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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-EIGHTH SESSION (New York, 2 - 13 March 1998)

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I. INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continued its work on the preparation of a uniform law on assignment in receivables financing, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995).[1/] That was the fifth session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" held in New York from 17 to 21 May 1992 in conjunction with the twenty-fifth session. A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth session (1980) had decided to defer for a later stage.[2/]

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the

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

2/ Ibid., Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28.

assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties.[3/]

4. At its twenty-fourth session (Vienna, 8-19 November 1995), the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16).

5. At its twenty-ninth session (1996), the Commission had before it the report of the twenty-fourth session of the Working Group (A/CN.9/420). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously.[4/]

6. At its twenty-fifth session (New York, 8-19 July 1996), the deliberations of the Working Group were based on a note prepared by the Secretariat, which contained provisions on a variety of issues, including form and content of assignment, rights and obligations of the assignor, the assignee, the debtor and other third parties, subsequent assignments and conflict-of-laws issues (A/CN.9/WG.II/WP.87). At its twenty-sixth session (Vienna, 11-22 November 1996), the Working Group considered a note prepared by the Secretariat, which contained a revised version of the draft Convention on Assignment in Receivables Financing (A/CN.9/WG.II/WP.89).

7. At its thirtieth session (1997), the Commission had before it the reports of the twenty-fifth and twenty-sixth sessions of the Working Group (A/CN.9/432 and A/CN.9/434). The Commission noted that the Working Group had reached agreement on a number of issues and that the main outstanding issues included the effects of the assignment on third parties, such as the creditors of the assignor and the administrator in the insolvency of the assignor.[5/] In addition, the Commission noted that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates.[6/]

8. At its twenty-seventh session (Vienna, 20-31 October 1997),[7/] the Working Group continued its work by considering a revised version of the draft Convention contained in a note prepared by the Secretariat (A/CN.9/WG.II/WP.93). At that session, the Working Group adopted the working

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3/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

4/ Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), para. 234.

5/ Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), para. 254.

6/ Ibid., para. 256.

7/ The twenty-seventh session, which was originally scheduled to take place in New York from 23 June to 3 July 1997, had to be rescheduled as a result of the decision of the General Assembly to hold its nineteenth special session on Agenda 21 in New York from 23 to 27 June 1997.

assumption that the text being prepared would include conflict-of-laws provisions dealing in particular with questions of priority (A/CN.9/445, paras. 27 and 31).

9. The Working Group, which was composed of all States members of the Commission, held the present session in New York from 2 to 13 March 1998. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Botswana, Bulgaria, Chile, China, Ecuador, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

10. The session was attended by observers from the following States: Benin, Canada, Côte d'Ivoire, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Gabon, Guinea-Bissau, Indonesia, Iraq, Ireland, Kuwait, Mongolia, Qatar, Republic of Korea, Romania, Senegal, Sweden, Switzerland, Syrian Arab Republic, Turkey and Venezuela.

11. The session was attended by observers from the following international organizations: Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Commercial Finance Association (CFA), European Federation of National Factoring Associations (EUROPAFACTORING), Factors Chain International (FCI), Fédération Bancaire de l'Union Européenne, International Bar Association (IBA) and Union Internationale des Avocats (UIA).

12. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Abu Algassim Mergehni Mohammad (Sudan)

13. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.II/WP.95) and a note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing" (A/CN.9/WG.II/WP.96).

14. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of draft Convention on Assignment in Receivables Financing.

4. Other business.

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

15. Recalling that draft articles 14 to 22 had not been discussed at its previous session for lack of sufficient time, the Working Group decided to begin its deliberations by discussing draft article 14. The Working Group considered draft articles 14 to 22 and 25 to 28, as set forth in document A/CN.9/WG.II/WP.96.

16. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in Chapters III and IV. The Working Group adopted the substance of draft articles 14 to 16 and 18 to 21 and referred them to a drafting group established by the Secretariat to align the various language versions of the draft articles adopted. In addition, the Working Group requested the Secretariat to revise draft article 17, taking into account the deliberations and conclusions of the Working Group.

III. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 14. Rights and obligations of the assignor and the assignee

17. The text of draft article 14 as considered by the Working Group was as follows:

> "(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 or general conditions 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) In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to the particular receivables financing practice."

Paragraph (1)

18. The Working Group adopted the substance of paragraph (1) unchanged.

Paragraph (2)

19. The view was expressed that paragraph (2) should be deleted. In support, it was stated that the paragraph was redundant, since parties might in any case agree to be bound by usages and were normally bound by practices established between themselves. In addition, it was observed that, in situations where successive assignments were to be expected in the normal course of a transaction (e.g., in the case of an international factoring agreement), the paragraph might create uncertainty as to which usages and

practices would be binding on subsequent assignees who would not necessarily be aware of those usages and practices agreed upon between the initial assignor and the initial assignee.

20. The prevailing view, however, was that the paragraph should be retained. It was pointed out that while in many countries a provision along the lines of paragraph (2) might be regarded as stating the obvious, there might also exist jurisdictions where the principles on which the paragraph was based might not be taken for granted. That was said to be a reason for which those principles had been expressed in the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the United Nations Sales Convention"). In addition, it was observed that any discrepancy between the draft Convention and the United Nations Sales Convention in that regard might create difficulties in the interpretation of both instruments. With respect to the objection raised regarding successive assignments, it was widely felt that since the paragraph dealt with the two-party relationship between each assignor and its assignee, there might be no ambiguity as to which usages and practices were binding in the context of that relationship. After discussion, the Working Group adopted the substance of paragraph (2) unchanged.

Paragraph (3)

21. The view was expressed that paragraph (3) should be deleted since it merely restated a widely accepted principle, under which certain usages would be made applicable to a contractual relationship in the absence of a contrary agreement. In addition, it was stated that the paragraph might introduce uncertainty since currently there did not seem to exist a distinct body of usages on receivables financing practices. In favour of deletion of paragraph (3), it was also observed that, as currently drafted, it might result in the assignor and the assignee being bound by usages of which they might not be aware. In that context, it was pointed out that recognizing the faculty of the parties to agree otherwise might not provide a satisfactory solution, since it would be extremely difficult for the parties who were unaware of a given usage to agree upon the exclusion of that usage.

22. The prevailing view, however, was that paragraph (3) might serve a useful purpose in limiting the reference to trade usages to those usages that were regularly observed in international trade. Regarding the objection that there currently existed no generally accepted usages or practices for receivables financing in international trade, it was stated that, pending the emergence of such international usages, paragraph (3) would appropriately result in excluding those purely domestic usages that should not be binding upon parties to an international assignment. It was also pointed out that the need to prevent international transactions from being subject to domestic usages was a reason why references to internationally accepted usages had been inserted in the United Nations Sales Convention. It was generally felt that the possibility for parties to adjust the contents of their contractual relationship provided them with sufficient protection against any usage which they might regard as unsuitable.

23. However, in order to accommodate the concerns expressed, a number of suggestions were made. One suggestion was that the text should indicate more clearly that the parties to the assignment could exclude the application of usages to their assignment by way of an explicit or an implied agreement. That suggestion was objected to on the grounds that: it could raise problems in the interpretation of other provisions of the draft Convention where reference was made to the contrary agreement of the parties; and such an approach would unnecessarily interfere with contract law applicable outside the draft Convention.

24. Another suggestion was that the reference to actual or constructive knowledge reflected in the words "knew or ought to have known" should be deleted. In support of deletion, it was stated that while

such a reference to the subjective knowledge of the parties might be useful in a two-party relationship, it would be inappropriate in a tripartite relationship, since it would be extremely difficult for third parties to determine what the assignor and the assignee knew or ought to have known. General support was expressed in favour of that suggestion. Subject to that change, the Working Group adopted the substance of paragraph (3).

Article 15. Representations of the assignor

25. The text of draft article 15 as considered by the Working Group was as follows:

"(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents that:

"(a) [notwithstanding an agreement between the assignor and the assignee limiting in any way the assignor's rights to assign its receivables,] the assignor has, at the time of assignment, the right to assign the receivable;

"(b) the assignor has not previously assigned [, nor will later assign,] the receivable to another assignee; and

"(c) the debtor does not have, at the time of assignment, any defences or rights of set-off arising under the original contract or any other agreement with the assignor, other than those specified in the assignment.

"(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay."

Paragraph (1)

Chapeau

26. There was general agreement in the Working Group that the chapeau should include a reference to the point of time when the assignor had to make the representations referred to in draft article 15. As to the question what that time should be, after discussion, the Working Group decided that it should be the time of the conclusion of the contract of assignment. Subject to that change, the Working Group adopted the substance of the chapeau.

Subparagraph (a)

27. It was generally felt that the bracketed language contained in subparagraph (a) was repetitious, since it was implicit in draft article 12 that the assignor had a right to transfer its receivables despite the existence of an anti-assignment clause contained in the contract under which the receivables arose ("the original contract"). While the view was expressed that despite its being repetitious the bracketed language should be retained for the purpose of ensuring absolute clarity, the prevailing view was that the matter was sufficiently clear and that the bracketed language could thus be deleted.

28. As to statutory limitations of the assignor's right to assign its receivables, it was generally agreed that subparagraph (a) properly allocated between the assignor and the assignee the risk that the

assignment might be invalidated as a result of such limitations, since the assignor was in a better position to know whether there was a statutory limitation of its right to assign its receivables.

29. The Working Group noted that, as a result of its decision to include in the chapeau a reference to the point of time when the assignor had to make the representations referred to in draft article 15, the reference to the time of the assignment contained in subparagraph (a) was no longer necessary. The view was expressed, however, that a distinction should be drawn between the time when the representations were made and the time when they had to take effect.

30. While it was agreed that it was appropriate to draw such a distinction, a number of concerns were expressed with regard to the reference to the time of assignment, a term defined in draft article 5 (k). One concern was that such a reference was incomplete, since draft article 15 was based on the assumption that the parties to the assignment had not dealt with the issue of representations in their agreement and yet draft article 5 (k) failed to cover the situation in which the parties had not specified the time of the assignment in their agreement. Another concern was that, as a result of the formulation of the definition of the time of the assignment contained in draft article 5 (k), the representation referred to in subparagraph (a) could inadvertently take effect even after the conclusion of the contract of assignment, a result which was said to be inappropriate. After discussion, the Working Group adopted the substance of subparagraph (a), subject to the deletion of the bracketed language and the reference to the time of the assignment.

Subparagraph (b)

31. The Working Group first considered the question whether the reference to the representation that the assignor would not assign the same receivables again, which appeared in subparagraph (b) within square brackets, should be retained. In support of retention, it was observed that in assignments involving the transfer of property in receivables the assignee would normally require the assignor to undertake that the assignor would not assign the same receivables again. In support of deletion, it was stated that such a representation would not be appropriate in an assignment by way of security in which only a part of a receivable was encumbered. In that connection, it was observed that the right of the assignor to offer to different lenders different parts of the receivables was at the heart of important financing practices and should be preserved. In addition, it was said that such a representation was normally negotiated in the context of specific transactions and did not belong in a default rule that was intended to apply to various types of transactions.

32. As to the words "previously assigned", it was generally felt that they would be meaningful only if a point of time were to be included, in respect of which it could be determined what "previous" assignment meant. Further to the decision of the Working Group to include in the chapeau a reference to the point of time at which the representations were to be made, it was generally agreed that the words "previously assigned" could be retained. Subject to the deletion of the bracketed language, the Working Group adopted the substance of subparagraph (b).

Subparagraph (c)

33. A number of concerns were expressed with regard to the representation as to the defences and rights of set-off of the debtor contained in the subparagraph. One concern was that in bulk assignments by way of security a representation along the lines of subparagraph (c) would not be appropriate, since the assignor might have no way of knowing whether the various debtors had such defences. In order to address that concern, it was suggested that the subparagraph should be deleted and that the matter should be left to the trade usages and practices that would be applicable under draft article 14, paragraph (2). That suggestion was objected to on the ground that credit was normally extended on the basis of receivables that were not subject to defences. In addition, it was stated that, in the case of bulk assignments involving receivables that were likely to be subject to defences on the part of the debtors, assignors received credit representing only the amount of those receivables that were not subject to any defences, while they had to repay a higher amount. Moreover, it was said that, in the so called “recourse financing”, if the assignee was unable to obtain payment as a result of defences raised by the debtor, the assignor had to take the receivables back and replace them with other receivables.

34. Another concern was that limiting the representations to be undertaken by the assignor under subparagraph (c) to contractual defences and rights of set-off would inappropriately expose the assignee to defences and rights of set-off that might not be of a contractual nature. It was therefore suggested that the bracketed language contained in subparagraph (c) should be deleted. As to the words "other than those specified in the assignment", it was generally felt that they should be deleted, since: they were redundant in view of the reference to a contrary agreement between the assignor and the assignee contained in the chapeau of paragraph (1); and they introduced a rather rigid approach in that failure to specify all possible defences of the debtor in the assignment would inadvertently result in the assignor being in breach if such defences arose.

35. Yet another concern was that, by referring to the time of the conclusion of the contract of assignment, subparagraph (c) could inadvertently result in the assignor making representations as to the absence of defences and rights of set-off, the existence of which would be unknown to the assignor at the time of the conclusion of the contract of assignment (i.e., defences and rights of set-off that might arise under contracts to be concluded in the future). It was stated that that result would be inappropriate.

36. In order to address that concern, it was suggested that subparagraph (c) should be revised with a view to ensuring that, in the case of future receivables, the representation as to the absence of defences on the part of the debtor should take effect at the time when the receivables arose. That suggestion was objected to on the ground that such a different treatment of defences arising from existing or from future contracts was not justified. It was explained that the assignee needed the representations to take effect at the time of transfer of the receivable and, under draft article 11, that time was the time of the assignment in the case of both existing and future receivables.

37. While it was generally recognized that the time of transfer of the receivables should be the time of the assignment, the Working Group was reminded of the concerns raised with regard to the definition of the "time of the assignment" contained in draft article 5 (k) (see para. 30 above). It was thus suggested that subparagraph (c) should be rephrased to reflect the general understanding of the Working Group without referring to draft article 5 (k). According to that suggestion, subparagraph (c) should read along the following lines: "if the receivable is an existing receivable, the debtor does not have and will not have any defences or rights of set-off and, if the receivable is a future receivable, the debtor will not have any defences or rights of set-off at or after the time when the receivable arises". While the thrust of that

suggestion was found to be generally acceptable, the Working Group preferred a simpler formulation along the following lines: "the debtor does not have and will not have any defences or rights of set-off".

38. In the discussion, the question was raised as to whether future rights of set-off arising under contracts that were unrelated to the original contract would be covered in subparagraph (c). In response, it was stated that such rights of set-off that were available to the debtor under draft article 19, paragraph (2) would indeed be covered. In addition, it was observed that the assignee could protect itself against such rights of the debtor by notifying the debtor.

39. After discussion, the Working Group adopted the substance of subparagraph (c) as suggested at the end of paragraph 37 above.

Paragraph (2)

40. It was generally agreed that paragraph (2) appropriately allocated the credit risk as between the assignor and the assignee. After discussion, the Working Group adopted the substance of paragraph (2) unchanged.

Article 16. Notification of the debtor

41. The text of draft article 16 as considered by the Working Group was as follows:

> "(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and request that payment be made to the assignee.
>
> "(2) Notification of the assignment or request for payment made by the assignor or the assignee in breach of an agreement under paragraph (1) is effective. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.
>
> "(3) Notification shall be in writing and shall reasonably identify the receivables and the person to whom or for whose account or the address to which the debtor is required to make payment.
>
> "(4) Notification of the assignment may relate to receivables arising after notification. [Such notification is effective for a period of five years after the date it is received by the debtor, unless:
>
> "(a) otherwise agreed between the assignee and the debtor; or
>
> "(b) the notification is renewed in writing during the period of its effectiveness [for a period of five years unless otherwise agreed between the assignee and the debtor.]]"

Paragraph (1)

42. It was generally agreed that paragraph (1) was appropriately cast with a view to establishing a right and not an obligation to notify the debtor. It was stated that an obligation to notify the debtor could undermine useful financing practices in which the debtor was not notified of the assignment and was expected to continue paying the assignor. With regard to the final words of paragraph (1), the view was

expressed that they unnecessarily restricted the scope of the provision to situations where the notification would involve a request of payment to the assignee. It was widely felt that wording along the lines of article 18, paragraph (2), would more appropriately refer to payment being made "in accordance with the payment instructions set forth in the notification". Subject to that modification, the Working Group adopted the substance of paragraph (1) (in the context of its discussion of draft article 18, paragraph (2), the Working Group modified the reference to “payment instructions”, see paras. 72 to 73 and 78 below).

Paragraph (2)

43. It was stated that, as currently drafted, paragraph (2) could be used to settle questions other than the discharge of the debtor's obligations, such as priority between competing assignees (e.g., where applicable law would give priority to the assignee who first notified the debtor), which was said to be inappropriate. On the other hand, it was observed that the purpose of paragraph (2) was to overcome situations where there might exist restrictions to the freedom of the parties to notify the debtor.

44. As a matter of drafting, it was widely felt that the words "an agreement under paragraph (1)" might be misinterpreted as requiring the conclusion of a specific agreement between the assignor and the assignee. It was decided that those words should be replaced by the words "an agreement referred to in paragraph (1)". Subject to that modification, the Working Group adopted the substance of paragraph (2).

Paragraph (3)

45. It was generally felt that the draft Convention should contain a provision regarding the language in which the notification should be made. As to how that provision might be structured, there was general agreement that it should recognize any language which was reasonably designed to inform the debtor about the content of the notification. In addition, in view of the important consequences of notification under the draft Convention, that provision should establish certainty by way of a "safe harbour" rule, i.e., a rule under which the effectiveness of a notification in a specified language would be recognized. Moreover, that provision should recognize the effectiveness of multilingual notifications.

46. It was thus suggested that wording along the following lines should be added to the text of paragraph (3) or in a new paragraph of draft article 16: "Notification shall be in any language that is reasonably designed to inform the debtor about the content of the notification. For the purpose of this paragraph, it shall be sufficient if notification is given in the language of the original contract." After discussion, the Working Group adopted the substance of paragraph (3) and of the new paragraph. In the context of its discussion on draft articles 18, paragraphs (2) and (3), 19, paragraph (2), and 21, new paragraph (4), the Working Group reopened discussion on draft article 16, paragraph (3) (see paras. 74 to 76, 82 to 83, 99 to 100 and 135 below).

Paragraph (4)

47. With respect to the second sentence of paragraph (4), which currently appeared within square brackets, it was generally felt that the reference to a fixed period of effectiveness of the notification was inappropriate. It was pointed out that: there normally existed no agreement between the assignee and the debtor; it would be difficult for the assignee to establish the date at which the notification had been received by the debtor; the debtor would be overly burdened with the obligation to verify the date of notification in order to assess whether it could obtain discharge by paying the assignee; and the period of five years was arbitrary and would not necessarily correspond to a limitation period in all contracting

States. Subject to the deletion of the second sentence, the Working Group adopted the substance of paragraph (4).

Article 17. Right of the assignee to payment

48. The text of draft article 17 as considered by the Working Group was as follows:

> "(1) The assignee is entitled to payment of the assigned receivable. Unless otherwise agreed between the assignor and the assignee, if payment is made to the assignee, the assignee is entitled to retain whatever it receives.
>
> "(2) Unless otherwise agreed between the assignor and the assignee, if payment is made to the assignor, the assignee has a right in whatever is received by that assignor.
>
> "(3) If payment is made to another person, including another assignee, a creditor of the assignor or the insolvency administrator, the assignee has a right in whatever is received by that person."

Paragraphs (1) and (2)

49. While support was expressed in favour of the principles embodied in paragraphs (1) and (2), a number of suggestions were made with regard to their exact formulation. One suggestion was that the first sentence of paragraph (1) should be deleted. In support of deletion, it was stated that the right of the assignee to payment would sufficiently result from the agreement between the assignor and the assignee. That suggestion was objected to on the ground that the first sentence of paragraph (1), as the core provision of draft article 17, was necessary to establish the right of the assignee to payment.

50. Another suggestion was that, in order to avoid affecting the rights of third parties, the rule under which the assignee was entitled to payment should be limited in scope by inserting at the beginning of the first sentence of paragraph (1) the words "as between the assignor and the assignee". It was stated that the matter of the right of the assignee to request payment from the debtor had already been established in draft articles 2, paragraph (1), 10 and 16, paragraph (1), and was implicit in draft article 18, while the rights of third parties were dealt with in draft articles 23, 24, 34, 35, 39 and 40. The view was expressed, however, that not dealing clearly with the right of the assignee to claim payment from the debtor in the core provision of the draft Convention dealing with the right of the assignee to payment might cast uncertainty as to whether the assignee could request payment from the debtor, in particular before notification.

51. Yet another suggestion was that the words "to the extent of its right in the receivable" should be added at the end of paragraph (1). It was explained that the proposed language would address situations in which the assignee in an assignment by way of security had to account for and return to the assignor any surplus remaining after satisfaction of the assignee’s claim against the assignor. The Working Group found that suggestion to be generally acceptable.

52. Yet another suggestion was that, in order to address situations in which payment of the assigned receivable was effected in kind, the words "discharge of the debtor's obligation" should be substituted for the term "payment". It was observed that, while payment of receivables was normally made by tendering money, in some situations goods might be offered in discharge of the assigned receivable. In particular in

the context of factoring transactions, it was said to be important to establish the right of the assignee to recover from the assignor or to retain returned goods in discharge of the assigned receivable.

53. It was stated that the concern regarding a possible payment in kind might sufficiently be taken care of under draft article 2, paragraph (3), which had been patterned after article 7 of the UNIDROIT Convention on International Factoring (hereinafter referred to as "the Ottawa Convention"). It was also observed that since the definition of "receivable" included any right arising under the original contract, "payment of the receivable" would include discharge of the receivable in kind.

54. It was widely felt, however, that an additional provision might need to be prepared to deal with the limited number of cases where goods were returned to or recovered by the assignee in discharge of the assigned receivable. On the other hand, it was generally agreed that the reference to "payment" should be maintained in draft article 17. In that connection, the suggestion was made that a definition of "payment" might be introduced in draft article 17 to include payment in kind. That suggestion was objected to on the grounds that introducing a definition of "payment" for the sole purpose of draft article 17 might create interpretation problems with respect to the provisions of the draft Convention in which the term "payment" was used.

New proposed paragraph (1)

55. With a view to addressing the various suggestions made with respect to paragraphs (1) and (2), it was proposed that the two paragraphs might be merged and reworded along the following lines:

> "(1) As between the assignor and the assignee, unless otherwise agreed between them, the assignee is entitled to payment of the assigned receivable and is entitled:
>
> "(a) to whatever is or will be received by the assignor in total or partial discharge of the receivable, and
>
> "(b) to retain whatever it receives in such discharge.
>
> The assignee may not under this paragraph retain an amount in excess of its right in the receivable."

56. While the proposed wording was found to provide an acceptable basis for continuation of the discussion, various amendments were suggested. One suggestion was to replace the words "as between the assignor and the assignee" with the words "without prejudice to the rights of third parties", to the effect that the right of the assignee to claim payment from the debtor would be preserved under draft article 17. Another suggestion was that the reference to "discharge" might not be equally meaningful in all legal systems and that the notion of "payment" should be reintroduced, since payment was a familiar concept in all legal systems. Yet another suggestion was to insert in draft article 17 a provision dealing with the right of the assignee to claim payment before notification of the assignment. In response to that suggestion, it was pointed out that the right of the assignee to claim payment before notification had been established implicitly in draft article 10, while in such a situation a defence was provided to the debtor in draft article 18. Yet another suggestion was that the provisions of draft articles 16 and 17 might need to be clarified with respect to the possible interplay between the notification on the one hand and the request for payment on the other.

57. After discussion, the Working Group requested the Secretariat to prepare a revised version of paragraphs (1) and (2), taking into account the above-mentioned views and suggestions.

Paragraph (3)

58. The view was expressed that it was necessary to indicate more clearly in paragraph (3) a principle that was already implied in the current draft, namely that the assignee had a right in any proceeds of the assigned receivables received by another person in payment of the receivables, provided that the assignee had priority over that person. In order to achieve that result, it was suggested that paragraph (3) should be revised to read along the following lines:

> "If payment with respect to the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to whatever is or will be received by that person in total or partial discharge of the receivable. The assignee may not under this paragraph claim or retain an amount in excess of its right in the receivables."

59. As to the use of the word "priority", the view was expressed that it was too vague and should be supplemented by a reference to the priority rules of the draft Convention. However, it was observed that such an approach would inadvertently result in leaving unaddressed situations in which the right of the person receiving payment was based not on priority but on other considerations (e.g., good faith). In order to cover such situations, it was suggested that reference should rather be made to the assignee's "superior right under applicable law".

60. That suggestion was objected to on the ground that if, e.g., the proceeds of the receivables were received in good faith by a depositary institution and were commingled with other assets so that they could no longer be identified as proceeds of the receivable, the assignee should not be able to claim those proceeds, even if it had priority. It was not uncommon for such conflicts to arise in situations where, e.g., a dealer of equipment assigned to different financing institutions receivables arising from sales distinguished per type of equipment. Such conflicts could be usefully addressed by agreement between the various creditors (so-called "inter-creditor agreements"). It was observed, however, that in situations in which the proceeds of the receivables were deposited in a financing institution by or on behalf of the assignor, even under the proposed wording which referred to priority, the assignee would have to claim the proceeds from the assignor, who in fact would be the person that received payment, and not from the institution in which the proceeds might have been deposited.

61. With regard to the second sentence of the proposed wording, the concern was expressed that it might run counter to normal practice under which the assignee obtained payment of the full amount of the receivable and had to give account and return to the assignor or its other creditors any remaining surplus. In order to address that concern, the suggestion was made that the words "claim or" should be deleted.

62. After discussion, the Working Group requested the Secretariat to prepare a revised version of paragraph (3) taking into account the views expressed and the suggestions made.

Priority in proceeds of receivables

63. The Working Group next turned to the question whether the assignee's right in the proceeds of the assigned receivables should be a personal or a proprietary right (ad personam or in rem). It was widely felt that the issue was an important one, in particular in case the assignor became insolvent, and should be

addressed in the draft Convention. As to the specific way in which that issue could be addressed, differing views were expressed. One view was that the assignee's right in the proceeds of receivables should be treated as a right in rem. Such an approach would reduce the risk of non-payment of the assignee, since in case of insolvency the assignee could take the receivables out of the insolvency estate or, at least, be treated as a secured creditor. Such a result was said to have the potential of decreasing the cost of credit. It was widely felt, however, that the assignee's right in the proceeds of receivables should be cast as a right ad personam. It was pointed out that attempting to follow another approach would run counter to national law involving public policy considerations. It was further observed that, in view of its inconsistency with basic principles of national law in many jurisdictions, an approach based on a right in rem of the assignee in the proceeds of the assigned receivables could jeopardize the acceptability of the draft Convention to many States. After discussion, the Working Group concluded that the issue could not be addressed by a substantive law rule and decided to explore the possibility of devising a private international law rule.

64. A number of suggestions were made in that connection. One suggestion was that priority in proceeds of receivables should be left to the law of the country in which the assignor was located. Such an approach would be consistent with the approach followed in the context of priority with regard to receivables. In addition, it was observed that such an approach would result in the law governing priority being the law of the jurisdiction in which insolvency proceedings with regard to the assignor were most likely to be opened (i.e., the law of the country in which the assignor was located). That suggestion was opposed on the ground that it would not be acceptable to subject the rights of, e.g., a holder of a negotiable instrument or the beneficiary of a funds transfer or the person in possession of goods received in discharge of the assigned receivable, to the law of the country in which the assignor was located.

65. Another suggestion was that priority in proceeds of receivables should be left to the law of the country in which the proceeds were located. Such an approach would ensure that mandatory rules of law dealing, e.g., with rights in negotiable instruments or goods would prevail. That suggestion was also objected to on the ground that it would be inappropriate to subject to different laws different stages of the same transaction (i.e., payment in cash, then in the form of a negotiable instrument, then in the form of a funds transfer) or different forms of the same assets (i.e., receivables and different types of proceeds). In addition, it was pointed out that such an approach could inadvertently result in assignees structuring transactions in an artificial way in order to subject them to the law of a convenient jurisdiction ("forum shopping"). Yet another suggestion was that priority in proceeds of receivables should be made subject to the law of the country in which the assignee was located. That suggestion was objected to on grounds similar to those mentioned in opposition to the approach based on the location of the proceeds.

66. In view of the difficulty in addressing priority in all types of proceeds even by way of a private international law rule, the suggestion was made that the private international law rule to be prepared might address issues of priority only in proceeds that were receivables. Under such an approach, it would be easier for the Working Group to agree on a private international law rule along the lines of draft articles 23 and 24 that provided for the application of the law of the country in which the assignor was located. Alternatively, it was observed, priority in other types of proceeds could be addressed as well, presumably through a rule based on the location of the proceeds, e.g., in the form of negotiable instruments or goods.

67. The concern was expressed that, irrespective of the approach to be taken with regard to the law applicable to issues of priority in proceeds of receivables, the matter would remain unaddressed if the law applicable did not deal with it. In order to address that concern, it was suggested that a substantive law rule might be included in the draft Convention which would apply only in case the applicable law did not

deal with the matter. Alternatively, it was suggested, the draft Convention might provide alternative substantive law rules for contracting States to choose from. Both suggestions were objected to on the grounds that the approach suggested could inadvertently result in fragmentation of the law applicable and thus in increased uncertainty.

68. After discussion, the Working Group requested the Secretariat to prepare a draft text to address issues of priority in proceeds of receivables, taking into account the views expressed and the suggestions made.

Section II. Debtor

Article 18. Debtor's discharge by payment

69. The text of draft article 18 as considered by the Working Group was as follows:

"(1) Until the debtor receives notification of the assignment, it is entitled to discharge its obligation by paying the assignor.

"(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (5) of this article, it is discharged only by paying in accordance with the payment instructions set forth in the notification.

"(3) In case the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying in accordance with the payment instructions set forth in the first notification received by the debtor.

"(4) [In case the debtor receives notification of the assignment from the assignee,] the debtor is entitled to request the assignee to furnish within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, [the writing evidencing assignment or] any [other] writing emanating from the assignor and indicating that the assignment has taken place.

"(5) This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor."

Paragraph (1)

70. The Working Group adopted the substance of paragraph (1) unchanged.

Paragraph (2)

71. General support was expressed in favour of the principle embodied in paragraph (2) that, subject to the exceptions established in paragraphs (3) to (5), after notification the debtor could discharge its obligation only by paying the person identified in the notification.

72. However, the reference to payment instructions contained in paragraph (2) raised a number of concerns. One concern was that it could be read as giving the assignee the right to change the payment

terms contained in the original contract, in particular the country and the currency of payment, a result that would run counter to draft article 7, paragraph (2). Another concern was that a reference to payment instructions could inadvertently result in uncertainty as to whether the debtor could be discharged by paying the assignee in case of a notification containing incomplete instructions. It was generally agreed that that matter needed to be clarified by including in draft article 5 (f) a cross-reference to draft article 16, paragraph (3). However, the view was expressed that an exception had to be made in draft article 19 to the effect that a notification that would not include payment instructions could cut off the debtor's rights of set-off acquired after notification based on contracts with the assignor that were unrelated to the original contract.

73. In order to address those concerns, it was suggested that paragraph (2) should be aligned with draft article 16, paragraph (3), and the reference to "payment instructions" should be replaced by the words "the person or to the account or address identified in the notification".

74. The Working Group then went on to consider the relationship between the notification and the payment instructions. The view was expressed that a clear distinction should be drawn between the notification of the assignment and the payment instructions (in other terms, the request for payment). According to that view, the notification should identify the assigned receivables and the request for payment should identify the payee. In order to reflect that view, it was suggested that draft article 16, paragraph (3), should be revised along the following lines:

> "(3) Notification of the assignment shall be in writing and shall reasonably identify the receivables.
>
> "(4) A request for payment shall be in writing and, subject to article 7(2), shall identify the person to whom or for whose account or the address to which the debtor is required to make payment. A request for payment may be included in the notification or may be sent later."

75. Some support was expressed in favour of the approach suggested on the ground that it accurately reflected practice in which a clear distinction was drawn between notification and request for payment. It was stated that that approach was justified in view of the difference, both in purpose and in timing, between a notification and a request for payment. In addition, it was pointed out that, under its current formulation, draft article 16, paragraph (3), would inadvertently result in invalidating notifications that failed to identify the payee, a result that would hamper currently existing practices.

76. The suggested approach was objected to on a number of grounds. It was stated that it unnecessarily formalized a distinction that had practical importance only in some practices. For example, it was observed that in factoring transactions a notification normally included a request for payment to the assignee. It was also pointed out that even in those transactions in which assignees notified debtors of the assignment without requesting payment to be made to them, a notification would normally include an instruction that the debtor should keep paying the assignor. Such notifications were said to be merely intended to cut off any rights of set-off that the debtor might acquire based on dealings with the assignor that were unrelated to the original contract. In addition, it was observed that such an approach could inadvertently result in an increase in the cost of credit, since, if notification did not specify the assignee or the person authorized to issue payment instructions on behalf of the assignee, assignees would always have to send a request for payment. Moreover, such an approach would complicate the matter of the discharge of the debtor's obligation, in particular in case the debtor received several notifications and several requests for payment.

77. In the discussion, the question was raised as to whether payment to the assignor with the consent of the assignee, which could take place, e.g., in the context of situations involving a prolonged retention of title, could discharge the debtor's obligation. In response, it was observed that, under paragraph (1), in the absence of notification of the assignment the debtor had the right to discharge its obligation by paying the assignor. In the case of notification, the same result could be reached through a combined application of paragraph (2) and draft article 16, paragraph (3), since the assignee could request that payment be made to the assignor.

78. After discussion, the Working Group adopted the substance of paragraph (2), subject to replacing the reference to payment instructions with the words "the person or to the account or address identified in the notification".

Paragraph (3)

79. It was noted that paragraph (3) was intended to cover situations in which the debtor received several notifications relating to more than one assignment of the same receivables made by the same assignor. It was generally agreed that in such situations the debtor should be able to discharge its obligation by paying the person identified in the first notification. It was stated that the debtor should be provided with an easy mechanism to discharge its obligation and could not be expected to find out who among several assignees of the same receivables was the rightful claimant. In response to a question, it was explained that the issue as to whether the assignee who received payment by the debtor could retain the proceeds of payment was not addressed in draft article 18 but in the provisions dealing with priority. A suggestion to revise paragraph (3) in order to allow the debtor to discharge its obligation by paying the person identified in any notification was not met with approval.

80. Noting that paragraph (3) was not intended to cover situations in which several notifications related to one and the same assignment, the Working Group considered the question whether the paragraph should be revised in order to address the issue of corrections of mistakes or changes in payment instructions contained in a notification. It was pointed out that a rule along the lines of paragraph (3) could inadvertently result in the assignee being unable to correct mistakes made in the first notification or to change its payment instructions.

81. As to the specific way in which those issues should be addressed, a number of suggestions were made. One suggestion was that the issuer of the first notification should be allowed to correct or to change it. That suggestion was objected to on the ground that, if the issuer of the first notification was the assignor, it should not be allowed to change the payment instructions given in the notification, since the assignor was divested of its rights in the receivables. It was thus suggested that the right to correct or to change the payment instructions should be reserved for the assignee. That suggestion was also objected to on the ground that, if the first notification was given by the assignor, only the assignor could correct or change it. Both of the above-mentioned suggestions were objected to on the ground that a rule subjecting the debtor's discharge to corrections or changes made in the notification by the assignor or the assignee would inappropriately require the debtor to determine the correct or accurate content of the notification. Such a result would place on the debtor the risk of loss for mistakes made by, or changes in the intentions of, the assignor or the assignee and could thus jeopardize the certainty needed in a rule dealing with the debtor's protection. It was therefore suggested that the matter should be left to be resolved by national law and practice.

82. In view of its discussion of the issue of payment instructions, the Working Group decided that a reference to the assignee should be added in draft article 16, paragraph (3). It was widely felt that the

debtor needed to know, in addition to the identity of the payee, the identity of the assignee who could issue payment instructions. The suggestion to also refer to the person authorized by the assignee to issue payment instructions was objected to on the ground that the assignee's right to authorize someone else to issue payment instructions was sufficiently based on agency law and did not need to be explicitly mentioned in draft article 16, paragraph (3).

83. Still with regard to draft article 16, paragraph (3), it was stated that the notification should be kept as simple as possible in order to avoid that an incomplete notification would be invalid. The validity of the notification, it was said, should depend exclusively on the identification of the assignee and the receivables assigned, while identification of the payee or any payment instructions should not constitute a necessary element. It was, therefore, pointed out that it would be necessary to reconsider the wording of draft article 16, paragraph (3).

84. In the discussion, the question was raised as to whether paragraph (3) was inconsistent with draft article 17 which established the right of each assignee to payment. In response, it was pointed out that, by allowing the debtor to discharge its obligation through payment to the person identified in the first notification, the paragraph established a defence that the debtor could raise against all other assignees.

85. After discussion, the Working Group adopted the substance of paragraph (3), subject to replacing the reference to payment instructions by the words "the person or to the account or address identified in the first notification received".

Paragraph (4)

86. While general support was expressed in favour of the substance of the rule contained in paragraph (4), a number of suggestions were made. One suggestion was that the assignee should be under a general obligation to attach to the notification adequate proof of the assignment. That suggestion was objected to on the ground that such an approach would inadvertently result in an increase in the cost of credit.

87. Another suggestion was that the words "and until" should be inserted after the word "unless" in order to make it clear that the proof of the assignment should be submitted by the assignee to the debtor “within a reasonable period of time” and prior to the time of payment. That suggestion did not attract support in view of the general understanding that, under paragraph (4), the debtor who had requested proof of the assignment should suspend payment until such proof had been received or the reasonable period had elapsed. It was generally felt that the suggested wording might be misinterpreted as allowing the debtor to discharge its payment obligation by paying the assignor during the "reasonable period" referred to in paragraph (4).

88. Yet another suggestion was that the scope of the paragraph should be expanded to cover defective notifications and thus that the paragraph should be rephrased along the following lines:

> "In case the debtor receives payment instructions which are incomplete, unclear or otherwise defective, the debtor is entitled to request the assignee or the person identified in the notification as the person entitled to issue payment instructions to furnish within a reasonable period of time such information as is needed to complete, clarify or correct such payment instructions and, unless the assignee or such person entitled to issue payment instructions does so, the debtor is discharged by paying the assignor."

89. It was generally felt that adding the proposed wording was unnecessary, since a defective notification, i.e. a notification that did not contain all the elements described in draft article 16, paragraph (3), would be ineffective. It was generally agreed that the opening words ("In case the debtor receives notification of the assignment from the assignee") adequately reflected the need to protect the debtor in case notification was received by a person unknown to the debtor and should thus be retained.

90. As a matter of drafting, it was suggested that the reference to the proof of the assignment being "furnished" by the assignee should be avoided since, in certain jurisdictions, it might be interpreted as prescribing that the original documents evidencing the assignment should be delivered to the debtor, to the exclusion of any copy of such documents. It was generally felt that words such as "exhibited", "displayed" or "provided" would be preferable. For the same reasons, it was agreed that, pending a final decision as to the form of the assignment, the words between square brackets ("the writing evidencing the assignment or") should be deleted. Subject to those modifications, the Working Group adopted the substance of paragraph (4).

Paragraph (5)

91. General support was expressed in favour of the principle embodied in paragraph (5) that draft article 18 was not intended to exclude other grounds for discharge of the debtor that might exist under law applicable outside the draft Convention.

92. However, the view was expressed that the words "any other ground" might not make it sufficiently clear that the paragraph referred to the provisions of applicable law outside the draft Convention,

including contractual and non-contractual law. It was generally agreed that such an interpretation, in conformity with the interpretation given of references to "any other ground" in the Ottawa Convention, could appropriately be given in a commentary to the draft Convention, to be prepared at a later stage.

93. A related view was that the words "to the person entitled to payment" might raise some uncertainty as to how the debtor was to determine who was the rightful claimant. It was generally felt, however, that the reference being made to payment "to the person entitled to payment" was particularly useful and provided the necessary degree of flexibility by establishing a "safe harbour rule" under which, irrespective of whether payment was made in accordance with the other provisions of draft article 18, the debtor could obtain discharge of its obligation by paying the rightful claimant. After discussion, the Working Group adopted the substance of paragraph (5) unchanged.

Article 19. Defences and rights of set-off of the debtor

94. The text of draft article 19 as considered by the Working Group was as follows:

> "(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 arising from the original contract [or from a decision of a judicial or other authority giving rise to the assigned receivable] of which the debtor could avail itself if such claim were made by the assignor.
>
> "(2) The debtor may raise against the assignee any rights of set-off arising from contracts between the assignor and the debtor other than the original contract [or from a decision of a judicial or other authority other than that giving rise to the assigned receivable], provided that they were available to the debtor at the time notification of the assignment was received by the debtor.
>
> "(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 12 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee."

Paragraph (1)

95. The Working Group found the substance of the paragraph to be generally acceptable. It was pointed out, however, that the term "defences" might insufficiently cover rights to raise a counter-claim arising under the original contract. It was thus decided that the words "or rights of set-off" should be inserted after the words "all defences" in paragraph (1). Subject to that change, the Working Group adopted the substance of paragraph (1).

Paragraph (2)

96. While support was expressed in favour of the principle that notification should cut off certain rights of set-off that the debtor might have against the assignee, a number of concerns were expressed with regard to the current formulation of paragraph (2). One concern was that the paragraph might inappropriately limit the rights of set-off arising from contractual sources, thus excluding rights of set-off arising from non-contractual sources or rights based on law or a judicial or other decision. In order to address that concern, it was suggested that the words "arising ... the assigned receivable]" should be deleted and that paragraph (2) should be rephrased to refer to "any other" rights of set-off. That suggestion was broadly supported.

97. Another concern was that the reference to the rights of set-off being "available" to the debtor when the notification was received might be insufficiently precise regarding the required degree of maturity of a right of set-off at the time of notification. In order to address that concern, the suggestion was made that rights of set-off should not only be "available" but also "actual and ascertained" at the time when notification was received. That suggestion was objected to on the ground that it would inappropriately limit the rights of set-off of the debtor to those in which the amount of the counter-claim was fixed at the time of notification. It was suggested that such an approach would unnecessarily interfere with national law on set-off, a matter on which national systems were said to differ widely.

98. As to how rights of set-off arising prior to notification and not quantified at the time when notification was received might be accommodated by the draft Convention, it was suggested that a distinction should be drawn between rights of set-off arising from contracts related ("connex") to the original contract and those rights of set-off arising from contracts unrelated to the original contract. Accordingly, the former should be "available" even if they were not quantified at the time of notification, while the latter should be "available" only if they were quantified at the time of notification. It was generally felt, however, that it might not be feasible to unify in the context of draft article 19 the various legal regimes governing set-off. After discussion, the Working Group decided to leave the matter to the applicable law. In that connection, the suggestion was made that paragraph (2) should then specify which law would be applicable to set-off. The Working Group generally agreed to defer its discussion on the law applicable to set-off until it had completed its review of draft article 30.

99. In the discussion, the view was expressed that in the context of paragraph (2) an exception should be made to the rule contained in draft article 16, paragraph (3). It was stated that such an exception would result in a notification that did not identify the payee cutting off rights of set-off that might become available to the debtor after notification. It was pointed out that such an approach would reflect current practice and failure to adopt it could hamper such practices and adversely affect the availability and the cost of credit.

100. While some support was expressed for the above suggestion, a number of objections were raised. It was observed that the suggested approach would jeopardize the certainty needed for debtors to the extent that debtors, including consumer-debtors, would inappropriately be required to know that a notification had different effects for the purposes of the various provisions of the draft Convention. In addition, it was pointed out that the suggested approach would not provide the degree of certainty required by assignees (i.e., financiers), since they would normally identify the payee in the notification, along the lines of draft article 16, paragraph (3), as adopted by the Working Group. In response, it was observed that, while it would be normal practice to identify the payee in the context of certain transactions (e.g., factoring), a notification would not always contain an identification of the payee in the context of other practices, under which notification was merely intended to cut off the debtor's rights of set-off that might arise after notification based on a source other than the original contract. For that reason, draft article 16, paragraph (3), requiring identification of the payee in the notification would need to be reconsidered. After discussion, the Working Group decided that paragraph (2) should include within square brackets language reflecting the above-mentioned suggestion for consideration at a future session and referred the specific formulation to the drafting group. The decision was made on the understanding that draft article 16, paragraph (3), might need to be reconsidered at a later stage. Subject to that modification and the modification mentioned in paragraph 96 above, the Working Group adopted the substance of paragraph (2).

Paragraph (3)

101. The view was expressed that draft article 12 would only be acceptable if the debtor could raise against the assignee any rights of set-off that might be available to the debtor against the assignor for violation of an anti-assignment clause. The suggestion was thus made that paragraph (3) should be either deleted or revised to reflect that view. The prevailing view, however, was that, in case of an assignment made in breach of an anti-assignment clause, the debtor could claim damages only from the assignor and not from the assignee. Such an approach was generally found to be consistent with the approach followed in draft article 12, according to which any liability existing under the law applicable outside the draft Convention for the violation of an anti-assignment clause by the assignor should not be extended to the assignee, since that could render the assignment of no value to the assignee.

102. As a matter of drafting, it was suggested that the reference to paragraph (2) contained in paragraph (3) should be deleted, since paragraph (3) referred to defences and rights of set-off arising because of a violation of anti-assignment clauses included in the original contract. That suggestion was objected to on the ground that anti-assignment clauses might be agreed upon by the assignor and the debtor in an agreement other than the original contract. After discussion, the Working Group adopted the substance of paragraph (3) unchanged.

Article 20. Agreement not to raise defences or rights of set-off

103. The text of draft article 20 as considered by the Working Group was as follows:

> "(1) Without prejudice to [the law governing consumer protection] [public policy requirements] in the State in which the debtor is located, the debtor may agree with the assignor in writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 19. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.
>
> "(2) The debtor may not agree not to raise:
>
> (a) defences arising from fraudulent acts on the part of the assignee or the assignor;
>
> (b) the right to contest the validity of the original contract.
>
> "(3) Such an agreement may only be modified by written agreement. [After notification, such a modification is effective as against the assignee subject to article 21(2).]"

Paragraph (1)

104. Various views were expressed as to whether the opening words of the first sentence should refer to the law governing consumer protection or to public policy requirements. One view was that the reference to public policy requirements should be retained, since it would parallel existing rules under many national laws. A related view was that both references to consumer protection and to public policy requirements should be retained in order to ensure maximum protection of the debtor. The prevailing view, however, was that the reference to public policy should be avoided, since it would inappropriately widen the scope of the exceptions to the provision and create uncertainty as to its contents. Moreover, it was pointed out that the question of public policy was sufficiently addressed in the context of draft articles 32 and 33 dealing with mandatory rules and public policy respectively.

105. As to the reference to consumer-protection legislation, the view was expressed that it should be limited to: statutory law (thus excluding the application of case law, the contents of which might be difficult to ascertain); and to the law applicable to individuals, i.e., natural persons (thus excluding the law applicable to legal persons, although certain associations or small unincorporated businesses might be treated as "consumers" under consumer-protection legislation in certain countries). It was suggested that elements of a definition of "consumer" for the purposes of draft article 20 could be drawn from draft article 4 (a), which dealt with assignments made "for personal, family or household purposes".

106. It was widely felt, however, that it would be overly ambitious for the draft Convention to attempt to unify notions such as "consumer" or "law governing consumer protection" by way of a substantive law provision. Any attempt to define "consumer" in the context of draft article 20 or more generally for the purposes of the draft Convention would deviate from the approach taken in previous international legal instruments adopted by UNCITRAL. After discussion, the Working Group agreed that it would be preferable for the draft Convention to deal with the matter of consumer protection by way of a conflict-of-laws rule under which the definition of "consumer", as well as the scope and contents of any "law governing consumer protection", would be determined by the law of the country in which the debtor was located.

107. As to the second sentence of paragraph (1), while the view was expressed that it merely stated the obvious consequence of the rule contained in the first sentence, it was generally felt that it should be maintained for the purpose of clarity. After discussion, subject to the above-mentioned deletion of the reference to public policy requirements, the Working Group adopted the substance of paragraph (1) unchanged.

Paragraph (2)

Opening words

108. As a matter of drafting, it was generally agreed that the words "the debtor may not agree not to raise" should be replaced by wording such as "the debtor may not agree to exclude".

Subparagraph (a)

109. The view was expressed that the reference to defences arising from fraudulent acts on the part of the assignor should be deleted. In support, it was stated that such a reference might introduce uncertainty in a number of financial transactions by requiring the assignee to investigate whether the original contract might be vitiated by fraud on the part of the assignor. It was also stated that, in the context of paragraph (2), it was important to grant protection to the assignee who had acted in good faith. It was generally felt that the reference to "fraudulent acts on the part of the assignee" would sufficiently address the need to cover both cases where fraud had been committed by the assignee alone or by the assignee in collusion with the assignor. After discussion, it was decided that subparagraph (a) should read along the following lines: "defences arising from fraudulent acts on the part of the assignee".

Subparagraph (b)

110. A concern was expressed that precluding the debtor from agreeing not to raise "the right to contest the validity of the original contract" might run counter to existing practice, which was said to be essential in the context of financing of export transactions and under which debtors would agree not to raise defences arising from the possible invalidity of the original contract. Such practice was consistent with

the need to preserve the assignee from having to investigate the validity of the underlying original contract.

111. It was recalled that paragraph (2) had been inspired by article 30, paragraph (1), of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"; see A/CN.9/434, para. 211) and was intended to parallel in the context of assignment of receivables the legal regime of negotiable instruments. The discussion focused on the ways in which such a parallel might be established. Various views were expressed in that respect.

112. One view was that the matter might be dealt with by way of a general reference to the law of negotiable instruments. Pursuant to that view, a proposal was made that subparagraph (b) should be rephrased along the following lines: "The debtor may not agree not to raise against the assignee defences or rights of set-off which the debtor would be entitled to raise if the receivable were embodied in a negotiable instrument issued in the State in which the debtor is located". It was stated that, should the proposed wording be retained as stating a general rule, subparagraph (a) as currently drafted could be mentioned as an illustration of that rule. That proposal was supported on the ground that it would accommodate the above-mentioned practice in the financing of export transactions by validating clauses under which debtors would agree not to raise defences arising from the possible invalidity of the original contract. A related proposal was that paragraph (2) might merely refer to article 30, paragraph (1), of the Bills and Notes Convention, which would thus be incorporated by reference into the draft Convention.

113. However, doubts were expressed as to whether it would be appropriate to regulate the issue by way of a mere reference to the law of negotiable instruments, which might not in all countries be similar to the legal regime established by the Bills and Notes Convention. Doubts were also expressed as to whether a reference to the law of negotiable instruments was consistent with draft article 4 (b), which excluded the application of the draft Convention to transfers of receivables by endorsement or delivery of a negotiable instrument. In addition, it was stated that referring to the law governing negotiable instruments might run counter to the will of the parties, since their decision not to incorporate their receivables in negotiable instruments might indicate their intent not to make their transaction subject to the law of negotiable instruments. In that context, it was stated that paragraph (2) as currently drafted should be regarded as establishing the minimum level of protection for the debtor. With a view to preserving that minimum level of protection, it was suggested that the words "to the extent that it would contravene the public policy of the State in which the debtor is located" might be added at the end of subparagraph (b).

114. Another view was that paragraph (2) should be replaced by substantive provisions drawn from article 30, paragraph (1) (a) and (c), of the Bills and Notes Convention. While providing the debtor with a level of protection similar to that currently embodied in paragraph (2), such a substantive provision could avoid any reference to the "validity" of the original contract, a reference which might prove ambiguous in view of the various concepts (e.g., misrepresentation, error and other defences) that might be associated with it in certain legal systems.

115. With a view to reflecting the possible contents of substantive provisions drawn from article 30, paragraph (1), of the Bills and Notes Convention, the following text was proposed as a substitute for paragraph (2) (b):

"(b) defences based on the debtor's incapacity to incur liability on the original contract;

> "(c) where the original contract is in writing, defences based on the fact that the debtor signed the original contract without knowledge that the debtor's signature made the debtor a party to the contract, provided that such lack of knowledge was not due to the debtor's negligence and provided that the debtor was fraudulently induced to sign".

116. It was observed that the proposed new subparagraphs (b) and (c) were based solely on the provisions of article 30, paragraph (1) (c), of the Bills and Notes Convention. Thus, article 30, paragraph (1) (a), of that Convention, which empowered a party to set up against a holder of a negotiable instrument "defences under paragraph 1 of article 33, article 34, paragraph 1 of article 35, paragraph 3 of article 36, paragraph 1 of article 53, paragraph 1 of article 57, paragraph 1 of article 63 and article 84 of [the Bills and Notes] Convention", was not reflected in the proposal. It was explained by the proponents of the new subparagraphs that the defences listed in article 30, paragraph (1) (a), of the Bills and Notes Convention were either not applicable in the context of assignment transactions or, if applicable, were of the kind that should be subject to waiver by the debtor. While it was widely felt that further deliberation might be needed at a future session regarding the extent to which the draft Convention should parallel the approach taken in article 30, paragraph (1), of the Bills and Notes Convention, the Working Group agreed that the proposed text provided an appropriate basis for continuation of the discussion.

117. Wide support was expressed for new paragraph (2) (b), which was said to dispel uncertainty by avoiding the reference to the notion of the "validity" of the original contract. With respect to the proposed reference to the "incapacity" of the debtor to incur liability, it was generally felt that the text should make it clear that it was also intended to refer to the possible lack of authority of the debtor to incur liability, a concept which might not be encompassed by the notion of "incapacity" in all legal systems. On that assumption, the Working Group adopted the substance of new paragraph (2) (b) and referred it to the drafting group.

118. Support was also expressed in favour of new paragraph (2) (c). The view was expressed, however, that the proposed text might need to be considered more carefully at a future session in the light of the need to ensure an appropriate level of protection of the debtor. In particular, it was stated that imposing upon the debtor the cumulative obligation to prove that it had not been negligent and that it had been fraudulently induced to sign might be excessively burdensome. As a matter of drafting, it was stated that the proposed text of new paragraph (2) (c) placed too much emphasis on form requirements, by referring to the original contract being "in writing" and to the "signature" of the debtor. It was thus suggested that, instead of focusing on how form requirements had been met by the original contract, the provision should focus on how the consent of the debtor had been expressed. With a view to accommodating the above-mentioned views and concerns, it was suggested that the proposed new subparagraph (c) might be redrafted as follows:

> "(c) defences based on the fact that the debtor consented to the original contract without knowledge that the debtor's consent made it a party to the contract, provided that such lack of knowledge was not due to the debtor's negligence or provided that the debtor was fraudulently induced to consent".

119. The Working Group took note of the suggested amendment. After discussion, it was decided that the original text of the proposed paragraph (2) (c) referred to in paragraph 115 above should be placed in square brackets for continuation of the discussion at a future session.

Paragraph (3)

120. As a matter of drafting, it was generally felt that the words "such an agreement" should be replaced by the words "an agreement referred to in paragraph (1)". It was also felt that the drafting group might need to consider whether the text of paragraph (3) might be better placed before paragraph (2).

121. It was generally agreed that there was no need to limit the scope of the provision to the case where a modification of the agreement occurred after notification of the assignment. With a view to covering also the case where a modification occurred before notification, it was decided that the second sentence should be redrafted as follows: "The effect of such a modification is determined by article 21". After discussion, the Working Group adopted the substance of paragraph (3) as amended.

Article 21. Modification of the original contract [or of the receivable]

122. The text of draft article 21 as considered by the Working Group was as follows:

> "(1) An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's right to payment is effective as against the assignee and the assignee acquires corresponding rights.
>
> "(2) After notification of the assignment, an agreement under paragraph (1) of this article is effective as against the assignee and the assignee acquires corresponding rights,
>
> "Variant A
>
> if it is made in good faith and in accordance with reasonable commercial standards or, in case of a modification relating to a receivable fully earned by performance, it is consented to by the assignee.
>
> "Variant B
>
> if the modification is provided for in the assignment or is later consented to by the assignee.
>
> "[(3) Paragraphs (1) and (2) of this article do not affect any right of the assignee against the assignor for breach of an agreement between the assignor and the assignee that the assignor will not modify the original contract without the assignee's consent.]
>
> "[(4) In case a receivable is confirmed or determined in a decision of a judicial or other authority, it may be modified only through a decision of that authority.]"

Paragraph (1)

123. While support was expressed in favour of the substance of paragraph (1), a number of suggestions of a drafting nature were made. One suggestion was that reference should be made, instead of to "the assignee's right to payment", to the contents or the characteristics of the receivable. That suggestion was broadly supported. Another suggestion was that the last words of paragraph (1) could be usefully clarified by a reference to the person as against which the assignee acquired corresponding rights. It was agreed that those words were generally acceptable to the extent that they were intended to ensure that the assignee acquired the rights arising under the modified contract as against the debtor. It was widely

felt, however, that, in order to avoid creating any uncertainty as to the meaning of those words, language should be included in paragraph (3) so as to ensure that any modification of the original contract agreed upon between the assignor and the debtor would not affect the rights of the assignee against the assignor. Subject to the above-mentioned change to paragraph (1) and the modification of paragraph (3) (see para. 132 below), the Working Group adopted the substance of paragraph (1).

Paragraph (2)

124. As a matter of drafting, it was suggested that the chapeau of paragraph (2), rather than focusing on the exceptional cases in which a modification after notification was effective as against the assignee, should be reformulated to state the rule that after notification a modification would not be effective as against the assignee. Language along the following lines was suggested: "After notification, an agreement between the assignor and the debtor is ineffective as against the assignee unless". The suggestion was broadly supported on the understanding that in those exceptional cases in which a modification would be effective as against the assignee even after notification, the assignee would acquire the rights arising under the modified contract as against the debtor.

125. The Working Group considered the question of which of the two variants contained in paragraph (2) was preferable. In favour of variant A, it was stated that it was sufficiently flexible to ensure that, while a modification would need to be consented to by the assignee in case of a fully earned receivable, the assignee's consent would not be necessary for every minor modification of the original contract if the receivable was not fully earned. It was observed that such flexibility was necessary in particular in project financing where requiring the parties to the original construction contract to obtain the consent of the assignee to every minor modification could be disruptive for the project and burdensome for the assignee. In addition, it was said that the same degree of flexibility was necessary in financial restructuring agreements in which, in return for a change in the interest rate or the date of maturity of debts, receivables were offered as security. In that context, the assignor, who was allowed to manage its business, should not be required to seek the consent of the assignee to every little modification of the restructuring agreement.

126. While the need to preserve flexibility in the above-mentioned cases was generally recognized, the view was widely shared that variant A introduced uncertainty. It was stated that such uncertainty would be caused by the use of the terms "good faith" and "reasonable commercial standards", which were not universally understood in the same manner. In addition, it was observed that an approach along the lines of variant A might encourage fraud by the assignor. Moreover, it was pointed out that parties to construction or to restructuring agreements did not need the protection provided by variant A, since they would normally address the issue of modifications in their contracts. As to the requirement that the assignee consent to a modification in case of a fully earned receivable, it was stated that it did not adequately protect the assignee, since assignees often extended credit on the basis of unearned or partly earned receivables (e.g., in case of multiple shipments over a long period of time or post-invoice contractual obligations).

127. The Working Group thus focused its attention on variant B. It was widely felt that variant B appropriately reflected the cardinal principle that, after notification of the assignment, a modification of the original contract made without the consent of the assignee could not be effective as against the assignee. However, in order to accommodate the need for some flexibility, a number of suggestions were made. One suggestion was that variant B could be usefully revised to provide that consent by the assignee should not be withheld unreasonably. There was broad support in the Working Group for that suggestion.

128. Another suggestion was that variant B could be restructured so as to list three situations in which a modification would be effective as against the assignee, i.e. if the modification was provided for in the original contract or if it was later consented to by the assignee or if a reasonable assignee would have consented to the modification. While that suggestion received strong support, a number of concerns were expressed. One concern was that such an approach might inadvertently result in assignees having to look at a large number of contracts in order to determine whether a provision was included therein dealing with contract modification. Another concern was that, in order to ensure that the modification would be effective as against the assignee, the debtor would have to determine whether a "reasonable" assignee would have consented to it, a matter that would not always be easy for the debtor to determine.

129. Yet another suggestion was that the consent of the assignee should be required only in case a modification of the original contract resulted in "material adverse effects" on the rights of the assignee. While some support was expressed in favour of that suggestion, it was objected to on the ground that it would inappropriately limit the situations in which the consent of the assignee would be required. The reference to the consent of a "reasonable assignee" was said to be preferable, since it appeared to be less restrictive in that respect.

130. In order to accommodate the views and concerns expressed, language along the following lines was proposed:

> "After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective unless:
>
> > "(a) the assignee consents to it; or
> >
> > "(b) the receivable is not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification."

131. Broad support was expressed in favour of the suggested revision of paragraph (2). In response to a number of questions that were raised, it was observed that: the exact meaning of the word "ineffective" could usefully be clarified in a commentary to the draft Convention; reference should be made to modifications provided for in the original contract, so as to ensure that both the debtor and the assignee would be able to know about the possibility of modifications; and reference should be made to fully earned receivables, on the understanding that such reference indicated the time when an invoice was issued even if the relevant contract had only been partially performed. After discussion, the Working Group adopted the substance of paragraph (2) as amended.

Paragraph (3)

132. The Working Group recalled the decision taken in the context of its discussion of paragraph (1) to revise paragraph (3) so as to ensure that a modification agreed upon between the assignor and the debtor did not affect the assignee's rights against the assignor (see para. 123 above). It was widely felt that paragraph (3) needed to be expanded so as to cover any right of the assignee as against the assignor for breach of an agreement between them.

133. As to the exact way in which that understanding could be expressed, a number of suggestions were made. One suggestion was that reference should be made, instead of to rights of the assignee for breach of an agreement not to modify the original contract, to paragraphs (1) and (2) being without prejudice to

any agreements between the assignor and the assignee. Another suggestion was that the words "that the assignor ... consent" contained in paragraph (3) should be deleted. That suggestion received broad support. It was stated that a modification of the original contract could be a breach of an agreement between the assignor and the assignee, even if that agreement did not include a specific clause precluding the assignor from modifying the original contract. Subject to that change, the Working Group adopted the substance of paragraph (3).

Paragraph (4)

134. It was generally agreed that paragraph (4) should be deleted. It was stated that a judgement creditor and a judgement debtor should be allowed to settle their dispute by agreement. While the courts might not be bound by such a settlement agreement, the parties thereto were. In addition, it was observed that the paragraph might be misinterpreted as interfering with the judicial process in that it might be read as suggesting that a higher court could not reverse the decision of a lower court. After discussion, the Working Group decided that the paragraph should be deleted. In line with that decision, the Working Group decided that the reference to the original receivable in the title of draft article 21 should be deleted.

New paragraph (4)

135. The view was expressed that, for the same reasons mentioned in the context of the Working Group's discussion of draft article 19 (see paras. 99-100 above), a new paragraph (4) should be inserted within square brackets in draft article 21. The Working Group decided that new paragraph (4), to be included in draft article 21 for consideration at a future session, should read along the following lines: "For the purposes of this article, the notification of the assignment is effective even if it does not identify the person to whom or the account or address to which the debtor is required to make payment."

Article 22. Recovery of advances

136. The text of draft article 22 as considered by the Working Group was as follows:

> "Without prejudice to [the law governing consumer protection] [public policy requirements] in the country in which the debtor is located and the debtor's rights under article 19, failure of the assignor to perform the original contract [or the decision of a judicial or other authority giving rise to the assigned receivable] does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee."

137. The view was expressed that the title of draft article 22 insufficiently reflected the contents of the provision. It was stated that the reference to "a sum paid by the debtor" was intended to cover not only "advance" payments but more generally any payment made by the debtor to the assignor or the assignee. For example, in the case where the original contract was to be performed in successive instalments, the failure of the assignor to perform an instalment should not entitle the debtor to recover any sum paid upon performance of a previous instalment. After discussion, the Working Group decided that the title of draft article 22 should read "Recovery of payments".

138. With respect to the substance of the draft article, the view was expressed that the words "and the debtor's rights under article 19" should be deleted as superfluous. In support of deletion, it was stated that the debtor's rights to raise defences or rights of set-off would only apply where the debtor wished to

reduce or avoid payments that were yet to be made. Such rights were said to be irrelevant in the context of draft article 22, since where a sum had already been paid, defences or rights of set-off of the debtor under draft article 19 could not entitle the debtor to recover any such sum from the assignee. The view was expressed, however, that deleting the reference to draft article 19 might inappropriately weaken the position of the debtor, particularly in case of fraudulent collusion between the assignor and the assignee. After discussion, the Working Group decided to maintain the reference to draft article 19 in draft article 22, subject to further deliberation at a future session.

139. With regard to the reference to public policy, support was expressed in favour of the view that it should be retained. It was stated that dealing with the issues of public policy and other mandatory rules of law only in the context of draft articles 32 and 33 might inappropriately limit the extent to which the draft Convention would defer to the mandatory law applicable outside the draft Convention. It was stated in response that, while draft articles 32 and 33 were placed in Chapter VI dealing with conflicts of laws, they were not intended in any way to limit the extent to which the draft Convention would take into account the concerns of States regarding public policy and other mandatory rules. In addition, it was said that those draft articles were intended merely to ensure that public policy and other mandatory rules would apply through the mechanism of conflict-of-laws rules, thus providing the widest recognition of legislation applicable outside the draft Convention. Moreover, it was pointed out that by avoiding multiple references to the notions of "public policy" and "mandatory rules" in the draft Convention, draft articles 32 and 33 were useful in limiting the risk that such notions might receive different interpretations in the context of different articles of the draft Convention. After discussion, it was generally agreed that the text of draft article 22 should mirror the provisions of draft article 20, and that, in line with the decision taken with respect to draft article 20, paragraph (1) (see para. 107 above), the words "[public policy requirements]" should be deleted. Subject to that change, the Working Group adopted the substance of draft article 22.

CHAPTER V. SUBSEQUENT ASSIGNMENTS

General remarks

140. After concluding its discussion of Section II of Chapter IV of the draft Convention, owing to the lack of sufficient time, the Working Group decided to defer consideration of Section III to a future session and to have an initial exchange of views on Chapter V. It was generally agreed that the purpose of that exchange of views would be to identify the issues to be addressed at a future session.

141. It was generally felt that subsequent assignments (i.e., assignments by the initial or any other assignee to subsequent assignees) should be covered by the draft Convention. It was stated that such assignments were made in a number of practices, including international factoring, securitization, project financing, restructuring of financially troubled businesses and refinancing transactions. Facilitation of such practices, it was observed, should be at the core of a text which was aimed at increasing the availability of lower-cost credit.

142. In the discussion, the view was expressed that the Working Group might consider establishing rules dealing with order of priority among several assignees of the same receivables by the same assignor in the case of an assignment by way of security. It was pointed out that in some legal systems a second assignment of the same receivables was invalid, thus not permitting the use of receivables by the assignor as security for credit obtained from several successive assignees.

Article 25. Scope

143. The text of draft article 25 as considered by the Working Group was as follows:

"This Convention applies to:

"(a) assignments of receivables by the initial or any other assignee to subsequent assignees ("subsequent assignments") that are governed by this Convention under article 1, notwithstanding that the initial or any other previous assignment is not governed by this Convention; and

"(b) any subsequent assignment, provided that the initial assignment is governed by this Convention,

as if the subsequent assignee were the initial assignee."

Subparagraph (a)

144. It was noted that subparagraph (a) was intended to clarify that subsequent assignments that fell within the scope of the draft Convention were governed by the draft Convention, even if the initial assignment fell outside the scope of the draft Convention (e.g., a subsequent assignment in a securitization transaction may be covered even if the initial assignment was a domestic assignment of domestic receivables).

145. A number of observations were made. One observation was that subparagraph (a) appeared to be inconsistent with the principle of continuatio juris embodied in subparagraph (b). Another observation was that, in order to more accurately reflect the idea that a subsequent assignment falling within the scope of the draft Convention should be covered, even if the initial assignment was not covered, reference should be made to Chapter I as a whole.

Subparagraph (b)

146. Support was expressed for the principle of continuatio juris embodied in subparagraph (b), i.e. that the regime governing the initial assignment should govern any subsequent assignment. However, it was observed that subparagraph (b) could operate well if the initial receivable was international, since any subsequent assignee would be able to predict that the draft Convention would apply to subsequent assignments by virtue of the internationality of the receivable. To the contrary, in case the initial receivable was domestic, the application of subparagraph (b) might not produce satisfactory results, since a subsequent assignee would not be able to predict the application of the draft Convention to a domestic assignment of a domestic receivable. It was thus widely felt that subparagraph (b) needed to be amended in order to avoid a situation in which the draft Convention would apply to domestic assignments of domestic receivables. In order to achieve the desired result, it was suggested that, at the end of subparagraph (b), language along the following lines should be added: "provided that in cases in which the receivable was a domestic receivable a subsequent assignment in which the assignor and the assignee are located in the same State as the debtor is not governed by this Convention".

Article 26. Agreements limiting subsequent assignments

147. The text of draft article 26 as considered by the Working Group was as follows:

"(1) A receivable assigned by the initial or any subsequent assignee to a subsequent assignee is transferred notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the initial or any subsequent assignor's right to assign its receivables.

"(2) Nothing in this article affects any obligation or liability for breach of such an agreement, but a person who was not party to such an agreement is not liable for its breach."

Title

148. It was observed that the title of draft article 26 might need to be aligned with the title of draft article 12.

Paragraph (1)

149. It was noted that, in paragraph (1), a reference had been added to an anti-assignment agreement between "the initial or any subsequent assignor and the debtor or any subsequent assignee" in order to ensure that an anti-assignment clause contained in the original contract or in the assignment or in a subsequent assignment did not invalidate any subsequent assignment. While support was expressed for the substance of paragraph (1), the view was expressed that its exact formulation might have to be considered in particular with a view to determining whether a reference to a subsequent assignee was necessary.

Paragraph (2)

150. It was noted that, under paragraph (2), if any assignee was liable towards the debtor or any assignor under other applicable law outside the draft Convention for further assigning the receivable despite an anti-assignment clause contained in the original contract, in the assignment or in any subsequent assignment, that liability was not extended to any subsequent assignee.

151. The view was expressed that, if paragraph (2) referred to contractual liability, it might be superfluous in that it expressed a general principle of contract law. If, however, paragraph (2) covered tortious liability of the assignee for causing the assignor to violate an anti-assignment agreement, it might not be appropriate.

152. In response, it was pointed out that, if the assignee were to be held liable in any way relating to the breach of an anti-assignment agreement between the assignor and another party, the assignment would be of no value to the assignee. In addition, subjecting the assignee to such potential liability would inadvertently result in an increase in the cost of credit even if such liability did not actually arise, since assignees, in case of a bulk assignment, would have to examine a large number of contracts in order to determine whether an anti-assignment clause was included therein. Moreover, it would in any case be difficult to distinguish tortious from contractual liability and to cover one but not the other. After discussion, it was agreed that the matter needed to be revisited in the context of draft article 12, in which the issue of liability of the assignee for breach of an anti-assignment clause by the assignor was dealt with.

Article 27. Debtor's discharge by payment

153. The text of draft article 27 as considered by the Working Group was as follows:

> "Notwithstanding that the invalidity of an assignment renders all subsequent assignments invalid, the debtor is entitled to discharge its obligation by paying in accordance with the payment instructions set forth in the first notification received by the debtor."

154. It was stated that, in order to avoid repeating the title of draft article 18, the title of draft article 27 might need to be amended so as to read "debtor's discharge by payment in subsequent assignments".

155. It was widely felt that, in case the debtor received several notifications relating to a number of subsequent assignments, the debtor should be able to discharge its obligation by paying the person identified in the last notification received before payment. It was stated that, in its current formulation, the provision could inadvertently result in the debtor having to determine whether an intermediate assignment was invalid. In response, it was observed that, for the debtor to be able to determine that that

rule would apply and not the rule of draft article 18 (3) (which provided that the debtor should discharge its obligation by paying the person identified in the first notification), the notification should indicate the fact that several subsequent assignments had taken place. However, the view was expressed that in practice no problem would arise since normally only the last assignee would need to notify the debtor and thus the first notification would be also the last. It was stated that draft article 28, which was drawn from article 11, paragraph (2), of the Ottawa Convention, had been premised on that understanding.

156. It was noted that in the case of an initial assignment, under draft article 18, paragraph (2), the debtor could discharge its obligation by paying the person identified in the first notification even if the initial assignment was invalid; and that, if in doubt as to the validity of an assignment, the debtor may, under draft article 18, paragraph (4), pay the assignor and be discharged. However, the view was expressed that the reference to the invalidity of a subsequent assignment and the absence of similar language in draft article 18 might raise problems of interpretation.

157. It was agreed that, in line with the decision of the Working Group on draft article 18, paragraph (2) (see para. 78 above), the words "the person or the account or address identified in the first notification" should be substituted for the words "in accordance with the payment instructions set forth in the notification received by the debtor".

Article 28. Notification of the debtor

158. The text of draft article 28 as considered by the Working Group was as follows:

> "Notification of a subsequent assignment constitutes notification of [any] [the immediately] preceding assignment."

159. The view was expressed that notification of a subsequent assignment should constitute notification of any preceding assignment. It was stated that, in view of draft article 16, paragraph (3), such an approach might inadvertently result in requiring that the notification identify all assignees and all payees. In response, it was observed that the content of notification in the context of subsequent assignments would need to be different. It was pointed out that the debtor receiving a notification needed to be able to determine whether a series of subsequent assignments or of several assignments of the same receivables were involved. For lack of sufficient time, the Working Group deferred further consideration of draft article 28 to a future session.

IV. REPORT OF THE DRAFTING GROUP

160. The Working Group requested a drafting group established by the Secretariat to review the provisions of draft articles 14 to 16 and 18 to 21, with a view to ensuring consistency between the various language versions.

161. At the close of its deliberations, the Working Group considered the report of the drafting group and adopted the substance of draft articles 14 to 16, 18, 19 and 21 as revised by the drafting group. The text of those revised articles is reproduced in the annex to the present report.

162. With respect to draft article 20, paragraph (2), the text of subparagraph (b) as revised by the drafting group was as follows:

"(b) defences based on the debtor's incapacity or the lack of authority of the debtor's agent to incur liability on the original contract;"

163. Doubts were expressed as to whether the reference to "the lack of authority of the debtor's agent" appropriately reflected the decision taken by the Working Group to clarify that the text was also intended to refer to a possible lack of authority of the debtor to incur liability (see para. 117 above). It was stated that, while the reference to the debtor's incapacity to incur liability was intended to apply to situations where the debtor was a natural person, the reference to the lack of authority of the debtor was intended to apply mostly to situations where the debtor was a legal person, thus acting through its authorized agents. With a view to expressing more clearly the intent of the Working Group, it was decided that subparagraph (b) should read as follows:

"(b) defences based on the debtor's incapacity or the lack of authority of the debtor's agent to incur the debtor's liability on the original contract;"

164. Subject to that modification, the Working Group adopted the substance of draft article 20 as revised by the drafting group. The adopted text is reproduced in the annex to the present report.

V. FUTURE WORK

165. It was noted that the next session of the Working Group was scheduled to take place at Vienna from 5 to 16 October 1998, those dates being subject to confirmation by the Commission at its thirty-first session, to be held in New York from 1 to 12 June 1998.

Annex

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 14. 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 or general conditions 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) In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage which in international trade is widely known to, and regularly observed by, parties to the particular receivables financing practice.

Article 15. Representations of the assignor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the contract of assignment that:

(a) the assignor has the right to assign the receivable;

(b) the assignor has not previously assigned the receivable to another assignee; and

(c) the debtor does not and will not have any defences or rights of set-off.

(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay.

Article 16. Notification of the debtor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and request that payment be made to the person identified in the notification.

(2) Notification of the assignment or request for payment made by the assignor or the assignee in breach of an agreement referred to in paragraph (1) is effective. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

(3) Notification of the assignment shall be in writing and shall reasonably identify the assigned receivables, the assignee and the person to whom or for whose account or the address to which the debtor is required to make payment.

(4) Notification shall be in any language that is reasonably designed to inform the debtor about the content of the notification. It shall be sufficient if notification is given in the language of the original contract.

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

Section II. Debtor

Article 18. Debtor's discharge by payment

(1) Until the debtor receives notification of the assignment, it is entitled to discharge its obligation by paying the assignor.

(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (5) of this article, it is discharged only by paying the person or to the account or address identified in such notification.

(3) In case the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying the person or to the account or address identified in the first notification received.

(4) In case the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

(5) This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

Article 19. Defences and rights of set-off 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 or rights of set-off arising from the original contract [or from a decision of a judicial or other authority giving rise to the assigned receivable] of which the debtor could avail itself if such claim were made by the assignor.

(2) The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received. [For the purposes of this paragraph, the notification of assignment is effective even if it does not identify the person to whom or for whose account or the address to which the debtor is required to make payment.]

(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 12 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

Article 20. Agreement not to raise defences or rights of set-off

(1) Without prejudice to the law governing consumer protection in the State in which the debtor is located, the debtor may agree with the assignor in writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 19. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

(2) The debtor may not exclude:

(a) defences arising from fraudulent acts on the part of the assignee;

(b) defences based on the debtor's incapacity or the lack of authority of the debtor's agent to incur the debtor’s liability on the original contract;

[(c) where the original contract is in writing, defences based on the fact that the debtor signed the original contract without knowledge that the debtor's signature made the debtor a party to the contract, provided that such lack of knowledge was not due to the debtor's negligence and provided that the debtor was fraudulently induced to sign.]

(3) Such an agreement may only be modified by written agreement. The effect of such a modification as against the assignee is determined by article 21(2).

Article 21. Modification of the original contract

(1) An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.

(2) After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(a) the assignee consents to it; or

(b) the receivable is not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(3) Paragraphs (1) and (2) of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

[(4) For the purposes of this article, the notification of assignment is effective even if it does not identify the person to whom or the account or address to which the debtor is required to make payment.]

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