's comments on these provisions, see A/CN.9/WG.II/WP.104, remarks 1-6 to chapter V and 1-3 to the annex of the draft Convention).

Form of the instrument being prepared

17. The Working Group agreed that a convention would be preferable to a model law since it would result in greater certainty. It was generally felt that such certainty was necessary in achieving the draft Convention's main objective, namely increased access to lower-cost credit. In addition, it was agreed that a convention could better achieve the goal of establishing, along with the Convention on International Factoring (which was prepared by the International Institute for the Unification of Private Law- hereinafter referred to as "Unidroit"- and adopted at a diplomatic conference called by the Government of Canada, Ottawa, 1988- hereinafter referred to as "the Ottawa Convention"), a more comprehensive legal regime with regard to assignment-related transactions.

"Opting-in"/"opting-out"

18. The Working Group decided not to limit the application of the draft Convention to cases in which the assignor and the assignee chose to subject their relationship to the draft Convention. It was generally felt that such a limitation of the scope of the draft Convention was unnecessary. The draft Convention is not aimed at replacing national assignment-related rules but rather at facilitating international practices, which are currently not sufficiently developed in view of the uncertainty

prevailing under national laws (as to the potential effect of the draft Convention on national practices, see paras. 11, 12, 20 and 30). The Working Group may wish to consider the question whether the parties to an assignment, not falling under the ambit of the draft Convention, may choose to apply the draft Convention. Such an opting-in right may or may not exist under private international law rules applicable to the draft Convention, at least to the extent that such a choice of law might affect third parties, a situation that might create uncertainty (for a precedence of an express opting-in provision, see article 1 (2) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit).

19. Draft article 6 recognizes the right of the parties to the assignment or to the contract giving rise to a receivable to exclude the application of the draft Convention or derogate from or vary the effect of any of its provisions, as long as the rights of third parties are not affected. This approach is based on the assumption that the effects of assignment-related transactions on third parties would normally be governed by national rules of mandatory law that could not be derogated from or varied by agreement of the parties (as to the issue of party autonomy, see paras. 59-60).

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Article 2. Assignment of receivables

REFERENCES

A/CN.9/420, paras. 33-44
A/CN.9/432, paras. 39-69 and 257
A/CN.9/434, paras. 62-77
A/CN.9/445, paras. 146-153
A/CN.9/456, paras. 38-43

COMMENTARY

“Transfer by agreement”

20. Assignment is defined as a “transfer by agreement”. This means that the main focus of the draft Convention is on assignment as a way of transfer of property rights in receivables. The contract of assignment or the financing contract is not covered, except where expressly otherwise provided (e.g., draft articles 13–16 and 27; the Working Group may wish to confirm that chapter III addresses the effectiveness of the assignment as a transfer of property rights but not of the contract of assignment). However, other practices involving the transfer of property rights in receivables, such as contractual subrogation or pledge, are covered. Such an approach is appropriate in particular in view of the fact that, in certain legal systems, significant receivables financing transactions, such as factoring, involve a contractual subrogation or pledge rather than the assignment of receivables. An explicit reference to such transactions, contained in an earlier version of draft article 2 (A/CN.9/WG.II/WP.93), was deleted on the understanding that listing such related practices might inadvertently result in excluding some of them (A/CN.9/445, para. 151). As already mentioned above (see paras. 11, 12 and 18), the draft Convention, rather than creating a new type of assignment, is aimed at providing uniform rules on assignment and assignment-related practices with an international element, which, although

covered in theory by currently existing national law, could not be sufficiently developed in view of the uncertainty prevailing in national laws. The reference to agreement is intended to exclude assignments by operation of law (e.g., statutory subrogation).

21. In order to avoid any ambiguity as to whether the term “transfer” includes assignments by way of security, the matter is expressly clarified in the second sentence of draft article 2 (a), which creates the legal fiction that, for the purposes of the draft Convention, the creation of security rights in receivables is deemed to be a transfer. However, the draft Convention does not define outright assignments and assignments by way of security. This matter is left to other law applicable outside the draft Convention, since, in view of the wide divergences existing among legal systems as to the classification of transfers, an assignment by way of security could in fact possess attributes of a sale, while a sale might be used as a security device (for a list of issues left to other law, see para. 64).

“From one person to another person”

22. Both the assignor and the assignee can be legal entities or individuals, whether merchants or consumers. Thus, the assignment between individuals is covered, unless they are both consumers and the assignment is made for consumer purposes common to both (draft article 4 (a)). As a result, the assignment of credit card receivables in securitization transactions, which has the potential of making lower-cost credit available to manufacturers, retailers and consumers, is covered. The assignment of loans secured by real estate in securitization of mortgages is also covered. In view of the fact that in the draft Convention the singular includes the plural and *vice versa*, an assignment made by many persons (e.g., joint owners of receivables) to many persons (e.g., a syndicate of financiers) is also covered. In the determination, however, of the territorial scope of application or internationality, the multiplicity of assignors or assignees should be ignored and the assignment by each assignor or to each assignee should be examined independently from assignments by or to another person (the question whether the location of several assignors or assignees could be defined by reference to the location of an authorized agent remains to be considered by the Working Group, see A/CN.9/WG.II/WP.102, remark 14 to draft article 1; as to cases involving multiple debtors, see para. 26).

“Contractual right to payment of a monetary sum”

23. The term “contractual” is intended to ensure that receivables arising from any type of contract are covered, while receivables arising by operation of law, such as tort receivables, tax receivables, or receivables determined in court judgements, are excluded, unless they are confirmed in a settlement agreement. Contractual receivables, the assignment of which is covered by the draft Convention, include receivables arising under contracts for the sale of goods or the provision of services, whether those contracts are commercial or consumer transactions, as well as receivables in the form of royalties arising from the licensing of intellectual property and receivables in the form of credit balances in deposit accounts or securities transactions (for a brief description of practices, see paras. 31-39).

24. The assignment of other, non-monetary, contractual rights is not covered (e.g., the assignment of the right to performance or the right to declare the contract avoided; as to the right of the assignor to claim damages for breach of contract or interest for late payment, see A/CN.9/WG.II/WP.104, remarks 2 and 3). While the right to performance, e.g., the right of the seller to any goods returned, is not a receivable, the assignee obtains it to the extent that any goods returned by the buyer take the place of

the assigned receivable. The matter is addressed in draft articles 16 and 26, according to which payment includes payment both in cash and in kind. However, in order to make this point clearer, the Working Group may wish to insert a reference in draft articles 16 and 26 to a right of the assignee in whatever is received in payment “or other discharge” of the assigned receivable (see A/CN.9/WG.II/WP.104, remark 1 to draft article 16). Assignments of contracts, which involve an assignment of contractual rights and a delegation of obligations, are not covered either. While such transactions may form part of financial arrangements, the financier would normally rely mainly on the receivables. As to the delegation of obligations, the Working Group thought that it goes far beyond the desirable scope of the draft Convention.

“[Owed by] a third person”

25. Apart from the assignor and the assignee, the debtor too could be a legal entity or an individual, a merchant or a consumer. To the extent they are contractual, consumer receivables are covered by the draft Convention, unless they are assigned from one consumer to another and they are thus intended to serve only personal, family or household purposes (draft articles 2 and 4 (a); on this matter, see also paras. 35 and 43).

26. The assignment of receivables, whether whole receivables or parts of receivables, owed jointly (i.e. fully) and severally (i.e. independently) by multiple debtors is also covered, provided that the contract from which the assigned receivables arise (hereinafter referred to as “the original contract”) is governed by the law of a Contracting State. If, however, the original contract is not governed by the law of a Contracting State and one or more, but not all, debtors are located in a Contracting State, each transaction should be viewed as an independent transaction and thus debtors who are not located in a Contracting State should not be affected by the draft Convention. Otherwise, the predictability as regards the application of the draft Convention to rights and obligations of debtors, which is one of the main objectives of the draft Convention, could be compromised.

Contract of assignment, financing or other service contract, original contract

27. The draft Convention recognizes the right of the parties to structure their contractual relationship freely so as to meet their various financing needs with a view to remaining competitive in a rapidly changing global marketplace (draft article 6). Thus, the draft Convention does not affect: the contract of assignment, unless it expressly states otherwise (e.g., draft articles 13-16 and 27); the financing or other service contract (which may be the same as the contract of assignment, as, e.g., in factoring transactions, or a separate contract, as, e.g., in securitization transactions); or the original contract between the assignor and the debtor, from which the assigned receivables arise, unless the draft Convention expressly provides otherwise (e.g., draft article 19).

28. The reference to “value, credit or services being given or promised” in return for the receivables assigned, which was contained in an earlier version of the definition of “assignment” (A/CN.9/WG.II/WP.96, draft article 2), has been deleted, since “value, credit or services” are part of the financing contract rather than the assignment. However, the deletion of those words does not change the fact that assignments are covered whether they are outright assignments in which value is given or promised by the assignee to the assignor or to another person affiliated with the assignor or to whom the assignor owed a debt, or assignments by way of security in which credit is given or promised,

or assignments in which no financing is offered but services (e.g., bookkeeping, collection or insurance against debtor-default, which is often the main or the only element in international factoring transactions). Assignments of receivables would be covered, whether such “value, credit or services” is given or promised not only at the time of the assignment but also at an earlier time. As a result, assignment-related transactions which involve the restructuring of debts of a debtor, being in financial difficulties short of insolvency, would also be covered by the draft Convention.

29. At an early stage in its work, the Working Group considered the question whether the application of the draft Convention should be limited to assignments with a commercial or financing nature or context. The Working Group decided that such a limitation would not be appropriate, since such a limitation: would inappropriately create yet another special regime on assignment, even though one was not needed, and thus inadvertently result in further disunification of the law on assignment; would raise uncertainty since the terms “financing” and “commercial” were not universally understood in the same way, nor was it feasible or desirable to attempt to define them in a uniform way in an international convention; and would unnecessarily exclude from the scope of the draft Convention important transactions such as assignments in international factoring transactions in which only service may be provided (e.g., book-keeping, collection services or insurance against debtor-default). The Working Group preferred to start from a broad scope of application and to exclude transactions that were already well regulated.

30. With regard to the possible impact of such an approach on national law, as already mentioned (see paras. 11, 12, 18 and 20), the draft Convention is intended to cover assignments with an international element and does not adversely affect domestic assignments of domestic receivables (on this matter, see also A/CN.9/WG.II/WP.104, remarks 3-5 to draft article 1; on potential conflicts with the Ottawa Convention, see A/CN.9/WG.II/WP.104, remarks to draft article 33).

Transactions covered

31. The draft Convention covers a wide array of financial transactions. First of all, included are such traditional financing techniques such as factoring, forfaiting and invoice discounting. In these types of transactions, assignors assign to a financier their rights in receivables arising from the sale of the assignors’ goods or services. The assignment in such transactions may either be for security or by way of outright transfer with an adjustment in the purchase price depending on the risk and the time involved in the collection of the underlying receivable. Beyond their traditional forms, those transactions have developed a number of variants tailored to meet the various needs of parties to international trade transactions. For example, in addition, or in the place of financing, a number of services may be provided, including collection, bookkeeping and insurance against debtor-default. Insurance services are often provided in international factoring, where receivables are assigned to a factor in the country of the assignor (“export factor”) and then from the export factor to another factor in the country of the debtor (“import factor”) for collection purposes, while the factors do not have recourse against the assignor in the case of debtor-default (non-recourse factoring). All those transactions are covered in the draft Convention regardless of their form.

32. In view of the broad definition of a “receivable” in draft article 2 (a) (“contractual right to payment of a monetary sum”), the Convention also covers many other forms of financial transactions used in modern international commerce. These include innovative financing techniques such as

securitization, project finance and swaps, as well as transactions involving the financed sale of high-value mobile equipment (on whether some of those practices should be treated differently or excluded altogether from the scope of the draft Convention, see A/CN.9/WG.II/WP.104, remarks 3-16 to draft article 4).

33. In a securitization transaction, an assignor creates receivables through its own efforts. The assignor could be a manufacturing concern selling goods; it could also be a bank extending loans. The assignor assigns, usually by way of an outright transfer, these receivables to an entity specially created for the purpose of buying the receivables and paying their price with the money received from investors to whom it sells the receivables or securities backed by the receivables. This “special purpose vehicle” (“SPV”) thus has as its only assets those receivables transferred to it. The segregation of the receivables from the assignor’s other assets allows the credit given for the transfer from the assignor to the SPV to be priced solely on the credit of the receivables assigned, and without regard for the assignor’s other assets. Immediately after, or concurrently with, such transfer, the SPV assigns an undivided interest in the receivables to investors or issues securities backed by the receivables. As indicated above, the price paid by investors for this interest (or the money lent, which is used to pay back the initial assignor) is linked to the financial strength of the receivables assigned, and not to the creditworthiness of the assignor. Thus, the assignor may be able to obtain more credit than would be warranted on the basis of its own credit-rating. In addition, by gaining access to international securities markets, the assignor may be able to obtain credit at a cost that would be lower than the average cost of commercial bank-based credit. Moreover, the assignment of the receivables by the initial assignor to an entity established for the sole purpose of issuing securities backed by the receivables reduces the risk of insolvency and thus the cost of credit.

34. The draft Convention will similarly apply to an assignment of a project’s future cash-flow. In large-scale, revenue-generating infrastructure projects, sponsors raise the initial capital costs by borrowing against the future revenue stream of the project. Thus, hydroelectric dams are financed by the future obligation of payers to pay for electricity, telephone systems are paid for by the future revenues from telecommunications charges and highways are constructed with funds raised through the assignment of future toll-road receipts. Given the draft Convention’s applicability to future receivables, these types of project finance may be reduced to transfers, usually for purposes of security, of the future receivables to be generated by the project being financed.

35. In this context, it should be emphasized that the draft Convention’s exclusion of assignments made for personal, family or household purposes will not act to exclude consumer receivables (the transaction by which the receivable arises, e.g., the creation of an obligation by a consumer such as that represented by a utility bill, is not an assignment). Only the transfer of the right to receive that payment is an assignment, and the transfer by the utility company to a financier or SPV would not be for personal, family or household purposes (on this matter, see paras. 25 and 43). In addition, it should be noted that toll-road receipts would be contractual receivables falling under the ambit of the draft Convention since they arise from contracts concluded *de facto* between operators and users of highways.

36. Swaps and derivatives transactions will also come within the draft Convention’s ambit. A “swap” is basically a two-party transaction in which different parties’ creditworthiness and willingness to take financial risks are exploited. In the traditional case, a creditworthy entity borrows money at a fixed rate.

A less-secure entity borrows a similar sum, but its financial standing only permits it to borrow in credit markets at a variable rate. Through a financial intermediary, the two entities “swap” their respective obligations, and agree to indemnify and hold each other harmless, should either party default. There is a fee paid for the swap, with the end result that the less-creditworthy entity, for a fee, can obtain credit at a fixed rate. In view of the fact that the financiers lending the money are invariably part of these transactions (otherwise the swapping would likely be an event of default), their transfer of these rights to receive money brings these types of transactions within the ambit of the draft Convention.

37. Derivatives are similar to swaps in that obligations of debtors are divided and sold among financial and other entities. For example, the first five years of interest payments on a 30-year bond might be packaged and sold to investors, as might be the last five years of such payments. Given the different periods of time, these payment streams present different risks which attract investors, creating a market for such instruments. The trading of such rights to money is directly within the ambit of the draft Convention.

38. Even less traditional transactions are covered by the draft Convention. Loan syndications and participations, for example, are complex forms of assigning the debtor’s contractual obligation to pay the debt. All forms of loan syndications, in which the participant receives some right to the debtor’s contractual obligation to pay, come within the scope of the draft Convention. The transaction may take the common form of a bank loan, or it may take the form of public financing of some project or equipment acquisition. Thus, transfers of certificates of indebtedness (being contractual obligations to pay) secured by aircraft would be covered by the draft Convention, as would participations in equipment trusts. Indeed, if the initial financing of mobile equipment, such as aircraft, is secured by future revenues, the draft Convention will also apply since the transfer of those receivables by way of security will effectively be a transfer of the customer’s contractual obligation to pay. In this context, it should be noted that, if negotiable bonds represent the obligation to pay, their transfer is not covered by the draft Convention by virtue of the exclusion of the transfer of negotiable instruments contained in draft article 5.

39. Similarly, assignments of bank accounts (representing the depository bank’s obligation to pay out on such accounts) or assignments of insurance policies (representing the insurance company’s contingent obligation to pay upon loss) will also be covered. Again, such transfers may be outright transfers, such as when portfolios of bank accounts or insurance policies are transferred between firms or within a corporate structure. They may also be transfers by way of security, such as insurance premium loans or loans secured by a deposit in a commercial bank.

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Article 3. Internationality

REFERENCES

A/CN.9/420, paras. 26-29
A/CN.9/432, paras. 19-25
A/CN.9/445, paras. 154-167
A/CN.9/456, paras. 44-45 and 228-227

COMMENTARY

40. Under the draft Convention, once a receivable is international, its assignment is always covered by the draft Convention. However, even if a receivable is domestic, its assignment may be covered by the draft Convention, if it is international or it is part of a chain of assignments which includes an earlier international assignment (on this matter, see para. 10, as well as A/CN.9/WG.II/WP.104, remarks to draft article 3). The meaning of the term “location” and the issue of location of multiple assignors and assignees have not been decided yet (for the Secretariat’s suggestions with regard to this matter, see A/CN.9/WG.II/WP.104, remarks 3-10 to draft article 5).

41. Internationality of a receivable is determined at the time of the conclusion of the original contract. This approach is based on the assumption that at that time the creditor (potential assignor) would need to know which law might apply in order to be able to assess the risks involved in a transaction and to determine whether to extend credit to the debtor and on what terms. However, as a result of this approach, parties to an assignment may not be able to determine at the time of the assignment whether the draft Convention will apply if future receivables are involved (i.e. receivables arising from contracts not in existence at the time of assignment). On the other hand, internationality of an assignment is determined at the time it is made. Thus, the parties will always be able to predict at the time of the assignment whether the draft Convention will apply or not.

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Article 4. Exclusions

REFERENCES

A/CN.9/432, paras. 18, 47-52, 106 and 234-238
A/CN.9/434, paras. 42-61
A/CN.9/445, paras. 168-179
A/CN.9/456, paras. 46-52

COMMENTARY

42. In view of its decision that the scope of application of the draft Convention should be as broad as possible, the Working Group agreed that certain practices that did not need to be regulated should be excluded.

Assignments for consumer purposes

43. Subparagraph (a) is intended to exclude from the scope of the draft Convention assignments from a consumer to a consumer, since such assignments are of no practical significance (as to a Secretariat suggestion to rephrase subparagraph (a) or even to delete it, see A/CN.9/WG.II/WP.104, remark 1 to draft article 4). However, subparagraph (a) does not exclude assignments from a consumer to a merchant. Such assignments of consumer receivables form part of significant practices, such as securitization of credit card receivables, the facilitation of which has the potential of increasing access to lower-cost credit by manufacturers, retailers and consumers and, as a result, could facilitate international trade in consumer goods. While covering the assignment of consumer receivables, the draft Convention is not intended to override consumer-protection law. Where necessary, the draft Convention makes explicit reference to this principle. For example, under draft articles 21 (1) and 23, a consumer-debtor cannot waive any defences and rights of set-off and has a right to recover payments from the assignee, if the consumer-protection law applicable in the country of the debtor so provides (for anti-assignment clauses in a consumer context, see paras. 83 and 86).

Assignments of negotiable instruments

44. Subparagraph (b) excludes assignments made by endorsement and delivery of a negotiable instrument, such as a bill of exchange or a promissory note or a cheque, or by mere delivery of an instrument, such as a bearer document. The underlying reason for this exclusion is the need to avoid interfering with practices well regulated in national law and international texts. The draft Convention refers to the form of transfer rather than to the documentary nature of the receivable since: such a reference is adequate in protecting the negotiability of an instrument and the interests of a protected holder; it would be very difficult to reach agreement on a uniform definition of the term “documentary receivable”; and there is no need to exclude the assignment of contractual receivables on the sole ground that they have been incorporated in a negotiable instrument for the purpose of obtaining payment by way of summary proceedings in court, if necessary.

Assignments of receivables in corporate buyouts

45. Subparagraph (c) is aimed at excluding assignments made in the context of the sale of a business as a going concern, if they are made from the seller to the buyer. Such assignments are excluded as they are normally regulated differently by national laws dealing with corporate buyouts and are not of a financing nature. However, assignments made to an institution financing the sale are not excluded.

Other assignments

46. In the course of its work, the Working Group considered for exclusion other types of assignments such as assignments by operation of law, assignments as gifts, assignments of wages, assignment of contractual rights in general, assignments of insurance premiums, assignments of rents from real estate and equipment and assignments of balances in deposit accounts. As to assignments by operation of law, it should be noted that they are excluded in view of the definition of “assignment” by reference to a “transfer by agreement”. In view of the fact that consideration was thought to be part of the contract of assignment, which, with the exception of draft articles 13 to 16 and 27, is not addressed in the draft Convention, the Working Group decided not to address assignments as gifts. As to the assignment of

wages, the Working Group decided to leave the matter to other law. If such assignments are prohibited under national law, the draft Convention does not affect such a prohibition. If, however, such assignments are not prohibited under national law, with a view to preserving significant practices, such as the financing of temporary employment services, the draft Convention does not do anything to invalidate them (as to the law applicable to statutory assignability, see A/CN.9/WG.II/WP.104, remarks 3-4 to draft article 28). The Working Group decided to cover assignments of insurance premiums and of rents arising from leases of real estate and equipment, as well as assignments of credit balances in deposit accounts (however, as to the exact treatment of some of those transactions and possible exceptions, see A/CN.9/WG.II/WP.104, remarks 3-16 to draft article 4).

47. In the interest of enhancing the acceptability of the draft Convention, paragraph (2), which appears within square brackets since it has not been adopted yet by the Working Group, is intended to ensure that States are given a possibility to exclude further practices. Such an approach may be necessary if no agreement is reached on the practices to be excluded in paragraph (1) or in order to address concerns that might arise in the future. However, a possible disadvantage of such an approach would be that the scope of the draft Convention could vary from State to State, with the result that, in view of the multiplicity of parties involved and the possibility that one or more but not all possibly relevant States might have made a declaration, the exact scope of the draft Convention would not be easy to ascertain. This result in itself could increase the legal cost and thus the final cost of a transaction (on this matter, see A/CN.9/WG.II/WP.104, remarks 7 and 16 to draft article 4).

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CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

REFERENCES

A/CN.9/420, paras. 52-60
A/CN.9/432, paras. 70-72, 94-105
A/CN.9/434, paras. 78-85, 109-114, 167 and 244
A/CN.9/445, paras. 180-190
A/CN.9/456, paras. 53-78

COMMENTARY

“original contract”

48. The term is defined since it is referred to in draft articles 5 (b), 5 (k) (iii), 17 (1), 17 (2) (a) and (b), 18 (1), 19 (1), 20 (2), 22 (2) (b) and (23). With the contract of assignment and the financing or other service contract, which may be the same or a different contract, the original contract is part of the basic chain of contractual relationships involved in an assignment-related transaction. With the exception of those provisions which expressly state otherwise (e.g., draft article 19), the draft Convention does not affect the rights and obligations of the debtor as they are stipulated in the original contract (draft article 17).

“deemed to arise when the original contract is concluded”

49. With a view to enhancing certainty, the draft Convention provides a uniform rule on the time when a receivable is deemed to arise. Such a rule is essential in order to determine the internationality of a receivable and the effectiveness of a bulk assignment. The time when the original contract is concluded is the most appropriate point of time because at that point the identity of the creditor and the debtor, as well as the legal source of the receivable and its amount, are known. The time at which a receivable becomes due or the original contract becomes enforceable were thought to be inappropriate in this regard, since delaying the time at which a receivable arose and could be used for obtaining credit could have an adverse impact on the availability of credit. The term “concluded” refers to the conclusion of the contract, the exact meaning of which is left to law applicable outside the draft Convention. In any case, “conclusion” does not refer to the performance of the contract (for a Secretariat drafting suggestion to delete subparagraph (b) and to refer in draft articles 3 and 8 (1) (b) and (2) directly to the time of the conclusion of the original contract, see A/CN.9/WG.II/WP.104, remark 1 to draft article 5).

“existing” and “future” receivable

50. The terms “existing” and “future” receivable are referred to in draft articles 8 (effectiveness of an assignment) and 9 (time of assignment). The draft Convention does not introduce any limitation with regard to the types of future receivables the assignment of which is covered. Thus, the entire range of future receivables is covered in the definition, including conditional (i.e. receivables that might arise subject to a future event that might take place or not) and purely hypothetical receivables (i.e. receivables that might arise from an activity not initiated by the assignor at the time of the assignment). However, draft article 8 introduces a limitation as to the effectiveness of the assignment of a future receivable, by requiring that the future receivable should be identifiable, at the time of the conclusion of the original contract, as a receivable to which the assignment relates. Once this requirement is met, the future receivable is considered as transferred at the time of the conclusion of the contract of assignment. However, this result should not prejudice the rights of third parties (see para. 70).

“receivables financing”

51. This definition, which appears in square brackets, has not been adopted by the Working Group (for a Secretariat suggestion to delete this definition and to, possibly, refer to receivables financing in the preamble, see A/CN.9/WG.II/WP.104, remark 1 to draft article 5).

“writing”

52. The definition is intended to include other than paper-based means of communications which can perform the same functions as a paper communication (e.g., provide tangible evidence, serve as a warning to the parties with regard to the consequences, provide a legible communication, authentication and sufficient assurances as to its integrity). It is inspired by articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and reflects the two distinct notions of “writing” and “signature” (or “signed writing”).

53. The draft Convention requires a writing for the notification of the assignment and a signed writing for the waiver of the debtor's defences (draft article 21 (3), however, may need to clarify whether the signature of both the assignor and the debtor is required or only that of the debtor; see A/CN.9/WG.II/WP.104, remark to draft article 21). Writing is also required for declarations by States and for certain registration-related acts. This approach is based on the assumption that the need for higher assurances as to the authenticity of communications should be assessed differently depending on the context in which the communication is made.

54. "Accessible" is meant to imply that the communication is readable and interpretable; "usable" refers not only to use by a physical person but also by a computer; and "subsequent reference" establishes a standard which is akin to that implied by a notion such as durability (while not referring to the strict interpretation given to the notion of durability in certain legal systems as equivalent to non-alterability) but more objective than that implied by notions such as readability or intelligibility (see Guide to Enactment of the Model Law, para. 50). Signature is defined by reference to the identification of the signer and indication of the signer's approval of the content of the communication.

"notification of the assignment"

55. Under subparagraph (f), a notification meets the requirements of the draft Convention if it is in writing and provides a reasonable description of the assigned receivables. What is a reasonable description is a matter to be determined in view of the circumstances. However, reasonable would include descriptions along the following lines: "all my receivables from my car business" and "all my receivables as against my clients in countries A, B and C". There is no requirement that the notification identify the person to whom or for whose account or the address to which the debtor is to pay. As a result, a notification containing no payment instruction is effective under the draft Convention. However, in view of the fact that, under the draft Convention, a notification changes the way in which the debtor may discharge its debt, parties notifying the debtor would be encouraged to include in their notification such a payment instruction. The Working Group based the discharge of the debtor on the notification rather than on the payment instructions in order to avoid confusing the debtor in cases in which the two communications might be sent separately or in which several communications might be sent to the debtor by several persons.

"insolvency administrator" and "insolvency proceeding"

56. Subparagraphs (g) and (h) have been inspired by the definitions of "foreign proceeding" and "foreign administrator" contained in article 2 (a) and (d) of the UNCITRAL Model Law on Cross-Border Insolvency. They are also consistent with articles 1 (1), 2 (a) and (b) of the European Convention on Insolvency Proceedings. By referring to the purpose of a proceeding or to the function of a person, rather than using technical expressions that may have different meanings in legal systems, the definitions are sufficiently broad to encompass a wide range of insolvency proceedings, including interim proceedings. This approach is intended to avoid that a Contracting State recognizes as an insolvency proceeding or administrator a proceeding or person which does not have that character under the *lex loci concursus*, or is unable to recognize as an insolvency proceeding or administrator a proceeding or person which has that character under the *lex loci concursus*.

“priority”

57. Priority under the draft Convention means that a party may satisfy its claim in preference to other claimants, under the implicit conditions that there is a valid assignment as between the assignor and the assignee and that the assignee has extended credit to the assignor (as to whether “priority” covers the question whether an assignee has a claim *in rem* or *ad personam*, see A/CN.9/WG.II/WP.104, remark 3 to draft article 5). Whether the person with priority may retain all the proceeds of payment or turn over any remaining balance after payment of its claim to the next person in the line of priority or to the assignor depends on whether an outright assignment or an assignment by way of security is involved; this matter is left to law applicable outside the draft Convention. The definition does not refer to the right to payment since, while this expression might be appropriate for assignments by way of security, it might be restrictive in outright assignments in which the assignee may, for example, have a right to receive any goods returned by the debtor to the assignor. However, the Working Group may wish to consider whether this matter might be better addressed if wording along the following lines is inserted in subparagraph (i): “the right to payment or other discharge”.

“location”

58. The Working Group has not reached a decision yet as to the meaning of the notion of “location” (for the Secretariat’s suggestions, see A/CN.9/WG.II/WP.104, remarks 4-10 to draft article 5).

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Article 6. Party autonomy

REFERENCES

A/CN.9/432, paras. 33-38
A/CN.9/434, paras. 35-41
A/CN.9/445, paras. 191-194
A/CN.9/456, paras. 79-80

COMMENTARY

59. Article 6, which is modelled on article 6 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; hereinafter referred to as “the United Nations Sales Convention”) provides broad recognition of the principle of party autonomy. Unlike article 6 of the United Nations Sales Convention, however, draft article 6 does not allow the assignor and the assignee to exclude the draft Convention as a whole. The reason for this approach is that, as the draft Convention deals with the rights of parties other than the assignor and the debtor, an exclusion of the application of the draft Convention would affect the rights of third parties (i.e. in the context of an agreement between the assignor and the assignee, the debtor, the assignor’s creditors and the insolvency administrator and, in the context of an agreement between the assignor and the debtor, the assignee, the assignor’s creditors and the insolvency administrator). Such a result would not only go beyond any acceptable notion of party autonomy but would also introduce an undesirable degree of uncertainty and could thus frustrate the main objective of the draft Convention to facilitate increased access to lower-

cost credit and to provide, at the same time, an adequate debtor-protection system. Thus, the assignor and the assignee may only vary or derogate from draft articles 13 to 16 and 27, while the assignor and the debtor are free to vary or derogate from draft articles 17 to 23, as long as the rights of the assignee or other third parties are not prejudiced.

60. Like article 6 of the United Nations Sales Convention, draft article 6 requires an agreement, i.e. two corresponding declarations of intent, for the effective derogation from the draft Convention. Such an agreement may be explicit or implicit. A typical example of an implicit derogation is where the parties refer to the law of a non-Contracting State or to the national law of a Contracting State. The derogation is effective, if the choice of law by the parties is valid under the private international law rules of the forum. If the choice of law is invalid, in the absence of any indications, it cannot be generally assumed that the parties intended to derogate from the Convention, regardless of whether or not their choice of law was valid. It cannot be generally assumed either that, had the parties known that their choice of law would be invalid, they would wish that the proper law of the contract would apply to their contract. An effective derogation does not require that the parties reach an agreement on the law applicable to the matters on which they derogated from the provisions of the draft Convention. In such a case, it should be assumed that the parties do not wish to have recourse to national law but wish any gaps to be filled in accordance with draft article 7 (2). If parties have agreed on the law applicable to the issues on which they derogated from the draft Convention, that law should be applied in a way consistent with the draft Convention, unless the derogation is so great that a particular matter can no longer be regarded as falling under the draft Convention.

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Article 7. Principles of interpretation

REFERENCES

A/CN.9/432, paras. 76-81
A/CN.9/434, paras. 100-101
A/CN.9/445, paras. 199-200
A/CN.9/456, paras. 82-85

COMMENTARY

61. This article, inspired by article 7 of the United Nations Sales Convention, deals with the interpretation of and the filling of gaps in the draft Convention. With regard to the interpretation of the draft Convention, draft article 7 (1) refers to three principles, i.e. the international character of the text, uniformity and good faith in international trade. These principles are common to most UNCITRAL texts. The reference to the international character or source of the text should lead a court to avoiding to interpret the draft Convention on the basis of notions of national law, unless the meaning of a term used in the draft Convention is clearly identical with its meaning under a particular national law. The need to preserve uniformity can be served only if courts or arbitral tribunals apply the general principles underlying the draft Convention and have regard to decisions of courts or tribunals in other countries. The Case Law on UNCITRAL Texts (CLOUT), a system of reporting case law on UNCITRAL texts, has been established by UNCITRAL exactly with the need to preserve uniformity in mind (CLOUT is

available in paper form in the six official languages of the United Nations and through the UNCITRAL website, <http://www.uncitral.org>, in English, Spanish and French; depending on the resources available, the other language versions will also be made available in the future).

62. The reference to good faith may apply not only to the interpretation of the draft Convention but also to the conduct of the parties. However, while the principle of good faith would appropriately be applied to the contractual relationship between the assignor and the assignee or the assignor and the debtor, it could undermine the certainty of the draft Convention if applied to the relationship between the assignee and the debtor or the assignee and any other claimant. For example, if the principle of good faith prevailing in the forum State were to apply to the assignee-debtor or the assignee-third party relationship: the debtor, who might have paid the assignee after notification, may have to pay again if, e.g., the debtor knew about a previous assignment; and the law applicable under draft article 24 might be disregarded if it does not respect the principle of good faith as it may be understood in the forum State.

63. As to gap-filling, the rule is that, if matters are governed by the draft Convention (chapter I) but not expressly settled in it, they are to be decided in accordance with the general principles on which the draft Convention is based. Such principles include notably the principles expressly mentioned in the preamble or enshrined in a number of provisions of the draft Convention (e.g., the principle of facilitation of increased access to lower-cost credit and the principle of debtor protection). Recourse to private international law rules is permitted only if: there is no principle on the basis of which a particular matter could be resolved; or the matter is not governed by the draft Convention at all.

64. Matters not governed by the draft Convention and left to other law include: the meaning of an outright assignment and an assignment by way of security; the question of the form of the contract of assignment; the accessory or independent character of a security right, which is the basis for determining whether it is transferred automatically with the receivables the payment of which it secures, or whether a new act of transfer is needed; the consequences of a breach of representations by the assignor; to a large extent, the assignability of a receivable (the draft Convention covers it to some extent in that it specifies a number of receivables that are assignable, including future receivables and receivables not identified individually, and in that it deals with contractual limitations to assignment, but leaves other types of receivables and other statutory limitations to assignment unaddressed); the question whether the assignor is liable towards the debtor for assigning its receivables in violation of an anti-assignment clause; the debtor's obligation to pay (the draft Convention deals with the debtor's discharge only); the discharge of the debtor on grounds other than those specified in the draft Convention (e.g., by paying the rightful claimant if the notification received does not meet the requirements of the draft Convention); the defences and rights of set-off that the debtor may raise against the assignee (the draft Convention provides that the debtor has against the assignee the same defences and rights of set-off that it would have against the assignor, without, however, specifying them); agreements between the debtor and the assignee by which the debtor waives its defences and rights of set-off towards the assignee; questions of priority among several assignees of the same receivables, between the assignee and the insolvency administrator and between the assignee and the assignor's creditors; and the question whether the right of the assignee in proceeds is a right *ad personam* or *in rem*.

65. In view of the possibility that it may be difficult to determine whether a matter is governed but not expressly settled in the draft Convention or not governed at all, the Working Group may wish to consider the question whether a provision along the lines of article 4 of the United Nations Sales Convention, listing expressly the matters covered therein, would be appropriate for inclusion in the draft Convention.

66. The Working Group may also wish to clarify whether gaps left in the private international law provisions of the draft Convention are to be filled in accordance with the substantive or the private international law principles underlying the draft Convention. In the absence of such principles, such gaps would be filled in accordance with the private international law of the forum.

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CHAPTER III. EFFECTS OF ASSIGNMENT

Form of assignment

REFERENCES

A/CN.9/420, paras. 75-79
A/CN.9/432, paras. 82-86
A/CN.9/434, paras. 102-106
A/CN.9/445, paras. 204-210
A/CN.9/456, paras. 86-92

COMMENTARY

67. The Working Group considered a wide variety of form requirements, ranging from written form (with or without any signature requirements) to the absence of any form (the possibility of leaving the matter to law applicable outside the draft Convention was also considered). While the widely prevailing view was that purely oral assignments should be invalidated, at least as against third parties, the Working Group was not able to reach agreement on this matter and decided to delete the provision dealing with form. The Working Group took this decision on the understanding that the matter is addressed: with respect to the mutual interests of the assignor and the assignee, in draft article 6, which enshrines party autonomy; with respect to the interests of the debtor, in draft article 19 (in the absence of written notification of the assignment, the debtor's right to discharge its obligation in accordance with the original contract is not affected) and in draft article 19 (general principle of debtor-protection); and with respect to the interests of third parties, in draft articles 24 to 26 (priority rules).

68. However, in draft articles 24 to 26 it is not clear that the law of the assignor's location governs form. As a result and in view of the fact that formal validity is a prerequisite for priority, the assignee, in order to ensure priority, would have to meet the requirements of the law of the assignor's location and the law governing formal validity, which may be difficult to determine (for a Secretariat suggestion to include in the text a private international law provision on form, see A/CN.9/WG.II/WP.104, remarks to chapter III). Specifying the law applicable to formal validity would provide a degree of certainty. However, it would leave to the law applicable: the question whether purely oral assignments would be

valid, thus allowing possible abuse or fraudulent collusion between an assignee and the assignor, particularly in situations where the assignor might become insolvent; the question whether stamp duties are payable for the contract of assignment to be valid, which would affect the overall cost of the transaction; and the question of form of an assignment of receivables backed by a security right, which might be subject to the law governing the security right (on this matter, see para. 93).

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Article 8. Effectiveness of bulk assignments, assignments of future receivables and partial assignments

REFERENCES

A/CN.9/420, paras. 45-60
A/CN.9/432, paras. 93-112 and 254-258
A/CN.9/434, paras. 122 and 124-127
A/CN.9/445, paras. 211-214
A/CN.9/456, paras. 93-97

COMMENTARY

Paragraph (1)

69. As a matter of principle, draft article 8 validates assignments (i.e. transfers, not contracts of assignment) of future receivables, bulk assignments and assignments of parts of or undivided interests in receivables. There are certain qualifications to this principle. While the assignment is effective as against the debtor as of the time it is made, before receiving notification in writing, the debtor may refuse to pay the assignee and discharge its debt by paying in accordance with the original contract (the debtor may discharge its debt by paying the assignee, even before receiving written notification; in such a case, however, the debtor takes the risk of having to pay twice, if it is later proven that no assignment took place).

70. A second qualification to the above mentioned principle is that the effectiveness of an assignment as against third parties is left to the law applicable to priority under draft articles 24 to 26. Thus, draft article 8 is not intended to: validate the first assignment in time while invalidating any further assignment of the same receivables by the same assignor; or to ensure that the assignee will prevail over an insolvency administrator on the sole ground that the assignment took place before the effective date of the insolvency proceeding. In order to avoid inadvertently leaving the effectiveness of future assignments altogether to the law applicable to priority, the Working Group decided to delete language in draft article 8 that would have made draft article 8, as well as draft article 9, subject to draft articles 24 to 26. This decision was taken on the understanding that the combined application of draft articles 8 to 12 and 24 to 26 would lead to the same result, namely that the provisions of chapter III are not intended to affect priority issues, since those issues are dealt with in draft articles 24 to 26.

“existing or future receivables”

71. The assignment of future receivables in bulk is at the heart of modern receivables financing practices. Yet great uncertainty exists as to the validity of such assignments. The draft Convention, therefore, places significant emphasis on the effectiveness of the assignment of future receivables and of bulk assignments in particular. At an early stage in its work, the Working Group noted that the validation of the assignment of conditional receivables and of purely hypothetical receivables might result in a business entity assigning all its claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries (as to the range of future receivables covered, see para. 49). However, the Working Group considered that a blanket exclusion of conditional or hypothetical receivables from the scope of the draft Convention could hamper significant practices, such as those involving the assignment of the cash-flow of a public-infrastructure project for financing purposes. Having carefully considered the matter, the Working Group decided to introduce the requirement, contained in draft article 8 (1), that the receivables should be identifiable when they arise (i.e. when the original contract is concluded) as receivables to which the assignment relates. This requirement is intended to provide appropriate recognition, on the one hand, of the economic need to allow bulk assignments of various types of future receivables and, on the other hand, of the need to protect assignors against the risks that might result from unlimited freedom to assign all conceivable future receivables.

“one or more”

72. While the focus of the draft Convention is on the assignment of a large volume of low-value receivables (involved, e.g., in factoring of trade receivables or in securitization of credit card receivables), the assignment of single, large-value receivables (involved, e.g., in loan syndication) is also validated (as to the question whether anti-assignment clauses and priority issues should be treated differently in the case of an assignment of single receivables, see A/CN.9/WG.II/WP.104, remarks 3-7 to draft article 4).

“is effective”

73. The result of the effectiveness of an assignment depends on whether an outright assignment or an assignment by way of security is involved, which is a matter left to law applicable outside the draft Convention. In the case of an outright assignment, “is effective” means that the assignment transfers full property in the receivable. This means: that the assignee is entitled to retain any surplus remaining after the satisfaction of its claim against the assignor; and that, in the case of debtor-default, the assignee has no recourse against the assignor. In the case of an assignment by way of security, “is effective” means: that the assignee has to turn over to the next claimant in line of priority or to the assignor any remaining surplus; and that, if the debtor fails to pay, the assignee can turn against the assignor and demand payment for the credit or the services extended to the assignor in return for the assigned receivables.

74. As a matter of expression, the term “effective” was thought to be preferable to the term “valid”, since: “effective” more accurately reflects the idea of effectiveness *erga omnes*; and “valid” is not universally understood in the same way.

“described”

75. The term “described” is intended to establish a standard lower than that which would be established by the term “specified”. Under this standard, a generic description of the receivable, without any specification of the identity of the debtor or the amount of the receivable, would be sufficient (e.g., “all my receivables from my car business”).

“individually”/“in any other manner”

76. These words are intended to ensure that an assignment of existing and future receivables is effective, whether the receivables are described one by one or in any other manner that is sufficient to relate the receivables to the assignment.

Paragraph (2)

77. With a view to expediting the lending process and reducing the cost of the transaction, paragraph (2), in effect, provides that a master agreement is sufficient to transfer rights in a pool of future receivables. If a new document were to be required each time a new receivable would arise, the costs of administering a lending programme would increase considerably and the time needed to obtain properly executed documents and to review those documents would slow down the lending process to the detriment of the assignor.

78. Under paragraph (2), which provides that the master agreement is sufficient to transfer a pool of future receivables, and draft article 9, which provides that a future receivable is transferred at the time of the conclusion of the contract of assignment, rights in future receivables are transferred directly to the assignee without passing through the estate of the assignor. However, the question whether the assignment is effective as against the assignor’s creditors or the insolvency administrator is a matter to be settled in accordance with the law governing priority under draft articles 24 to 26.

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Article 9. Time of assignment

REFERENCES

- A/CN.9/420, paras. 51 and 57
- A/CN.9/432, paras. 109-112 and 254-258
- A/CN.9/434, paras. 107-108 and 115-121
- A/CN.9/445, paras. 221-226
- A/CN.9/456, paras. 76-78 and 98-103

COMMENTARY

79. Draft article 9 is intended: to recognize the right of the assignor and the assignee to agree on the time at which a receivable is transferred, as long as their agreement does not negatively affect the rights of third parties; to set a default rule that, in the absence of contrary agreement between the assignor and

the assignee, the time at which a receivable is transferred is the time of the conclusion of the contract of assignment; and to clarify the meaning of other relevant provisions, such as draft articles 6, 8, 19 and 24 to 26.

80. Draft article 9 recognizes and, at the same time, limits party autonomy. The time specified by the assignor and the assignee binds third parties, a matter that may not be sufficiently clear in draft article 6. However, for such an agreement to be binding on third parties, it has to set a time of transfer which is not earlier than the time of the conclusion of the contract of assignment. This approach is in line with the principle, enshrined in draft article 6, since an agreement setting an earlier time could affect the order of priority between several claimants.

81. In the absence of an agreement between the assignor and the assignee setting the time of transfer of rights in the assigned receivables, the time of such transfer is the time of the conclusion of the contract of assignment, which is a fact that cannot be changed. While this approach is obvious with regard to receivables existing at the time they are assigned, a legal fiction is created with regard to future receivables (i.e. receivables arising from contracts not in existence at the time of the assignment). In practice, the assignee would acquire rights in future receivables only if they would in fact be created, but, in legal terms, the time of transfer would go back to the time of the conclusion of the contract of assignment. Such an approach is intended to facilitate the mobilization of future receivables by the assignor for the purpose of obtaining lower-cost credit or related services.

82. While draft article 9 sets the time of transfer of a receivable, it is not intended to set forth a priority rule, stating that an assignment is effective as against third parties as of the time it is made, since such a rule would be inconsistent with draft articles 24 to 26. If future receivables were transferred effectively as against third parties as of the time they were assigned, they would be removed from the insolvency estate or become subject to a security right irrespective of any publicity act required by the law governing priority.

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Article 10. Contractual limitations on assignments

REFERENCES

A/CN.9/420, paras. 61-68
A/CN.9/432, paras. 113-126
A/CN.9/434, paras. 128-137
A/CN.9/445, paras. 49-51 and 227-231
A/CN.9/447, paras. 148-152
A/CN.9/455, paras. 47-51
A/CN.9/456, paras. 104-116

COMMENTARY

83. The main objective of draft article 10 is to validate assignments made despite the existence of an anti-assignment clause in the original contract, in the assignment contract or in any subsequent

assignment contract. The underlying policy is that it is more beneficial for everyone to facilitate the assignment of receivables and to reduce the transaction cost rather than to ensure that the debtor would not have to pay a person other than the original creditor (assignor). Anti-assignment clauses may either defeat the purpose of a financing or service-related transaction altogether since they may invalidate assignments, or, at least, raise the cost of a transaction to the extent that financiers would need to check a potentially large number of contracts in order to ensure that no anti-assignment clauses are contained therein. In its considerations, the Working Group took into account that small debtors, such as consumers, would not be adversely affected by such a rule, since normally they do not have the bargaining power to insert anti-assignment clauses in their contracts and, in any case, they would often continue paying to the same bank account or post-office box, the control of which would switch from the assignor to the assignee without the debtors' knowledge. The Working Group also considered that, in any case, draft article 10 would not affect the interests of consumer-debtors to the extent that they were addressed by statutory limitations contained in consumer-protection law, since draft article 10 did not deal with statutory limitations. With regard to large debtors, the Working Group considered that they would not be adversely affected by the rule contained in draft article 10, since they have sufficient bargaining power and could take care of their own interests. The Working Group also thought that draft article 10 established an appropriate rule by not allowing such large debtors to preclude small- and medium-size enterprises from obtaining lower-cost credit or services on the basis of their receivables. Draft article 12 introduces an exception with regard to sovereign debtors (see paras. 94-96; for possible additional exceptions, see A/CN.9/WG.II/WP.104, remarks 3-7 to draft article 4).

84. Draft article 10 is thus intended to give the assignee a priority position as against the assignor's creditors in the case of default by the assignor and to enable the assignee to collect directly from the debtor, without, however, depriving the debtor of its rights and defences or of any cause of action the debtor may have against the assignor for breach of contract or even against the assignee based on tort. This approach constitutes a compromise between legal systems which invalidate assignments made in violation of anti-assignment clauses and legal systems which invalidate anti-assignment clauses. It thus attempts to counterbalance the need to preserve party autonomy and the need to facilitate financing and service-related transactions in the interest of trade in general. The Working Group recognized that invalidating anti-assignment clauses would preserve the interests of the assignee more effectively in that the assignee would be protected from the risk of accruing any liability and from the risk that the original contract might be declared avoided by the debtor for breach of an anti-assignment clause. However, it was widely felt that an approach based on the invalidation of anti-assignment clauses would excessively interfere with party autonomy and tilt the balance of interests in favour of the assignee to an inappropriate degree. On other hand, in an effort to make a step further in the direction of the protection of the debtor, the Working Group considered also the possibility of allowing the debtor to continue making payments in accordance with the original contract. Such an approach would allow the assignee to prevail in a conflict of priority with creditors of the assignor, but would deprive the assignee of the right to demand payment from the debtor. The Working Group noted that, under article 16 of the International Factoring Customs promulgated by Factors Chain International, in the case of an anti-assignment clause, the assignor is allowed to receive payments as an agent of the assignee. While recognizing that such a rule could be acceptable within groups of institutions subscribing to the same code of conduct, the Working decided not to extend its application to other practices, since depriving the assignee of the right to claim payment from the debtor would increase the risk of non-payment and thus the cost of credit.

85. Any contractual liability the assignor may have as against the debtor, under law applicable outside the draft Convention, for making an assignment in violation of an anti-assignment clause is not interfered with. By definition, the assignee cannot have contractual liability for breach of a contract to which the assignee is not a party. Any tortious liability that the assignee may have as against the debtor, under other law, is not interfered with either. In this context, the Working Group agreed that it should sanction malicious behaviour on the part of the assignee and that mere knowledge of the existence of an anti-assignment clause should not be sufficient to establish the assignee's liability. Penalizing the assignee for accepting an assignment while having knowledge of the anti-assignment clause would inadvertently result in encouraging the assignee to avoid a due-diligence test. If the assignee were diligent, it would find out about the anti-assignment clause and would not accept the receivables or would accept them at a substantially reduced value in view of the high risk of non-payment (for a Secretariat suggestion as to ways in which this idea could be expressly stated in draft article 10, see A/CN.9/WG.II/WP.104, remarks 2-3 to draft article 10).

86. Draft article 10 is supplemented by a legal regime introducing sufficiently high standards for the debtor protection in the draft Convention. Other than having to pay the assignee (in the country and currency stipulated in the original contract), the legal position of the debtor is not affected by the draft Convention (draft article 17). Notification of the assignment may cut off only those rights of set-off of the debtor that arise from contracts other than the original contract. This result would be acceptable, since the debtor would be aware of this consequence of a notification and may plan accordingly. For example, the debtor may avoid incurring further obligations. In exceptional situations, in which, for example, an assignment in violation of an anti-assignment clause is a fundamental breach of the original contract, the debtor may even declare the original contract avoided. Such avoidance of the contract, however, which would deprive the assignee of the right to demand payment from the debtor, should be available only in exceptional circumstances. Otherwise, the risk of the contract being avoided might in itself have a negative impact on the cost of credit. In such situations, the debtor would be able to recover payments from the assignor but not from the assignee (draft article 23). This result is appropriate since, even in the absence of an assignment, the debtor would bear the risk of insolvency of its contractual partner. Furthermore, any goods returned by the debtor subsequent to the avoidance of the original contract would go to the assignee who would have offered value to the assignor in return for the receivables which were cancelled. On the basis of the understanding that the draft Convention introduced a legal regime with sufficiently high debtor-protection standards, the Working Group decided that no reservation should be allowed to be made by States with regard to draft article 10 (for an exception with regard to sovereign debtors, see a Secretariat suggestion with regard to draft article 12 in A/CN.9/WG.II/WP.104, remarks to draft article 12). In reaching this conclusion, the Working Group took into account that States considering the adoption of the draft Convention would need to weigh the potential inconvenience to the debtor of having to pay a different person against the advantage of increased availability of lower-cost credit to debtors and assignors, which could stimulate the economy at large.

87. Draft article 10 applies to any contractual clauses limiting the assignment in any way (and not only to clauses prohibiting assignment) but does not apply to statutory limitations to assignment or to limitations relating to the assignment of rights other than receivables (e.g., confidentiality clauses). As to statutory limitations, the Working Group considered the possibility of addressing them by validating the assignment, while allowing the debtor to discharge by paying in accordance with the original contract. Such an approach would allow the assignee to prevail over other creditors of the assignor in

the case of assignor-default, while protecting the interests of the debtor. However, the Working Group was unable to reach agreement, since it could not find a way to distinguish between statutory limitations aimed at protecting the debtor (e.g., prohibiting the assignment of receivables owed by sovereign debtors) and statutory limitations aimed at protecting the assignor (e.g., prohibiting the assignment of wages).

88. The draft Convention, however, has already set aside statutory limitations to assignment to the extent that they refer to future receivables or to bulk assignments. Thus, the Working Group may wish to ensure, for example, that draft article 8 does not refer to future wages. In addition, the Working Group may wish to consider a limited rule dealing with statutory limitations aimed at protecting the debtor. Such a rule could, for example, validate an assignment as between the assignor and the assignee and as against third parties, but not as against the debtor. Moreover, the Working Group may wish to consider introducing the same rule for assignments of single receivables (which would normally be large-value receivables), in which a due-diligence test might not risk to increase the cost of credit. Such an approach might address the need to make, for example, assignments in loan syndications and participations subject to the consent of the debtor (for an analysis of possible approaches with regard to such practices, see A/CN.9/WG.II/WP.104, remarks 3-7 to draft article 4 and remark 1 to draft article 10).

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Article 11. Transfer of security rights

REFERENCES

A/CN.9/420, paras. 69-74
A/CN.9/432, paras. 127-130
A/CN.9/434, paras. 138-147
A/CN.9/445, paras. 232-235
A/CN.9/456, paras. 117-126

COMMENTARY

89. Draft article 11 reflects the generally accepted principle that accessory security rights are transferred automatically with the receivables which they secure. The question of the accessory or independent character of the security right and the substantive or procedural requirements to be met for the creation of such a security right are left to the law governing that right. Draft article 11 does not attempt to specify the law applicable to security rights, in view of the wide range of rights it is intended to cover (including, e.g., guarantees, pledges and mortgages) and of the wide divergences existing among the various legal systems in this regard.

90. The provision also recognizes the right of the assignor and the assignee to agree that an accessory right is not transferred to the assignee and is thus extinguished. Such an agreement may reflect the lack of willingness on the part of the assignee to accept the responsibility and the cost involved in the maintenance and safekeeping of collateral (e.g., taxation and insurance costs in the case of real estate or storage and insurance costs in the case of equipment). Draft article 11 also creates an obligation for the

assignor to transfer to the assignee any independent right securing payment of the assigned receivables as well as the proceeds of such a right. With regard to independent guarantees or stand-by letters of credit, this provision is based on the understanding that the right to demand payment from the guarantor/issuer is not a receivable. As a result, the rights of the guarantor/issuer are not affected by the assignment of the independent undertaking, while the assignee has a right in the proceeds, which is of particular importance in the case of insolvency of the assignor.

91. Paragraph (2) is intended to ensure that any anti-assignment clause agreed upon between the assignor and the debtor or other person granting a security right does not invalidate the assignment. Under paragraph (3), any liability that the assignor may have for breach of contract, under law applicable outside the draft Convention, is not affected but is not extended to the assignee (this approach is consistent with the approach taken in draft article 10). The underlying policy is that security rights should be treated with regard to anti-assignment clauses in the same way as receivables, since often the value relied upon by the assignee lies in the security right and not in the receivable itself. For example, in securitization in which receivables are assigned from the original creditor to a special purpose vehicle (“SPV”) fully owned by the original creditor, the value relied upon by investors buying securities issued by the SPV and backed by the receivables might be in the guarantee of the assignor. However, in the case of sovereign third-party guarantors, in line with draft article 12, the anti-assignment clause renders the assignment ineffective but only as against the sovereign third-party guarantor.

92. Whether or not the transfer of a security right is prohibited by agreement, if the transfer involves transfer of possession of the collateral and such transfer causes damage to the debtor or the person granting the right, any liability that may exist under law applicable outside the draft Convention is not affected. Paragraph (4) envisages, for example, a transfer of pledged shares which might empower a foreign assignee to exercise the rights of a shareholder to the detriment of the debtor or any other person who might have pledged the shares.

93. Under paragraph (5), the requirements of the law applicable outside the draft Convention to the form of transfer of security rights are not affected. As a result, a notarized document and registration may be necessary for the effective transfer of a mortgage, while delivery of possession or registration may be required for the transfer of a pledge. The draft Convention is not intended to affect either any requirements as to the form of an assignment of receivables secured by a certain asset (e.g., registration of an assignment secured by real estate). However, if the Working Group includes a rule on the form of assignment, subjecting the form of the assignment to the law of the assignor’s location (see Secretariat suggestion in A/CN.9/WG.II/WP.104, remarks to chapter III), that rule would need to be aligned with paragraph (5) (e.g., by providing that the law of the assignor’s location would govern form, unless the receivables are backed by a security right in which case the law governing that right would govern form).

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Article 12. Limitations relating to Governments and other public entities

REFERENCES

A/CN.9/432, para. 117
A/CN.9/455, para. 48
A/CN.9/456, paras. 115-116

COMMENTARY

94. Draft article 12 is intended to ensure that sovereign debtors are not affected by assignments made in violation of anti-assignment clauses contained in public procurement or other similar contracts. The Working Group decided to take this approach so as not to reduce the acceptability of the draft Convention to States that may not be able to protect their interests by way of a statutory limitation.

95. As a result of draft article 12, an assignment of receivables owed by a sovereign debtor is not effective as against the sovereign debtor who can continue paying in accordance with the original contract. In addition, the defences and rights of set-off of the sovereign debtor are not affected, whether they arise from the original contract or any other contract. However, the assignment remains effective as against the assignor and the assignor's creditors, which is of particular importance in the case of the insolvency of the assignor.

96. The exact scope of draft article 12, namely whether it is going to apply to assignments of receivables arising from contracts concluded by the central Government, the local authorities, publicly owned commercial entities or governmental authorities acting in a commercial capacity, remains to be determined by the Working Group (on this matter, as well as on the question of turning draft article 12 into a reservation, see the Secretariat's suggestions in A/CN.9/WG.II/WP.104, remarks to draft article 12).

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