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RECEIVABLES FINANCING

Newly revised articles of draft convention

on assignment in receivables financing

Note by the Secretariat

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INTRODUCTION

1. At its twenty-eighth session, in 1995, the Commission discussed the topic of assignment in receivables financing and entrusted the Working Group on International Contract Practices with the work of preparing a uniform law on this topic.¹
2. The Working Group commenced this task at its twenty-fourth session by reviewing a number of draft uniform rules set forth in a report of the Secretary-General (A/CN.9/412). At the conclusion of the session, the Working Group requested the Secretariat to prepare a revised version of the draft uniform rules on the basis of the deliberations and decisions of the Working Group (A/CN.9/420, para. 204).
3. At its twenty-ninth session, in 1996, the Commission had before it the report of the Working Group on the work of its twenty-fourth session (A/CN.9/420). The Commission expressed its appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously.²
4. At its twenty-fifth session, the Working Group considered a note by the Secretariat entitled "Revised articles of draft uniform rules on assignment in receivables financing" (A/CN.9/WG.II/WP.87). At that session, the Working Group decided to continue its work on the assumption that the rules would take the form of a convention aimed at harmonizing current law on assignment and related practices (A/CN.9/432, paras. 28 and 68).
5. The Working Group, which did not have sufficient time to discuss the conflict-of-laws provisions of the draft Convention, noted that the Hague Conference planned to prepare and submit to the Working Group for consideration at its next session a paper on conflict-of-laws issues in assignment and related aspects of insolvency law. At the conclusion of that session, the Working Group requested the Secretariat to prepare a revised version of the draft Convention on the basis of the deliberations and decisions of the Working Group (A/CN.9/432, para. 269).
6. The present note contains newly revised articles 1 to 25 of the draft Convention. Additions and modifications to the text are indicated by underlining. In line with the recent instructions relating to the stricter control and limitation of United Nations documents, the explanatory remarks to the draft provisions are as brief as possible. Reference is, therefore, made to the relevant documents. Additional explanations will be provided orally.

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

² Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17), para. 234.

DRAFT CONVENTION ON ASSIGNMENT
IN RECEIVABLES FINANCING

PREAMBLE

The Contracting States,

Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote the availability of commercial [and consumer] credit at more affordable rates,

Have agreed as follows:

References: A/CN.9/432, paras. 89-90, 206-208 and 260 (25th session, 1996)
A/CN.9/420, paras. 15-16, 101 (24th session, 1995)

CHAPTER I. SCOPE OF APPLICATION AND GENERAL PROVISIONS

Article 1. Scope of application

(1) This Convention applies to assignments of international receivables and to international assignments of receivables (...), if

(a) [the assignor and the debtor have their places of business] [the assignor has its place of business]

in a Contracting State; [or

(b) the rules of private international law lead to the application of the law of a Contracting State].

(2) A receivable is international if the places of business of the assignor and the debtor are in different States. An assignment is international if the places of business of the assignor and the assignee are in different States.

(3) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence.

References: A/CN.9/432, paras. 13-38 and 72 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft articles 1 and 2(7)
A/CN.9/420, paras. 19-32 (24th session, 1995)
A/CN.9/412, draft article 1

Remarks

1. At its previous session, the Working Group felt that, in determining which parties should have their places of business in a Contracting State, possible disputes to be addressed by the draft Convention should be considered (A/CN.9./432, para. 29). A provision requiring that all parties involved in an assignment have their places of business in a Contracting State would unnecessarily restrict the scope of application of the draft Convention, since most of the disputes identified at the previous session of the Working Group (most notably disputes relating to enforcement against the debtor and to the insolvency of the assignor) would be addressed by the draft Convention if only the assignor and the debtor were to have their places of business in a Contracting State.
2. It should be noted, however, that the identity of the debtor might not be known at the time of the assignment. The Working Group might, therefore, wish to consider providing that for the draft Convention to apply only the assignor should have its place of business in a Contracting State. Such an approach would emphasize what is true in receivables financing practice, namely that the most important problem is not the possibility that the assignee might not be able to collect some receivables in a pool of thousands of receivables, but rather that the whole pool might be lost to the assignee as a result of the intervention of the creditors of the assignor, in particular in case of insolvency. In addition, the interests of the debtor, whether located in a Contracting State or not, would be protected if debtor-protection in the draft Convention were to be so inadequate as to run counter to public policy considerations of the law of the State in which the debtor might be located.
3. In its consideration of paragraph (1)(b), the Working Group might wish to take into account article 1(b) of the UNIDROIT Convention on International Factoring (Ottawa, 1988; hereinafter referred to as "the Factoring Convention"), which provides for the application of the Convention in case both the sales contract and the factoring contract are governed by the law of a Contracting State.
4. In the context of its discussion of draft article 1, the Working Group might wish to review its working assumption that the draft Convention would harmonize and replace national law on assignment and related practices, rather than create a new type of assignment, leaving it to the parties to opt in the draft Convention (A/CN.9/432, paras. 67-69). At its previous session, the Working Group felt that a general opting-out, or an opting-in, provision might compromise certainty and predictability as to the rights of third parties (A/CN.9/432, paras. 33-38 and 67-69). This problem would not arise, however, if the assignor and the assignee were allowed to exclude the application of those provisions of the draft Convention that govern their mutual rights and obligations (this is the case with draft articles 11, 12(2) and (3), 13 and 14, while a determination has to be made in draft article 12(1) as to whether the draft Convention or the agreement of the parties should prevail in case of conflict).
5. Paragraph (3) has been modelled on article 10 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations Sales Convention"). The reference to the parties of the "relevant contract" is intended to refer to the

parties of the contract the internationality of which would be at question in each particular case (i.e., the original contract, the financing contract or the assignment). The Working Group might wish to consider whether the term "relevant contract" is sufficient to indicate the assignment in case there is no financing contract. In addition, the Working Group might wish to address the question whether, in determining "the relevant place of business", regard is to be had to any stipulations of the parties.

6. Moreover, the Working Group might wish to consider additional connecting factors for the territorial application of the draft Convention, including: seat, in order to cover situations in which a Government or governmental entity is involved; and place of registration or mailing address, in order to cover companies without a fixed place of business (e.g., post-office-box companies).

Article 2. Exclusions

This Convention does not apply to assignments:

- [(a) for personal, family or household purposes;
- (b) between individuals as gifts ;
- (c) solely by endorsement of a negotiable instrument or delivery of a bearer document;
- (d) by operation of law;
- (e) that are part of the sale of a business out of which the assigned receivables arose;
- (f) of receivables owed by individuals;
- (g) of receivables from employment relationships;
- (h) of receivables from contracts under which the assignee is to perform the contract;
- (h) of receivables from reinsurance contracts;
- (j) of receivables from lease agreements relating to real estate and equipment;
- (i) of receivables from deposit accounts].

References: A/CN.9/432, paras. 17 and 62-66 (25th session, 1996)

Remarks

1. In view of its decision to delete any reference to the financing purpose or context of assignment, the Working Group requested the Secretariat to introduce a list of assignments, receivables and parties to be excluded from the scope of the draft Convention (A/CN.9/432,

paras. 18 and 66). Draft article 2 has been prepared pursuant to that request. Its contents appear within square brackets, since they are based on tentative suggestions made at the previous session of the Working Group (A/CN.9.432, paras. 59, 63 and 65).

2. In particular with regard to receivables owed by individuals, the Working Group at its previous session failed to reach agreement as to whether they should be covered (A/CN.9/432, paras. 36, 64 and 234-238).

3. The main aim of an exclusion of receivables owed by individuals would be to avoid conflicts between the provisions of the draft Convention relating to the rights and obligations of the debtor and consumer-protection principles. Such an exclusion, however, would present a number of disadvantages, most notably that: it would exclude a substantial practice, i.e. the securitization of credit card receivables, which allows consumers access to lower cost credit; and it would have the unintended effect of excluding receivables owed by individual merchants (the term "individuals" is used in order to avoid having to define and draw a distinction between "consumers" and "merchants", terms that are not universally understood in the same manner).

4. A more appropriate approach might be to establish in the draft Convention an adequate debtor-protection system aimed at ensuring that the debtor's legal position is not changed as a result of the assignment, and that the debtor knows whom to pay in order to discharge its obligation. Such an approach could include the right of the consumer-debtor to discharge its obligation by paying to the bank account or post-office box specified by the assignor, a practice already followed in the context of credit card receivables. Another approach would be to indicate in the draft Convention that it does not override consumer-protection laws (A/CN.9/432, para. 237).

Article 3. Definitions

For the purposes of this Convention:

(1) "Assignment" means the (...) transfer by [written] agreement [of one or more, existing or future,] receivables[, or of partial and undivided interests in receivables,] from one or more parties ("assignor") to another party or parties ("assignee"), by way of sale, by way of security for performance of an obligation, or by any other way (...)[, including subrogation, novation or pledge of receivables].

[(2) "Receivables financing" means any transaction in (...) which (...) value, credit or related services are provided for value in the form of receivables. "Receivables financing" includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing.]

(3) "Receivable" means any right of the assignor or another party or parties to receive or to claim payment of a monetary sum from another party or parties (...).

(4) "Original contract" means a contract from which a receivable arises. [A receivable "arises" [when the original contract is concluded] [when it becomes payable] [when it is earned by performance] [when it accrues].]

(5) "Future receivable" means a receivable that might arise after the conclusion of the assignment.

(6) "Writing" means any form of communication that preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

(7) "Notification of the assignment" means a statement informing the debtor that an assignment has taken place.

(8) "Priority" means the right of a party to receive payment in preference to another party.

References: A/CN.9/432, paras. 39-72 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 2
A/CN.9/420, paras. 33-44 and 180-184 (24th session, 1995)
A/CN.9/412, draft articles, 1(2), 2 and 9(4)

Remarks

1. Paragraph (1) introduces a broad definition of "assignment", generally supported at previous sessions of the Working Group (A/CN.9/420, para. 39 and A/CN.9/432, para.45).

2. The reference to "written" assignments in paragraph (1) has been inserted pursuant to a suggestion made at the previous session of the Working Group (A/CN.9/432, para. 42). Such an approach, which is an additional alternative to those set out in draft article 7, would result in excluding oral assignments from the scope of application of the draft Convention.

3. In support of such an approach, it could be argued that it might discourage the practice of oral assignments thus protecting all parties concerned from the uncertainty arising in the context of oral assignments. However, such a protection might be unnecessary, since the parties to financing transactions are normally able to protect their own interests; the debtor is protected in any case since before written notification of the assignment the debtor may discharge its obligation by paying the assignor; and third parties could be protected through a provision requiring the filing in a public registry, not of the assignment as a whole, but of a notice containing certain essential elements.

4. The Working Group might wish to consider the question whether, in view of the broad approach followed in the definition of "receivable", the reference to certain types of receivables in paragraph (1) might be deleted. In addition, the Working Group might wish to consider the question whether the same result would be achieved without an explicit reference to subrogation, novation, or pledge.

5. With regard to paragraph (2), the Working Group might wish to consider the question whether it should be retained or deleted after having considered the title, the preamble and draft article 12(3), in which a reference to receivables financing is currently included. Should the Working Group decide to delete paragraph (2), it might wish to preserve at the appropriate place in the draft Convention certain elements the importance of which was emphasized at the previous session of the Working Group, i.e. the emphasis on assignments for obtaining services (e.g., accounting, collection, insurance) and the possibility that the assignor and the borrower under the financing contract may be two different persons (A/CN.9/432, para. 50). Should the Working

Group decide to retain paragraph (2), consideration might be given to the question whether the definition of "receivables financing" in its present formulation might be too broad, thus inadvertently resulting in covering transactions that should not be covered, e.g., cash-management transactions.

6. The definition of "receivable" in its present formulation, separated from the definition of the "original contract", is intended to cover both contractual (whether earned by performance or not) and non-contractual receivables, including damages of any nature, as well as receivables payable in any currency. In addition, it is intended to cover both receivables in a strict sense ("the right to claim") and proceeds of receivables ("the right to receive"). The language in square brackets, while not setting forth a definition but a rule of interpretation, is aimed at explaining a term used throughout the draft Convention (i.e., "a receivable arises"). The reference to a claim "accruing" was drawn from the Convention on the Limitation Period in the International Sale of Goods (New York, 1974; article 9). If such a reference were to be retained, it might need to be supplemented by a provision along the lines of article 10 of that Convention specifying when a claim "accrues".

7. The Working Group might wish to consider the question whether rights to payment in precious metals or in units of account should also be covered. In addition, the Working Group might wish to address particular issues arising in assignments of partial or undivided interests in receivables, including: the definition of "parts" of receivables, or the minimum units, that could be assigned; the question whether the debtor's consent should be necessary for such an assignment to be effective; the question whether the debtor should be able to discharge its debt by depositing the amount owed in a bank account or by mailing it to a post office box; and the issue of the assignee's protection from creditors of the assignor (A/CN.9/420, paras. 180-184).

8. The term "notification of the assignment" has been defined in view of the fact that the term is used throughout the draft Convention (see also draft article 15 which deals with the content of the notification and the question whether notification may relate to receivables not existing at the time of notification).

9. The Working Group might wish to consider paragraph (8) in the context of its discussion on draft articles 22 to 24, in which the term "priority" is used. In the same context, the Working Group might wish to address the question whether use of the term "priority" is appropriate in the context of both assignments by way of sale and assignments by way of security.

Article 4. Debtor's protection

(1) An assignment does not have any effect on the debtor's duty to pay except that upon receipt of notification of the assignment the debtor is entitled to discharge its obligation, subject to article 16, by paying the assignee.

(2) An assignment does not prejudice the debtor's rights against the assignor arising from the failure of the assignor to perform the original contract (...).

Remarks

1. Draft article 4 reflects a fundamental principle, embodied also in draft articles 16 and 17, that attracted broad support at the previous session of the Working Group (A/CN.9/432, paras. 89 and 244).
2. Paragraph (1) is aimed at establishing that the only effect of the assignment towards the debtor is a change in the identity of the creditor, which, subject to draft article 16, may result in a change in the way in which the debtor may discharge its obligation. The payment obligation, including the amount to be paid, the time, place and currency of payment, and the defences of the debtor should not be adversely affected.
3. The Working Group might wish to consider whether paragraph (1) might be inconsistent with draft article 18, in that, after, e.g., a reduction in the price under the original contract, the debtor might have to pay the original, higher price, unless the condition set forth in paragraph (2) of draft article 18 is met.
4. Paragraph (2), which is predicated on the assumption that the obligation to perform the original contract remains with the assignor, is intended to preserve any rights that the debtor might have against the assignor for failure of the assignor to perform the original contract. Those rights, however, may not be raised against the assignee (unless they form defences in accordance with draft article 17). Draft article 20, for example, provides that the debtor may not recover from the assignee advance payments made by the debtor to the assignee.
5. An adequate legal regime for the protection of the debtor might allay the concerns expressed at previous sessions of the Working Group with regard to covering international assignments of domestic receivables, and in particular of receivables owed by consumers (A/CN.9/420, paras. 24, 27-29 and 159 and A/CN.9/432, paras. 17, 21, 36 and 236-238). The change in the legal regime governing the debtor's obligation should be of no concern to the consumer/debtor as long as this legal regime adequately protects the consumer/debtor's interests. In addition, such a debtor-protection regime might enhance the acceptability of provisions on oral assignments, bulk assignments of future receivables, anti-assignment clauses and registration (see remark 4 to draft article 2).

Article 5. International obligations of the Contracting State

This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

References: A/CN.9/432, paras. 73-75 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 3
A/CN.9/420, para. 23 (24th session, 1995)

Remarks

The Working Group might wish to consider whether draft article 5 should be aligned with draft article 1(1)(a) in terms of which party has to have its place of business in a State party to the international agreement that should prevail over the draft Convention.

Article 6. Principles of interpretation

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

References: A/CN.9/432, paras. 76-81 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 4
A/CN.9/420, para. 190 (24th session, 1995)

CHAPTER II. FORM AND CONTENT OF ASSIGNMENT

Article 7. Form of assignment

Variant A

An assignment need not be effected in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Variant B

An assignment in a form other than in writing is not effective [towards third parties]. [If the assignment is at some point of time effected in or evidenced by writing, it becomes effective as of that time.]

References: A/CN.9/432, paras. 82-86 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 5
A/CN.9/420, paras. 75-79 (24th session)
A/CN.9/412, draft article 5

Article 8. Time of transfer of receivables

- (1) A receivable arising up to the time of assignment is transferred at the time of assignment.
- (2) Without prejudice to the rights of the assignor's creditors, a future receivable is transferred directly to the assignee [when it is assigned] [when it arises] [when it becomes payable] [when it is earned by performance], without the need for a new assignment.

References: A/CN.9/432, paras. 109-112 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 7(1) and (3)
A/CN.9/420, paras. 57-60 (24th session, 1995)
A/CN.9/412, draft article 3(2)

Remarks

1. For reasons of clarity, draft article 7 of the earlier version of the rules has been split into two separate articles, draft articles 8 and 9. The purpose of draft article 8 is to address a question of paramount importance, i.e., the question of the point of time at which the transfer of receivables becomes effective.
2. While paragraph (1) states an obvious rule, it has been included in draft article 8 for reasons of completeness. In paragraph (2), which presents four alternatives, the Working Group might wish to further specify the exact time of transfer by reference to a date, e.g., the date mentioned in the assignment, the financing contract or the original contract, if any, or the date of acceptance of an offer.
3. Depending on the approach to be taken in paragraph (2) with regard to the time of transfer of future receivables, the definition of "future receivable" might need to be adjusted. In view of the definition of "future receivable" in its present formulation, a provision setting as the time of transfer of future receivables a time subsequent to the time the receivable arises (i.e., after the receivable becomes an existing receivable) would mean that future receivables may not be assigned under the draft Convention.
4. The Working Group might wish to consider the question whether the effect of assignment might need to be explicitly stated in a substantive provision, despite the fact that "assignment" is defined as the transfer of receivables by agreement and that draft articles 8 and 9 implicitly state the effect of assignment.

Article 9. Bulk assignments

(...) Without prejudice to the rights of the assignor's creditors, future receivables that are not specified individually are transferred, if they can be identified as receivables to which the assignment relates either at the time agreed upon by the assignor and the assignee, or in the absence of such agreement, when the receivables arise (...).

References: A/CN.9/432, paras. 102-108 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 7(2)
A/CN.9/420, paras. 45-56 (24th session, 1995)
A/CN.9/412, draft article 3(1)

Remarks

Under draft article 9, the only condition of the transfer of future receivables in bulk is that they are identifiable at some point of time. The exact time for this identification is left to the discretion of the parties. This approach does not prejudice the rights of the debtor since the notification has reasonably to identify the receivables assigned. It does not prejudice the rights of the assignor's creditors either, because they are expressly excluded from draft article 9.

Article 10. Agreements prohibiting assignment

- (1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting assignment.
- (2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement prohibiting assignment, but the assignee is not liable to the debtor for such a breach.

References: A/CN.9/432, paras. 113-126 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 8
A/CN.9/420, paras. 61-68 (24th session, 1995)
A/CN.9/412, draft article 4

Remarks

1. Paragraph (2) is intended to cover both contractual liability and liability for tortious interference in the contractual relationship between the assignor and the debtor. The rule in paragraph (2) is supplemented by draft article 17(3), which provides that the debtor may not raise against the assignee the breach as a defence or setoff against the assignee damages arising from the breach.
2. The Working Group might wish to address a number of related questions, including: whether agreements limiting the right of the creditor to assign its receivables should be covered (e.g., one assignment is allowed but no more); and whether, in case of breach of an agreement allowing only one assignment, some types of debtors (e.g., Governments) should be allowed to discharge their obligation by paying the assignor.

Article 11. Transfer of security rights

(1) Unless otherwise provided by (...) law or by agreement between the assignor and the assignee, any [personal or property] rights securing the assigned receivables are transferred to the assignee without a new act of transfer.

(2) Paragraph (1) of this article does not affect any requirement relating to registration of any security rights.

References: A/CN.9/432, paras. 127-130 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 9
A/CN.9/420, paras. 69-74 (24th session, 1995)

CHAPTER III. RIGHTS, OBLIGATIONS AND DEFENCES

Article 12. Rights and obligations of the assignor and the assignee

[(1) [Subject to the provisions of this Convention,] the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages (...) referred to therein (...).]

(2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

(3) The assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to receivables financing practice.

References: A/CN.9/432, paras. 131-144 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 10
A/CN.9/420, paras. 73, 81, 95 (24th session, 1995)

Remarks

1. The Working Group might wish to consider the question whether, in case of conflict, the draft Convention or the agreement of the parties should prevail. It should be noted that, with the exception of the provisions dealing with form of the assignment, the provisions of the draft Convention dealing with the rights of the assignor and the assignee may be varied by agreement (draft articles 11, 12(2) and (3), 13 and 14(1)).

2. Paragraphs (2) and (3) are modelled on article 9 of the United Nations Sales Convention.

Article 13. Representations of the assignor

- (1) Unless otherwise (...) agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor, [and that the debtor does not have, at the time of assignment, defences or set-offs that could [deprive the assigned receivables of value] [defeat, in whole or in part, the right of the assignee to request payment].
- (2) Unless otherwise (...) agreed between the assignor and the assignee, the assignor does not represent that the debtor will pay (...).

References: A/CN.9/432, paras. 145-158 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 11
A/CN.9/420, paras. 80-88 (24th session, 1995)
A/CN.9/412, draft article 6

Remarks

1. Paragraph (1) provides for two types of representations: representations as to the ownership in the receivables, for which there was broad support at the previous session of the Working Group, and representations as to defences of the debtor under the original contract, which raised a number of concerns (A/CN.9/432, para. 149).
2. The new wording in paragraph (1) is intended to address a concern expressed at previous sessions of the Working Group that a reference to deprivation of "value" could be misunderstood as referring to economic value and not to defences legally defeating the claim of the assignee (A/CN.9/420, para. 87 and A/CN.9/432, para. 153). Should the Working Group decide to retain the representation as to defences of the debtor that are unknown to the assignee and prefer the reference to deprivation "of value", some clarification would need to be made as to whether any, or only a substantial, decrease in the amount of the assigned receivables would amount to a breach of the representation.

Article 14. Assignee's right to notify the debtor
and to request payment

- (1) Unless otherwise agreed between the assignor and the assignee, the assignee is entitled to give to the debtor notification of the assignment and to request payment of the receivables assigned (...).
- (2) If the assignee gives notification of the assignment to the debtor in violation of an agreement between the assignor and the assignee prohibiting or restricting notification, the notification is effective but the assignee may be liable to the assignor for breach of contract.

References: A/CN.9/432, paras. 159-164 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 12
A/CN.9/420, paras. 89-97 (24th session, 1995)
A/CN.9/412, draft article 7

Remarks

Paragraph (2) is intended to address the question whether a notification given in violation of an agreement between the assignor and the assignee precluding or restricting the assignee from notifying the debtor should be effective. It is based on general principles of contract law, namely that: agreements bind only the parties thereto; and that their violation may result in the defaulting party becoming liable to the other party for breach of contract. As a result, if the debtor receives notification from the assignee which conforms to the requirements set forth in draft article 15, it should be entitled to pay the assignee and be discharged.

Article 15. Notification of the debtor

(1) Notification of the assignment shall:

- (a) be given in writing to the debtor by the assignor or by the assignee; and
- (b) reasonably identify the receivables assigned and the person to whom or for whose account the debtor is required to make payment.

(2) Notification of the assignment may relate to receivables arising after notification.

References: A/CN.9/432, paras. 173-194 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 13(2)
A/CN.9/420, paras. 116-123 (24th session, 1995)
A/CN.9/412, draft articles 9(2)

Remarks

1. Paragraph (1) has been prepared pursuant to the suggestions made at the previous session of the Working Group with regard to draft article 13(2) (A/CN.9/432, paras. 173-184).
2. Under paragraph (2), notification of the assignment of receivables not existing at the time of notification may be validly given. However, in order to avoid an excessive restriction of the economic autonomy of the assignor, the Working Group might consider limiting the rule in paragraph (2), e.g., to receivables arising within a certain time-period after notification.

Article 16. Debtor's discharge

- (1) Until the debtor receives notification of the assignment pursuant to article 15, it is entitled to discharge its obligation by paying the assignor.
- (2) After the debtor receives notification of the assignment pursuant to article 15, subject to paragraph (3), it is entitled to discharge its obligation by paying the assignee.
- (3) Notwithstanding notification of the assignment pursuant to article 15, the debtor shall discharge its obligation by paying the assignor, if:
- (a) the debtor has actual knowledge of the invalidity of the assignment; and
 - (b) the debtor is instructed in the notification to continue paying the assignor.
- (4) Notwithstanding notification of the assignment pursuant to article 15, if the debtor receives notification of a prior assignment pursuant to article 15, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor, it is entitled to [discharge its obligation by depositing the amount owed with a public deposit fund] [seek instructions from a competent judicial or non-judicial body and pay as instructed].
- (5) In case the debtor receives notification pursuant to article 15 of more than one assignment of the same receivables made by the same assignor, the debtor is entitled to discharge its obligation by paying the first assignee to give notification of the assignment pursuant to article 15 and has against that assignee the defences and set-offs provided for under article 17.
- (6) If so agreed between the assignor and the debtor before notification of the assignment pursuant to article 15, the debtor is entitled to discharge its obligation by paying into a bank account or a post office box specified in the agreement. After notification of the assignment pursuant to article 15, the debtor and the assignee may agree on the method of payment.
- (7) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is entitled to pay the assignor and be discharged from liability [deposit the amount owed with a public deposit fund] [seek instructions from the competent judicial or non-judicial body and pay as instructed]. Adequate proof includes, but is not limited to, any document emanating from the assignor and indicating that the assignment has taken place.
- (8) Paragraph (2) of this article does not prejudice any other ground on which payment by the debtor to the assignee discharges the debtor's obligation.

Remarks

1. Pursuant to a decision made by the Working Group at its previous session, the focus of draft article 16 has been changed from the debtor's duty to pay to the debtor's discharge (A/CN.9/432, para. 181).
2. Paragraphs (1) and 2 are intended to establish a clear and simple rule for the debtor's discharge based on an objective criterion, notification of the assignment. Introducing a subjective criterion, e.g., knowledge of the assignment, would place on the debtor the burden of having to keep a record of possible assignments and could undermine the certainty necessary in a debtor's discharge rule. Both under paragraphs (1) and (2), the debtor is not precluded from paying based on its knowledge of the relevant facts. But, if the debtor, chooses to do so, it bears the risk of having to pay twice.
3. Paragraph (3) introduces two exceptions to that rule, namely the case in which the debtor has "actual knowledge" of the invalidity of assignment and the case in which the debtor is instructed to continue paying the assignor.
4. The first exception has been inserted pursuant to a suggestion made at the previous session of the Working Group that attracted some support (A/CN.9/432, para. 189). It appears within square brackets in view of the concerns expressed at previous sessions of the Working Group with regard to introducing a subjective criterion in a debtor-protection rule (A/CN.9/420, paras. 99-104 and A/CN.9/432, paras. 167-171 and 189-192). The main advantage of a provision along the lines of paragraph (3)(a) is that it places emphasis on the need to make business practice conform with good faith standards. Its main disadvantage is that it introduces uncertainty and invites costly litigation, since it raises a number of questions, including what constitutes knowledge, who has to prove it, what is its content (e.g., invalidity as a matter of law or as a matter of fact) and how knowledge is to be treated in case of several conflicting assignments. The second exception is intended to accommodate certain practices, e.g., securitization, in which the assignee, a special corporation established for the sole purpose of issuing and selling securities, does not have the structure geared to receiving payments.
5. In both cases, the debtor does not have a right but an obligation to pay the assignor. It would run counter to good faith standards to allow the debtor, who has actual knowledge of the assignment, to discharge its obligation by paying the assignee. In addition, allowing the debtor to pay the assignee when otherwise instructed would create obstacles to securitization practices.
6. Paragraphs (4) to (8) deal with particular cases in which the debtor may discharge its obligation in different ways. The Working Group might wish to consider whether all the ways for the debtor to discharge its obligation set forth in paragraphs (4) and (7) should be retained and, if so, whether they should be made available to the debtor alternatively or cumulatively, leaving the choice to the debtor (A/CN.9/432, paras. 199-202).
7. Paragraph (8), which originates from draft article 13(5) of the earlier version of the rules, is intended to avoid creating the risk that the discharge mechanisms established by the draft Convention might inadvertently exclude, for formal reasons (e.g., because notification did not conform with draft article 15), other grounds for discharge of the debtor through payment to the assignee.

Article 17. Defences and set-offs of the debtor

- (1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences (...) of which the debtor could avail itself if such claim were made by the assignor.
- (2) The debtor may raise against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose (...) that were available to the debtor at the time notification of the assignment was given to the debtor.
- (3) Notwithstanding paragraphs (1) and (2), defences and set-offs that the debtor could raise against the assignor for breach of agreements prohibiting assignment pursuant to article 11 are not available to the debtor against the assignee.

References: A/CN.9/432, paras. 205-209 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 14
A/CN.9/420, paras. 132-151 (24th session)
A/CN.9/412, article 10

Article 18. Modification of the original contract [and of the assignment]

- (1) A modification of the original contract agreed upon between the assignor and the debtor [before notification of the assignment] is binding on the assignee and the assignee acquires corresponding rights under the modified contract (...).
- [(2) A modification of the original contract, agreed upon between the assignor and the debtor after notification of the assignment, is binding on the assignee and the assignee acquires corresponding rights under the modified contract, if the modification is made in good faith and in accordance with reasonable commercial standards].
- [(3) A modification of the assignment, agreed upon by the assignor and the assignee after notification of the assignment pursuant to article 15, is binding on the debtor only if the debtor is given notification of the modified assignment].

References: A/CN.9/432, paras. 210-217 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 15

Remarks

1. Under paragraph (1), any modification of the original contract agreed upon by the assignor and the debtor would bind the assignee, in any case or only before notification. Limiting the right of the assignor and the debtor to modify the original contract might not be fully consistent with the rule in draft article 4 that the assignment should not negatively affect the legal position of the debtor. Therefore, the reference to notification in paragraph (1) and paragraph (2) as a whole appear within square brackets.

2. Under paragraph (2), a modification of the original contract would be binding on the assignee only if made in good faith and in accordance with reasonable commercial standards. If made in good faith a modification would bind the assignee even if modifications were to be prohibited in the assignment.

3. Paragraph (3) has been prepared pursuant to a request made by the Working Group at its previous session (A/CN.9/432, para. 217). It provides that in case of a modification of the assignment a second notification would be necessary. Paragraph (3) might not be necessary. If the modification is of minor importance, a second notification would be unnecessary and would have the unintended result of increasing the cost of financing, in particular in transactions involving the assignment of a large number of low-value receivables; and if the modification is so substantial as to amount to a new assignment, a second notification would be necessary in any case.

Article 19. Waiver of defences and set-offs of the debtor

(1) [Without prejudice to [the law applicable to the relationship between the assignor and the debtor] [to consumer-protection law],] the debtor may agree with the assignor or the assignee in writing to waive the defences and set-offs that it could raise under article 17. A waiver of defences and set-offs precludes the debtor from raising against the assignee those defences and set-offs.

(2) The following defences may not be waived:

- (a) defences arising from separate dealings between the debtor and the assignee; and
- (b) defences arising from fraudulent acts on the part of the assignee [or the assignor].

(3) A waiver of defences may only be modified by a written agreement.

References: A/CN.9/432, paras. 218-238 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 16
A/CN.9/420, 136-144 (24th session, 1995)
A/CN.9/412, draft article 11

Remarks

1. The Working Group might wish to address the question whether the application of draft article 19 should be subject to other rules of law and if so to which, the law applicable to the original contract in general or just the applicable consumer-protection law (A/CN.9/432, paras. 230 and 237).

2. An additional question that the Working Group might wish to consider is whether draft article 19 should recognize blanket waivers, covering all possible defences, or whether the defences to be waived should be identified in some way.

Article 20. Recovery of advances

Without prejudice to the debtor's rights under articles 4(2) and 17, failure of the assignor to perform the original contract, if any, does not entitle the debtor to recover a sum paid by the debtor to the assignee.

References: A/CN.9/432, paras. 239-244 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 17
A/CN.9/420, paras. 145-148 (24th session, 1995)
A/CN.9/412, draft article 12

Article 21. Rights of third parties

(1) Except as provided in articles 22 to 24, this Convention does not affect the rights of the assignees receiving the same receivables from the assignor, the assignor's creditors attaching the assigned receivables or the assignor's creditors in the context of insolvency of the assignor.

(2) Notwithstanding articles 22 to 24, this Convention or the general principles on which it is based do not govern:

(a) any right of creditors of the assignor attaching the assigned receivables to invalidate the assignment as a fraudulent transfer;

(b) any right of the administrator in the insolvency of the assignor to invalidate the assignment as a fraudulent or preferential transfer;

(c) the priority of the insolvency administrator for the benefit of privileged claims.

[...]

References: A/CN.9/432, para. 260 (25th session)
A/CN.9/WG.II.WP.87, draft article 18(7)

Remarks

1. At its previous session, the Working Group requested the Secretariat to revise draft article 18(7) of the earlier version of the rules to reflect the possibility that the draft Convention might affect the law applicable to the rights of third parties, including the creditors of the assignor in case of insolvency (A/CN.9/432, para. 260).
2. Draft article 21, which has been prepared pursuant to that request, states the rule that the draft Convention does not affect the rights of third parties and goes on to list the exceptions to the rule set forth in draft articles 22 to 24.
3. In order to avoid raising any doubt, paragraph (2) lists some fundamental rights of third parties, which involve public policy considerations and which the draft Convention should not

attempt to address. Those rights include: the right of individual creditors of the assignor to challenge the validity of assignments as a fraudulent transfer; the right of the administrator in the insolvency of the assignor to invalidate assignments as fraudulent or preferential transfers; and the priority of privileged claims (e.g., of the State for taxes and of employees for salaries and similar benefits). Under paragraph (2), those rights would be left to the otherwise applicable law to be determined by virtue of the conflict-of-laws rules of the draft Convention.

4. If an assignment constitutes a "fraudulent transfer", the assignor's individual creditors, or, in case of insolvency, the insolvency administrator may set it aside, even if the time of transfer, of registration or of notification of the assignment is before attachment or the opening of the insolvency proceedings.

5. This is particularly the case if the claims of the assignor's creditors arose before the date of the assignment. The result may be the same, even if the claims of the assignor's creditors arose after the date of the assignment, since the assignment may have been intended to prejudice future creditors. In this case, however, registration may play a role since future creditors would have notice of the assignment before extending credit to the assignor.

6. Similarly, if an assignment amounts to an unfair preference of one or more creditors over other creditors, the insolvency administrator may set it aside, even if the time of transfer, of notification or of registration is before the date of the opening of the insolvency proceedings.

7. The Working Group might wish to consider whether the approach taken in draft article 21 would be acceptable in view of the benefits to be derived for all parties concerned from an increased availability of lower cost credit which would be likely to result from enhancing the certainty as to whether the assignee will be able to obtain payment of the assigned receivables, in particular in case of insolvency of the assignor.

8. In addition, the Working Group might wish to consider the question whether additional types of conflicts should be excluded, e.g., conflicts between an assignee and a supplier of materials on credit terms with regard to the price from the sale of the end-product (without the extension of credit from the supplier of materials, the buyer might not be able to produce the asset, the further sale of which by the buyer creates the receivable).

Article 22. Competing rights of several assignees

(1) Where a receivable is assigned by the assignor to several assignees, (...) priority is determined on the basis of time of [notification] [registration] of the assignment.

(2) [If no assignee registers the assignment, (...) priority is determined on the basis of the time of notification of the assignment.] If no assignee notifies the debtor, priority is determined on the basis of the time of assignment.

Remarks

1. Draft article 22 is predicated on the assumption that while all assignments of the same receivables by the same assignor are valid, the assignee with priority will receive payment. Whether that assignee may retain all the proceeds of the receivables or has to turn over any balance remaining to the next assignee in line of priority is left to other applicable law to be determined on the basis of the conflict-of-laws rules contained in the draft Convention.
2. An approach along the lines of draft article 22 would be inconsistent with the approach taken in legal systems in which the first assignment transfers title to the receivables and, as a result, the subsequent assignments are invalid. In those systems, the result may be the same, even if the assignment is by way of security, since the type of the assignment is a matter of contract between the assignor and the assignee.
3. Notification of the debtor might not be an efficient way of determining priorities in case of bulk assignments of future receivables, for a number of reasons, including that: the identity of the debtors would not be known; the cost and time involved in notifying a significant number of debtors would be substantial; and third parties would be faced with the task of having to enquire about the status of the receivables with all those debtors, who would be under no obligation to respond. On the other hand, while registration would resolve those problems, no suitable registry seems to exist for registration of assignments covered by the draft Convention and the legal issues arising in the context of registration remain to be addressed.
4. The Working Group might wish to consider whether the reference to "several assignees" is sufficient to cover a situation that involves an assignee and a creditor of the assignor with a security right in the assignor's goods which extends to the proceeds generated from the sale of the goods.

Article 23. Competing rights of the assignee and the assignor's creditors

The assignee has priority over creditors of the assignor attaching the assigned receivables (...), if:

- (a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before attachment; or
- (b) the assignee has priority under the law governing attachment.

References: A/CN.9/432, 253 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 18(2)

Remarks

1. Under draft article 23, the rights of creditors of the assignor would be affected to the extent that the draft Convention provides that future receivables becoming due or being earned by performance after attachment are considered as transferred before attachment if they were assigned or the contract from which they might arise was concluded before attachment. Such an approach

would mean that the assigned receivables would not be subject to attachment at all (in case of an assignment by way of sale) or would be subject to attachment to the extent of any surplus remaining after payment of the assignee (in case of an assignment by way of security).

2. In view of the fact that the draft Convention does not draw a distinction between assignments by way of sale and assignments by way of security (A/CN.9/420, para. 95 and A/CN.9/432, paras. 46, 163-164 and 257), the question whether the assignee obtaining payment has to turn over any surplus to the assignor's creditors is left to other applicable law to be determined on the basis of the conflict-of-laws rules contained in the draft Convention.

3. Subparagraph (a) requires two choices to be made: first, what fact has to occur before attachment for the assignee to have priority over the attachment creditors; and second, whether, in addition, some type of publicity of the assignment should take place before attachment for the assignee to obtain priority. The purpose of requiring some form of publicity would be to protect third parties by allowing them to take the assignment into account before extending credit to the assignor. Subparagraph (b) is intended to ensure that the draft Convention does not limit the rights of assignees that currently exist under national law.

4. The Working Group might wish to consider the question whether, in addition to (a) and (b), for the assignee to obtain priority in case of an assignment providing for future payments by the assignee, value must have been given in respect of the assignment before attachment or shortly thereafter (see art. 9-301(4) United States Uniform Commercial Code).

Article 24. Competing rights of the assignee and the insolvency administrator

The assignee has priority over the administrator in the insolvency of the assignor, if:

(a) the receivables [were assigned] [arose] [became due] [were earned by performance] [and [notification] [registration] of the assignment occurred] before the opening of the insolvency proceedings; or

(b) the assignee has priority under the law governing the insolvency of the assignor.

References: A/CN.9/432, 254-258 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 18 (3)

Remarks

1. Under draft article 24, the rights of the creditors in the insolvency of the assignor would be affected by a rule providing that the assignee has priority over the administrator in the insolvency of the assignor with regard to receivables that were assigned or arose from a contract concluded before, but became payable or were earned by performance after, the opening of the insolvency proceeding.

2. Depending on whether an assignment by way of sale or an assignment by way of security is involved, the receivables would not be part of the assignor's estate or would be part of the estate only to the extent of any balance remaining after the payment of the assignee.
3. Subparagraph (b) is intended to ensure that the present rights of the insolvency administrator under national law are not expanded.

[CHAPTER IV. Registration]

[...]

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25. Subsequent assignments

- (1) This Convention applies to international assignments of receivables and to assignments of international receivables by the initial or any other assignee to subsequent assignees, even if the initial assignment is not governed by this Convention.
- [(2) A subsequent assignee has the rights afforded by this Convention to an assignee and is subject to the defences and set-offs recognized by this Convention to a debtor.]
- [(3) A receivable assigned by the assignee to a subsequent assignee is transferred notwithstanding any agreement prohibiting assignment. The subsequent assignee is not liable for breach of an agreement prohibiting the subsequent assignment.]
- (4) Notwithstanding that the invalidity of an (...) assignment renders all subsequent assignments invalid, the debtor is entitled to discharge its obligation by paying the first assignee to give notification of the assignment pursuant to article 15 [unless the debtor has actual knowledge of the invalidity of the assignment, in which case the debtor is entitled to discharge its obligation in accordance with paragraph (4) of article 16].

References: A/CN.9/432, paras. 264-268 (25th session, 1996)
A/CN.9/WG.II/WP.87, draft article 20
A/CN.9/420, paras. 188-195 (24th session, 1995)
A/CN.9/412, draft article 15

Remarks

1. Paragraph (1) in its present formulation is intended to clarify that subsequent assignments that meet the criteria set forth in draft article 1 are governed by the draft Convention, even if the initial assignment falls outside the scope of application of the draft Convention (i.e., it is a domestic assignment of domestic receivables).

2. Paragraphs (2) and (3) might not be necessary since a subsequent assignment would be an "assignment" and a subsequent assignee would be treated as an "assignee" under the draft Convention.

3. Paragraph (4), which is intended to protect the debtor from having to determine the validity of all assignments in a chain of assignments, in order to obtain a valid discharge of its obligation might be usefully placed in draft article 16 dealing with the discharge of the debtor. Under the present formulation of paragraph (4), if in doubt as to the validity of an assignment the debtor may pay to a public deposit fund or seek the instructions of a competent judicial or non-judicial body.

4. The reference to the knowledge of the invalidity of the assignment on the part of the debtor has been inserted in paragraph (4) pursuant to a view expressed at the previous session of the Working Group that attracted some support (A/CN.9/432, para. 268). It appears within square brackets pending determination of the Working Group on paragraph (3)(a) of draft article 16.

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