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RECEIVABLES FINANCING

Draft Convention on Assignment

in Receivables Financing: text with remarks and suggestions

Note by the Secretariat

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INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continues 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/ This is the eighth session devoted to the preparation of this 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 in conjunction with the twenty-fifth session, 17-21 May 1992). 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.

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 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. 2/

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. 3/

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

2/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

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

6. At its twenty-fifth and twenty-sixth sessions (New York, 8-19 July and Vienna, 11-22 November 1996 respectively), the Working Group continued its work by considering different versions of the draft uniform rules contained in two notes prepared by the Secretariat (A/CN.9/WG.II/WP.87 and A/CN.9/WG.II/WP.89 respectively). At those sessions, the Working Group adopted the working assumptions that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include conflict-of-laws provisions (A/CN.9/434, para. 262).

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. 4/ 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. 5/

8. At its twenty-seventh and twenty-eighth sessions (Vienna, 20-31 October 1997 and New York, 2-13 March 1998 respectively), the Working Group considered two notes prepared by the Secretariat (A/CN.9/WG.II/WP.93 and A/CN.9/WG.II/WP.96 respectively). At its twenty-eighth session, the Working Group adopted the substance of draft articles 14 to 16 and 18 to 22 and requested the Secretariat to revise draft article 17 (A/CN.9/447, paras. 161-164 and 68 respectively).

9. At its thirty-first session (1998), the Commission had before it the reports of the twenty-seventh and twenty-eighth sessions of the Working Group (A/CN.9/445 and A/CN.9/447). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously so as to complete its work in 1999 and submit the draft Convention for adoption by the Commission at its thirty-third session (2000). 6/

10. At its twenty-ninth and thirtieth sessions (Vienna, 5-16 October 1998 and New York, 1-12 March 1999 respectively), the Working Group considered three notes prepared by the Secretariat (A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98 and A/CN.9/WG.II/WP.102), as well as a note containing the report of a group of experts prepared by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.II/WP.99) and a proposal by the United States of America (A/CN.9/WG.II/WP.100). At those sessions, the Working Group adopted respectively the substance of the preamble and draft articles 1 (1) and (2), 5 (g) to (j), 18 (5*bis*), 23 to 33 and 41 to 50 (A/CN.9/455, para. 17) and, with the exception of the bracketed language, the title, the preamble and draft articles 1 to 24 (A/CN.9/456, para. 18).

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

5/ Ibid., para. 256.

6/ Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), para. 231.

11. At its thirty-second session (1999), the Commission had before it the reports of the twenty-ninth and thirtieth sessions of the Working Group (A/CN.9/455 and A/CN.9/456). The Commission expressed appreciation for the work accomplished by the Working Group and requested the Working Group to proceed with its work expeditiously so as to make it possible for the draft Convention, along with the report of the next session of the Working Group, to be circulated to Governments for comments in good time and for the draft Convention to be considered by the Commission for adoption at its thirty-third session (2000). As regards the subsequent procedure for adopting the draft Convention, the Commission noted that it would have to decide at its next session whether it should recommend adoption by the General Assembly or by a diplomatic conference to be specially convened by the General Assembly for that purpose. 7/

12. In order to facilitate the considerations of the Working Group, this note reproduces the text adopted by the Working Group at its thirtieth session (A/CN.9/456, Annex), as well the private international law provisions and the final provisions adopted by the Working Group at its twenty-ninth session (A/CN.9/455, Annex, draft articles 29-33 and 41-50) and text not yet adopted by the Working Group (A/CN.9/WG.II/WP.96, draft articles 34-40; the underlined wording comes from A/CN.9/WG.II/WP.102). The note also sets forth remarks on a number of draft articles and, where necessary, suggestions for alternative or additional provisions for consideration by the Working Group.

[DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING]

[DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES [IN INTERNATIONAL TRADE]]

PREAMBLE

The Contracting States,

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

Considering [that] problems created by [the] uncertainties as to the content and choice of legal regime applicable to assignments [of receivables] in international trade [constitute an obstacle to financing transactions],

Desiring to establish principles and adopt rules [relating to the assignment of receivables] that would create certainty and transparency and promote modernization of law relating to [assignments of receivables] [receivables financing] [including but not limited to assignments used in factoring, forfaiting, securitization, project financing, and refinancing,] while protecting existing [financing] [assignment] practices and facilitating the development of new practices,

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

Also desiring to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,

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

Have agreed as follows:

Remarks

1. At its previous session, the Working Group noted that the title and the preamble of the draft Convention appeared to be inconsistent with the scope provisions, according to which the draft Convention could apply to assignments outside a strictly financing context (A/CN.9/456, para. 60). In an attempt to align the title and the preamble with the scope provisions and to avoid raising questions of interpretation as to the exact scope of the draft Convention, the deletion from the title and the preamble of any reference to financing was proposed (A/CN.9/456, para. 61).

2. At the same session, the Working Group noted that the approach taken by the Working Group at previous sessions that, while the main focus of the draft Convention would be on financing transactions, other related transactions should not be excluded, was consistent with the mandate given by the Commission to the Working Group (A/CN.9/456, para. 63). At its thirty-second session, in response to a question raised, the Commission reaffirmed the flexible mandate given to the Working Group to determine how broad or narrow the scope of application of the draft Convention should be. 8/

3. It will be recalled that the Working Group decided not to limit the scope of the draft Convention to transactions with a "financing" or "commercial" nature or context, since such a limitation: would inappropriately create yet another special regime on assignment, where one was in principle not justified, and thus inadvertently result in further disunification of the law on assignment; would raise uncertainty since the terms "financing" and "commercial" were not universally understood in the same way, nor was it feasible or desirable to attempt to define them in a uniform way in an international convention; and would unnecessarily exclude from the scope of the draft Convention important transactions such as, e.g., assignments in international factoring transactions in which insurance against debtor-default or book-keeping and collection services are provided. The Working Group rather preferred to start from a broad scope of application and to exclude transactions that were of a consumer nature or were already well regulated (A/CN.9/420, paras. 41-43; A/CN.9/432, paras. 14-18 and 66; A/CN.9/434, paras. 18 and 42-61).

4. Should the Working Group confirm its decision not to limit the scope of application of the draft Convention to assignments made for "financing" purposes, it might wish to delete the reference to "receivables financing" from the title and the preamble of the draft Convention and to include an explanation of the matter in the commentary to the draft Convention. Alternatively, a

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8/ Ibid., Fifty-fourth Session, Supplement No. 17 (A/54/17, para. 326).

reference to receivables financing could be retained in the preamble, but not in the title, of the draft Convention, and explained in the commentary (see also remark 1 to draft article 5). Such a reference in the preamble could operate as a guidance with regard to the main objectives of the draft Convention, without limiting the scope of the draft Convention, a matter that could be usefully clarified in the commentary.

5. If the Working Group follows this approach, it may wish to consider the question whether the reference to international trade in the title of the draft Convention, which appears within square brackets, should be retained. The retention of a reference to international trade in the title presents a number of advantages, including that: it sufficiently reflects the overall objective of the draft Convention to facilitate the movement of goods and services across borders; and appropriately clarifies that the draft Convention applies to assignments with an international and commercial element, without attempting to regulate consumer assignments or domestic assignments of domestic receivables.

6. On the other hand, such a reference to international trade may inadvertently give the impression that the draft Convention applies only to assignments of receivables generated in international trade and not to: the assignment of consumer receivables; the international assignment of domestic receivables; or the assignment of receivables arising from loan or other transactions that may not involve the sale of goods or the provision of services. In addition, such a reference might fail to reflect the fact that the draft Convention might affect domestic assignments of domestic receivables in that it is intended to provide which law applies to a conflict between a domestic and a foreign assignee of domestic receivables (see remarks 3-5 to draft article 1). On balance, however, it would seem that, in line with practice followed in other UNCITRAL texts, a reference to international trade (or commerce) would be appropriate. As to the problems identified above, the Working Group may wish to address them in the commentary to the draft Convention, explaining that the term "international trade" is used in a broad sense and is intended to cover all the activities defined as "commercial" in the footnote to article 1 (1) of the UNCITRAL Model Law on International Commercial Arbitration.

* * *

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to:

(a) assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State;

(b) subsequent assignments provided that any prior assignment is governed by this Convention; and

(c) subsequent assignments that are governed by this Convention under subparagraph (a) of this paragraph, notwithstanding that any prior assignment is not governed by this Convention.

(2) This Convention does not affect the rights and obligations of the debtor unless the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State.

[(3) The provisions of chapter V apply [to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs (1) and (2) of this article] [independently of the provisions of this chapter]. However, those provisions do not apply if a State makes a declaration under article 34.]

(4) The annex to this Convention applies in a Contracting State which has made a declaration under article 36.

Remarks

1. Paragraph (3) appears within square brackets since it has not been adopted by the Working Group yet (A/CN.9/456, para. 26). The wording proposed by the Secretariat in a previous paper (A/CN.9/WG.II/WP.102, remark 23 to draft article 1) has been slightly modified to allow States to opt out of Chapter V as a whole, including draft articles 30 and 31 dealing with reservations as to the application of mandatory law and public policy. The Secretariat had originally suggested that those provisions could be excluded from an opt-out, in order for them to apply to private law provisions outside Chapter V (A/CN.9/WG.II/WP.102, remark 20 to draft article 1).

2. The modification is intended to avoid inadvertently subjecting the application of the substantive law provisions of the draft Convention to mandatory law or public policy, which could make it impossible to predict whether the draft Convention would apply or be set aside by a judge on the basis of not widely known or possibly surprising notions of mandatory law or public policy. However, the issue whether the law applicable by virtue of the private international law provisions of the draft Convention may be set aside if it is manifestly contrary to super-mandatory law (*loi de police*) and public policy remains to be resolved (see remarks to draft article 24).

3. So far, the Working Group has worked on the assumption that draft article 24 will apply to a conflict between a domestic and a foreign assignee of domestic receivables. One of the reasons for which the Working Group decided to turn the priority rules of the draft Convention into private international law rules was that such rules would not negatively affect the rights of domestic assignees of domestic receivables, since issues of priority would be left to substantive law applicable outside the draft Convention (A/CN.9/445, para. 22).

4. Should the Working Group confirm its assumption that conflicts of priority between a domestic and a foreign assignee of domestic receivables would be covered in draft article 24, the domestic assignee would have to meet the requirements of the same law it would probably expect to be applied anyway (since, by definition, in a domestic assignment of domestic receivables, the law of the assignor's, the assignee's and the debtor's jurisdiction would be the same, while in an international assignment only the assignee would be in a different State). If the Working Group

defines "location" of the assignor for the purposes of the priority rules by reference to its central administration (but not for the purpose of the scope rules; see remark 4 to draft article 5), a different law might apply to a conflict between an assignment by a branch of an entity in the debtor's jurisdiction and a second assignment by the head-office of the same entity in another jurisdiction (if one of those two States is not a Contracting State). However, even in such a case the domestic assignee could predict that the draft Convention could apply, since the domestic assignee: would be located in a Contracting State (i.e. the same State in which the assignor and the debtor would have their places of business); and would know that the assignor is a branch of a foreign entity. On the other hand, if draft article 24 did not apply to such a conflict, the foreign assignee may have no way to determine that a law other than the law of the assignor's central administration might apply. Depending on the frequency of such assignments by head- and branch-offices, the problem may be left to other law. In its consideration of this matter, the Working Group may also wish to take into account the need to avoid inadvertently interfering with domestic practices, a result which could reduce the acceptability of the draft Convention.

5. The Working Group may wish to consider for inclusion in draft article 1 or in draft article 24 wording along the following lines: "Article 24 of this Convention applies to a conflict of priority between an assignee in a domestic assignment of domestic receivables and an assignee in an international assignment of the same domestic receivables from the same assignor."

* * *

Article 2. Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Remarks

1. The reference to "contractual" receivables is intended to ensure that the draft Convention applies, for example, to the assignment of receivables arising under contracts for the sale of goods or the provision of services, whether those contracts are commercial or consumer transactions, as well as to the assignment of receivables in the form of royalties arising from the licensing of intellectual property and of receivables in the form of credit balances in deposit accounts or securities transactions. The assignment of tort and tax receivables or receivables determined in court judgements is not covered, unless those receivables are confirmed in a settlement agreement.

2. The Working Group may wish to consider whether the assignment of receivables under the draft Convention would include: damages for breach of contract (liquidated or not); interest for late payment (contractual interest, statutory interest or interest liquidated in a court judgement); sums payable as dividends (present or future) arising from shares; and receivables based on arbitral awards.

3. Under subparagraph (a), what constitutes a "contractual" right is left to law applicable outside the draft Convention. In view of the divergences existing between legal systems in this context, such an approach may, in some cases in which it may not be easy to distinguish between a contractual and an extra-contractual relationship, create uncertainty. In order to avoid this result, the Working Group may wish to consider defining the term "contractual" right in a negative way (e.g., "a right to payment of a monetary sum other than one arising by operation of law or determined in a court judgement"). Alternatively, the matter could be explained in the commentary.

* * *

Article 3. Internationality

A receivable is international if, at the time it arises, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Remarks

Under draft article 3, once a receivable is international, its assignment is always covered by the draft Convention (whether it is domestic or international). However, once a receivable is domestic, its assignment may be covered by the draft Convention, if: it is international; or it is domestic but is also part of a chain of assignments which includes an international assignment (for an additional situation in which a domestic assignment of domestic receivables may be affected, see remarks 3-5 to draft article 1). In order to limit the references in the text to the time when a receivable arises (term defined in draft article 5 (b)) and to align the wording of the first sentence with that of the second sentence, the words "at the time of the conclusion of the original contract" may be substituted for the words "at the time it arises" (see remark 1 to draft article 5).

* * *

Article 4. Exclusions

[(1)] This Convention does not apply to assignments:

(a) made for personal, family or household purposes;

(b) to the extent made by the delivery of a negotiable instrument, with any necessary endorsement;

(c) made as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

[(2) This Convention does not apply to assignments listed in a declaration made under draft article 35 by the State in which the assignor is located, or with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, by the State in which the debtor is located.]

Remarks

1. In view of the broad scope of application of the draft Convention, the Working Group decided to list assignments that should not be covered. In particular, the exclusion of assignments for consumer purposes is intended to emphasize that only assignments for commercial purposes are to be covered (without referring to the commercial purposes in order to avoid creating uncertainty). However, it would seem that assignments made from an individual to a financing institution, i.e. for mixed, consumer and commercial purposes, should not be excluded. In addition, subparagraph (a) may need to be revised in order to avoid inadvertently giving the impression that it is intended to exclude the assignment of consumer receivables. Thus, the Working Group may wish to reformulate subparagraph (a) along the following lines "made from one individual to another for personal, family or household purposes common to both" (in draft articles 21 (1) and 23, the use of the term "primarily" for personal, family or household purposes is made, but in that context the term "purposes" relates to one party, the debtor). The commentary will explain that only assignments from one consumer to another consumer are excluded and that in all other cases the assignment of consumer receivables is covered. The Working Group may wish to consider that such consumer assignments are extremely rare in practice and that, in the absence of an explanation in the commentary, such an exclusion may be inadvertently misunderstood as relating to the assignment of consumer receivables. In such a case, subparagraph (a) may be deleted altogether, while the commentary could explain that assignments from one consumer to another are not covered.

2. As to assignments of receivables in the context of a sale of a business as a going concern, the commentary may explain that, while the assignment from the seller to the buyer of the business is excluded, the assignment to an institution financing the sale is not excluded (A/CN.9/432, para. 66; and A/CN.9/434, paras. 42-61).

3. At the previous session of the Working Group, additional assignments were identified for possible exclusion, i.e. assignments of receivables arising in clearing-house, swaps and derivatives transactions and assignments of receivables arising from the sale or lease of high-value, highly mobile equipment (A/CN.9/456, paras. 48-49 and 232-239).

4. As to clearing-house, swaps and derivatives transactions, in order to avoid unsettling existing and well-functioning practices, the Working Group may wish to consider whether they should be excluded altogether or be dealt with differently. While it is a matter of discussion whether all of those transactions would create receivables the assignment of which would be covered by the draft Convention, it appears that the main concern in such transactions is that an assignment made without the consent of the debtor may inappropriately oblige the debtor to pay a third party, freeze the debtor's defences and rights of set-off and introduce an inappropriate priority regime.

5. Before deciding in favour of a blank exclusion of all those practices which may deprive parties thereto of the benefits to be derived from the draft Convention, the Working Group may wish to consider whether it can possibly address the relevant concerns in another way. For example, the Working Group may wish to include in the draft Convention a rule under which the debtor in such transactions (and possibly in insurance policies, which establish a strictly personal relationship between the insurer and the insured, and in loan syndications and participations, which normally involve the assignment of single, large-value receivables) will not be bound or affected in any way by an assignment. Such a rule would not prevent assignments, except that the assignee would not be able to collect from the debtor. The assignee would have priority over other claimants, but, as long as the debtor is not bound against its will and does not lose its defences and rights of set-off, the priority regime of the draft Convention would not affect the debtor. This result may be achieved by a general principle along the following lines: "Nothing in this Convention affects the rights and obligations of an intermediary in clearing house, swaps and derivatives transactions [, insurance policies and loan syndications and participations] without the intermediary's [, the insurer's or any lender's] consent." The same result may also be achieved by inserting in draft article 10 language along the following lines: "An assignment of receivables arising under clearing-house, swaps or derivatives transactions [, insurance policies or loan syndications and participations] is ineffective as against the debtor unless it is consented to by the debtor, whether or not there is a contractual limitation to such an assignment." Alternatively, the two provisions proposed above may be combined in one new provision.

6. In addition, the Working Group may wish to consider modifying draft article 20 to ensure that, in clearing-house, swaps and derivatives transactions, insurance policies and loan syndications and participations, notification does not freeze the defences and rights of set-off of the debtor, whether they arise from the original or any other contract. Such a modification of draft article 20 may not be necessary, since parties would have an opportunity to consider whether they wish to continue the transaction in view of the fact that the debtor would not be able to raise certain defences and rights of set-off arising after notification of an assignment. However, the application of draft article 20 may be problematic, since in some of those transactions it may not always be clear which is the original contract and which party is creditor or debtor, since any party may be debtor or creditor depending on the time one examines the transaction. Moreover, the Working Group may wish to consider a different priority regime from that embodied in draft articles 25 to 26, at least with regard to some of those practices. For example, in transactions involving investment property or deposit accounts, priority may need to be left to the law of the location of the securities intermediary or of the depositary institution, rather than to the law of the assignor's location.

7. If there is no agreement on the above-mentioned approach or if it is considered that it does not sufficiently address the relevant concerns, the Working Group may wish to consider excluding those practices altogether in draft article 4 (1) or leaving the matter to each State to settle by way of a declaration under draft articles 4 (2) and 35. The advantage of a draft-article 4 (1) exclusion would lie in the certainty that may be achieved by a uniform rule applicable to all Contracting States. The disadvantage of such an approach would be that certain practices may have to be excluded for all Contracting States, even though their coverage in the draft Convention would raise concerns only in one or more Contracting States. Another possible disadvantage of such an approach is that it would

not allow a State the flexibility to exclude practices if a concern with covering those practices in the draft Convention arises in the future. On the other hand, allowing each State to exclude practices by way of a declaration under draft articles 4 (2) and 35 may introduce an undesirable degree of uncertainty. If such an approach were to be followed, the scope of application of the draft Convention may differ from State to State and from time to time. As a result, parties to the relevant transactions may have to determine in each case the scope of application of the draft Convention.

8. As to transactions relating to mobile equipment, in order to avoid any conflicts with the draft convention and the equipment-specific protocols being prepared by the International Institute for the Unification of Private Law (Unidroit) in cooperation with the International Civil Aviation Organization (I.C.A.O.) and other organizations (hereinafter referred to as "the Unidroit draft Convention"), the Working Group may wish to consider whether the assignment of receivables arising from the sale or lease of and secured by mobile equipment should be excluded altogether (in the draft Convention or in the Unidroit draft Convention or relevant protocol) or be dealt with by way of a provision settling any conflicts that might arise between those texts (either in a uniform way for all Contracting States or by leaving it to each State to decide to which text it wishes to give precedence). Such conflicts may arise, since the Unidroit draft Convention, for example: requires consent of the debtor for an assignment to be effective; subjects priority with respect to mobile equipment and receivables inextricably linked thereto to an equipment-specific system of international registration; and vests the equipment financier with wide self-help powers, in particular in the case of insolvency in which the financier has the power to repossess the equipment after the opening of the insolvency proceeding if the insolvent debtor does not cure the default within a certain period of time.

9. If it is agreed that the regime introduced by the draft Convention is not appropriate for the assignment of receivables arising, for example, from the sale or lease of aircraft, as it is practised under current law, and that the particular needs of the relevant practices cannot be addressed by introducing additional rules in the draft Convention, the Working Group may wish to consider excluding in draft article 4 (1) the assignment of receivables secured by such equipment (it should be noted though that, while a parallel may be drawn, in some legal systems, between high-value equipment and real estate, the assignment of receivables arising from the sale or lease of real estate cannot be excluded, since receivables secured with a mortgage in real estate are often part of securitization schemes). Certainty in the application of the draft Convention and avoidance of any undue interference with well-regulated practices would be the main advantages of such an approach. For the same reasons, article 2 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; hereinafter referred to as the "Sales Convention") excludes the sale of certain types of goods (e.g., electricity, negotiable instruments, ships and aircraft).

10. As to the question of which types of practices should be excluded, the Working Group may wish to take into account, for example, that receivables arising from the sale or lease of and secured by aircraft are normally part of equipment, rather than receivables, financing transactions, at least to the extent that they are secured by the aircraft and the security interest is registered in the aircraft registry. In such situations, potential financiers of receivables secured by aircraft would know that they should have to look to the aircraft registry to determine their priority position and to decide on that basis whether to provide credit and at what cost. It should be noted, however, that receivables

arising from ticket sales are normally part of securitization schemes, rather than equipment financing, and thus their assignments should not be excluded from the scope of the draft Convention.

11. While it may be appropriate to follow the same approach with regard to satellites, it remains to be established that it should be followed with regard to other types of space equipment (e.g., control panels located on earth), railway rolling stock, oil rigs, containers or similar types of equipment. Caution would need to be exercised, since this approach could inadvertently result in limiting excessively the scope of the draft Convention, if mobile equipment were defined in the Unidroit draft Convention, as is presently the case (art. 3), as including "any uniquely identifiable object", i.e. cars, trucks, computers, television sets and the like.

12. Should the Working Group decide to follow this approach, a new subparagraph (d) may be inserted in draft article 4 (1) along the following lines: "made as part of transactions relating to security interests, conditional sales under reservations of title or leasing agreements with respect to [aircraft] and receivables arising from the sale or lease secured by [or associated with] such equipment. The term "aircraft" is within square brackets pending determination by the Working Group of the exact formulation of the exception and of other practices in which receivables may be part of equipment, rather than receivables, financing. The words "or associated with", which come from the definition of "associated rights" contained in draft article 1 of the Unidroit draft Convention, are within square brackets since they appear to be vague and may inadvertently broaden excessively the scope of the exclusion.

13. If, on the other hand, the problem with covering such practices in the draft Convention does not lie in the risk that the draft Convention may unsettle current practices but in the risk of creating conflicts with a future text, such as the Unidroit draft Convention, or of unsettling practices that may develop in the future, it may be preferable to address this problem by way of a provision settling any conflicts between the two texts, preferably in a uniform way for all States. Such an approach would present certain advantages, including that: it would settle the matter of potential conflicts with an acceptable degree of certainty; and it would avoid leaving a gap in case one or the other text is not widely adopted in a timely fashion (the Unidroit draft Convention will enter into force in stages as soon as an equipment-specific protocol enters into force and an equipment-specific registration system is in place). The question as to which text should have precedence may need to be answered differently depending on the type of equipment involved. For example, precedence may be given to the aircraft protocol but not to any other protocol.

14. Should the Working Group decide to follow this approach, language along the following lines may be inserted in draft article 33 as a new paragraph (2): "This Convention does not prevail over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning security interests, conditional sales under reservations of title and leasing agreements with respect to [aircraft] and receivables arising from the sale or lease secured by [or associated with] such equipment.

15. Alternatively, the extent to which any other text dealing with similar matters may prevail over the draft Convention may be left to that other text. Under such an approach, in the preparation of

each protocol, it would have to be determined whether receivables secured by the relevant type of equipment are part of equipment, rather than receivables, financing. The matter of the assignment of rights secured by mobile equipment, which is currently addressed in the base draft Unidroit Convention, would need to be left to each protocol to that draft Convention. In addition, the notion of "equipment" would have to be limited to certain high-value types of equipment and could not relate to "any uniquely identifiable object" since such a broad approach could inadvertently encompass consumer goods, such as cars and personal computers, and interfere with receivables financing practices, such as the securitization of consumer receivables. As a matter of drafting, if the Working Group agrees to insert a new provision in draft article 33, a reference to paragraphs (2) and (3) would need to be added in paragraph (1) of draft article 33 and the current paragraph (2) would need to be renumbered.

16. Paragraph (2) and draft article 35 foresee an additional way in dealing with the exclusion of practices, leaving the matter to each State. However, allowing each State to, in essence, define the scope of application of the draft Convention by excluding (or including) practices at any time would introduce an undesirable degree of uncertainty. If such an approach were to be followed, in view of the multiplicity of parties involved in assignment-related transactions, it may be very difficult to determine in each case which law applies. Thus, the Working Group may wish to consider deleting paragraph (2) and draft article 35.

* * *

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

For the purposes of this Convention:

(a) "original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) a receivable is deemed to arise at the time when the original contract is concluded;

(c) "existing receivable" means a receivable that arises upon or before the conclusion of the contract of assignment; "future receivable" means a receivable that arises after the conclusion of the contract of assignment;

[(d) "receivables financing" means any transaction in which value, credit or related services are provided for value in the form of receivables. Receivables financing includes factoring, forfaiting, securitization, project financing and refinancing;]

(e) "writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the

writing identifies that person and indicates that person's approval of the information contained in the writing;

(f) "notification of the assignment" means a communication in writing which reasonably identifies the assigned receivables and the assignee;

(g) "insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;

(h) "insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

(i) "priority" means the right of a party in preference to another party;

[(j) [For the purposes of articles 24 and 25,] an individual is located in the State in which it has its habitual residence; a corporation is located in the State in which it is incorporated; a legal person other than a corporation is located in the State in which its constitutive document is filed and, in the absence of a filed document, in the State in which it has its chief executive office.]

[(k) [For the purposes of articles 1 and 3:]

(i) the assignor is located in the State in which it has that place of business which has the closest relationship to the assignment;

(ii) the assignee is located in the State in which it has that place of business which has the closest relationship to the assignment;

(iii) the debtor is located in the State in which it has that place of business which has the closest relationship to the original contract;

(iv) in the absence of proof to the contrary, the place of central administration of a party is presumed to be the place of business which has the closest relationship to the relevant contract. If a party does not have a place of business, reference is to be made to its habitual residence[;

(v) several assignors or assignees are located at the place in which their authorized agent or trustee is located]].

Remarks

1. The Working Group may wish to consider whether subparagraph (b) is necessary. Currently, reference to the time at which a receivable arises is made in draft articles 3 and 8 (2) (in both provisions, a direct reference to the time of the conclusion of the original contract may be made). A reference to the fact of a receivable "arising" (without a reference to time) is made in draft articles 5 (a) and (c) and 12.

2. The Working Group may also wish to delete subparagraph (d) and to include a description of the practices to be covered by the draft Convention in the commentary (the reference to receivables financing could be retained in the preamble, if necessary; see remarks to the title and the preamble).

3. The Working Group may wish to insert at the end of the definition of "priority"in draft article 5 (i) wording along the following lines: "and includes the issue whether that party has a *right in rem or ad personam*" (see remark 1 to draft article 26).

4. Subparagraphs (j) and (k) reflect the divergence of views in the Working Group as to the issue of location of a legal person. The reference to draft articles 1, 3, 24 and 25 appears in square brackets, since the Working Group has not reached agreement on the question whether a different location rule should be adopted for the purpose of some of the provisions of the draft Convention in which the term "location" appears (i.e. draft articles 1, 3, 21 (1), 23-26, 27-29 and 39 (3)). However, at the previous session of the Working Group, there appeared to be agreement, at least: that the need for certainty was much stronger in the priority provisions than in the scope provisions; that the scope of application of the draft Convention should be as broad as possible; that, in order to achieve a sufficient degree of debtor-protection, at least, with regard to the debtor's location, reference should be made to the relevant place of business; and that a solution with regard to the priority provisions could be built around the concept of central administration/chief executive office of an entity (A/CN.9/456, paras. 35-37). In view of the above, the Working Group may wish to consider a provision along the following lines:

"(i) a party is located in the State in which it has its place of business;

"(ii) if the assignor or the assignee have more than one place of business, the place of business is that which has the closest relationship to the contract of assignment. If the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract. If a party does not have a place of business, reference is to be made to the habitual residence of that party;

"(iii) for the purposes of articles 24 to 26, the place where the central administration of an entity is exercised *de facto* is deemed to be the place of business with the closest relationship to the contract of assignment[;

"(iv) several assignors or assignees are located at the place in which their authorized agent or trustee is located]."

5. The main difference between the proposed text and the current formulation of subparagraph (k) is that, with regard to the priority provisions of the draft Convention, the proposed text does not create

a presumption that would almost certainly be rebutted in the case of branch offices, but a legal fiction that could not be rebutted. Such an approach would have the advantage of maintaining a balance between flexibility and certainty with regard to the application of the draft Convention, while giving precedence to certainty with regard to the priority provisions of the draft Convention.

6. Under such an approach, in the case of subsequent assignments under draft article 1 (b), reference would be made to the place with which any prior assignment is most closely connected, and in the case of subsequent assignments under draft article 1 (c), reference would be made to the place with which a subsequent assignment is most closely connected (similarly, internationality would have to be determined by reference to the place with the closest connection with the subsequent assignment).

7. As a matter of drafting, the Working Group may wish to avoid referring to "location" in draft articles 24 to 26 and to refer directly to the law of the State in which the assignor has its central administration. The need to subject priority issues in the case of an insolvency or other proceeding to the law of the assignor's main jurisdiction should be sufficient to justify referring to the place of the assignor's central administration as a connecting factor for the determination of the law governing such priority issues. As to conflicts among several assignees of the same receivables, while a place-of-business approach would be appropriate in the case of an assignor with a single place of business, it would be entirely unworkable if the assignor has more than one place of business (if, e.g., the same receivables are assigned by the head office and by a branch office, or by different branch offices, or by partners in a limited partnership located in different States, not all of which have adopted the draft Convention). In such a case, the application of a place-of-business approach could result in priority issues being governed by different laws and an assignee would have no way to know the circumstances under which the assignor assigned the same receivables several times.

8. A possible disadvantage of a bifurcated approach to the issue of location is that, if the place of business and the place of central administration do not coincide, assignees would have to check two different laws, the law of the place of business of the assignor for determining whether the draft Convention would apply and the law of the place of central administration of the assignor for determining the risk involved in the case of a double assignment or insolvency of the assignor (for another possible disadvantage, see remark 4 to draft article 1). However, this may be unavoidable, since a uniform approach appropriate in all circumstances does not seem to exist (as confirmed by the discussions in the Working Group and the UNCITRAL/Hague Conference group of experts; for the views of the latter group, see A/CN.9/WG.II/WP.99, part 3, definition of the concept of "location").

9. Compared with the place of incorporation, the place of central administration presents the advantage that it is a notion known in most legal systems and its application would not raise the possible problem of the application of an artificial jurisdiction without any developed laws as could be the case if reference were to be made to the place of incorporation. However, the place of central administration may not be as transparent as the place of incorporation, in particular: where the place of exercise of central authority is so evenly divided between two or more countries as to make the choice of one over the other impossible; and in the case of subsidiary companies where the

real administrative control resides in the parent company. While revising new subparagraph (j) (iii) to create a rebuttable presumption ("in the absence of proof to the contrary") could provide a solution to this problem, it would seem that such an approach would not be appropriate, since it would inadvertently result in reducing the level of certainty achieved by this rule. In an effort to address this problem, the Working Group may wish to refer in new subparagraph (j) (iii) first to the place designated in the constitutive documents of an entity and, only in the absence of such a designation, to the *de facto* place of central administration (article 21 of the Swiss Private International Law Code).

10. As to the question whether the centre of main interests should be preferred for reasons of consistency with the European Union Convention on Insolvency Proceedings (hereinafter referred to as "the EU Insolvency Convention") and the UNCITRAL Model Law on Cross-Border Insolvency, it may be noted that the centre of main interests is akin to central administration, chief executive office or principal place of business. All those terms are understood as denoting the centre of management and control, the real business centre from which the important activities of an entity are controlled, rather than the day-to-day management of the affairs and operations of such an entity. However, the rebuttable presumption established in those texts that the centre of main interests is the place of registration or, in the case of individuals, of the habitual residence of a party, may reduce the level of certainty necessary in a text, whose main focus is on the advance planning in the financing of a solvent debtor (A/CN.9/455, para. 27).

* * *

Article 6. Party autonomy

The assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

* * *

Article 7. Principles of interpretation

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

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

* * *

CHAPTER III. EFFECTS OF ASSIGNMENT

Remarks

1. The provisions in Chapter III deal with the substantive validity (more accurately, effectiveness *erga omnes*) of an assignment. They do not deal, however, with formal validity. After the deletion of the provision dealing with form (A/CN.9/WG.II/WP.102, draft article 9), formal validity is left to the law applicable outside the draft Convention (A/CN.9/456, para. 91). This law would presumably be the law of the contract of assignment (which could be the law of the assignor's or the assignee's place of business or, if the assignor or the assignee have more than one place of business, the place of business with the closest connection to the contract) or the law of the place in which the contract was concluded (which could be a place other than the place of business of the assignor or the assignee). As a result, in view of the fact that priority presupposes both substantive and formal validity, an assignee would have to ensure that it has a valid assignment under the provisions of Chapter III and under the law governing formal validity, as well as priority under the law of the assignor's location. This result could reduce certainty and thus have a negative impact on the cost of credit.

2. In order to address this problem, the term "priority" could be defined as including formal validity so that priority and formal validity are made subject to the same law. Alternatively, a rule may be included, preferably, at the beginning of Chapter III or, alternatively, in Chapter V along the following lines: "The form of the assignment and the effect of any non-compliance with such form is governed by the law of the State in which the assignor is located." (A/CN.9/WG.II/WP.96, draft article 9, variant C).

3. In line with the approach of the Working Group to focus on the assignment, rather than on the contract of assignment, the above-mentioned provision makes reference to the assignment. Formal validity is subjected to the law of the assignor's location, in order to ensure: that the law of single jurisdiction would govern; and that law would be the same as the law governing priority (in order to achieve this result, the meaning of "location" in this context would have to be the same as in draft articles 24 to 26).

* * *

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

(1) An assignment of existing or future, one or more, receivables, and parts of, or undivided interests in, receivables is effective, whether the receivables are described:

(a) individually as receivables to which the assignment relates; or

(b) in any other manner, provided that they can, at the time when the receivables arise, be identified as receivables to which the assignment relates.

(2) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable when it arises.

* * *

Article 9. <u>Time of assignment</u>

An existing receivable is transferred, and a future receivable is deemed to be transferred, at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

* * *

Article 10. <u>Contractual limitations on assignments</u>

(1) An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee, limiting in any way the assignor's right to assign its receivables.

(2) Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement. A person who is not party to such an agreement is not liable under that agreement for its breach.

<u>Remarks</u>

1. As already mentioned (see remark 5 to draft article 4), if practices, such as those involving clearing-house, swaps and derivatives transactions, insurance policies or loan syndications and participations, are to be covered by the draft Convention, a different rule may need to be included in draft article 10 with regard to those practices. Such a rule could provide that, in the absence of a consent by the debtor in those transactions, an assignment is not effective as against the debtor (for potential additional changes in the draft Convention to address the particular needs of those practices, see remark 6 to draft article 4).

2. The second sentence of paragraph (2), stating that the assignee has no contractual liability for breach of an anti-assignment clause by the assignor, appears to be stating the obvious (the assignee cannot have contractual liability for breach of a contract to which the assignee is not a party). The original intention of the Working Group was that, while, obviously, the assignee would have no contractual liability, the issue of tort liability would be left to law applicable outside the draft Convention (A/CN.9/455, paras. 51). The Working Group envisaged situations in which the assignee engages in manifestly improper behaviour (for example, induces the assignor to assign receivables in violation of an anti-assignment clause with the intent to harm the interests of the debtor). However, mere knowledge by the assignee of the existence of an anti-assignment clause should not give rise to liability of the assignee, since such a possibility might deter potential assignees from entering into receivables financing transactions (A/CN.9/455, paras. 50).

3. While the matter can be explained in the commentary, the Working Group may wish to settle it explicitly by deleting the words “under that agreement for its breach”and inserting instead language along the following lines: “even if it had knowledge of such an agreement” or “on the sole ground that it had knowledge of such an agreement” or “unless that person acts with the specific intent to cause loss or recklessly and with actual knowledge that the loss would be likely to result” (in any of those cases, mere knowledge would not be sufficient to establish liability; see article 18 of the UNCITRAL Model Law on International Credit Transfers and article 8 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules)).

* * *

Article 11. Transfer of security rights

(1) A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer, unless, under the law governing the right, it is transferable only with a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer this right and any proceeds to the assignee.

(2) A right securing payment of the assigned receivable is transferred under paragraph (1) notwithstanding an agreement between the assignor and the debtor or other person granting the right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

(3) Nothing in this article affects any obligation or liability of the assignor for breach of an agreement under paragraph (2). A person who is not a party to such an agreement is not liable under that agreement for its breach.

(4) The transfer of a possessory property right under paragraph (1) of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

(5) Paragraph (1) of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

* * *

Article 12. Limitations relating to Governments and other public entities

Articles 10 and 11 do not affect the rights and obligations of a debtor, or of any person granting a personal or property right securing payment of the assigned receivable, if that debtor or person is a governmental department[, agency, organ, or other unit, or any subdivision thereof, unless:

(a) the debtor or person is a commercial entity; or

(b) the receivable or the granting of the right arises from commercial activities of that debtor or person.]

Remarks

1. Draft article 12 is the result of a decision made at the previous session of the Working Group to ensure that sovereign debtors are not affected by assignments made in violation of anti-assignment clauses included in public procurement and other similar contracts. The Working Group thought that any interference with the legal regime of such contracts should be avoided, since it could seriously affect the acceptability of the draft Convention (A/CN.9/456, para. 115).

2. However, draft article 12 might go beyond its intended purpose of protecting sovereign debtors who do not need such protection or who can be protected by other means (e.g., by a statutory anti-assignment limitation to the extent it is not affected by the draft Convention; on this matter, see remark 4 below and remarks 3 and 4 to draft article 28; for a suggestion as to how to deal in draft article 10 with statutory limitations to the assignment, see A/CN.9/WG.II/WP.102, remark 7 to draft article 12). In addition, the possibility of a contractual limitation to assignment invalidating the assignment as against a sovereign debtor might inadvertently raise the risk of non-collection from a sovereign debtor and thus raise the cost of credit to all sovereign debtors, irrespective of whether they need the protection provided under draft article 12. Moreover, allowing anti-assignment clauses in public procurement contracts to invalidate assignments as against a sovereign debtor could inadvertently raise the cost of credit to small- and medium-size suppliers of goods and services, which would make it even harder for them to compete for public procurement contracts with large suppliers who normally have alternative sources of credit. The Working Group may, therefore, wish to consider revising draft article 12 in order to allow States to enter a reservation with regard to draft articles 10 and 11, if they so wish.

3. Should the Working Group prefer to take this approach, draft article 12 could be revised to read as follows: "If the State in which the debtor or any person granting a personal or property right securing payment of the assigned receivable is located at the time of the conclusion of the original contract has entered a reservation under draft article [...], articles 10 and 11 do not affect the rights and obligations of that debtor or person." In addition, a new draft article could be added to the final provisions to read along the following lines: "A State may declare at any time that it will not be bound by draft articles 10 and 11 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government[, central or local, any subdivision thereof, or any public entity, unless: [insert subparagraphs (a) and (b)]]."

4. The title of the provision may need to be slightly revised so as to reflect more clearly the fact that it deals with contractual, and not statutory, assignability. The commentary will clarify that, while draft articles 10 and 11 do not deal with statutory limitations to assignment, the substantive law part of the draft Convention is not subject to any mandatory rules of the law applicable outside the draft Convention limiting assignments, since such a result would undermine the certainty achieved by the draft Convention. For example, draft article 8 overrides any rule of law applicable outside the draft Convention, under which an assignment of future receivables is invalid (on mandatory rules and

rules reflecting public policy, see also remarks to draft articles 1 and 24). The wording used to reflect sovereign debtors has been modified so that sovereign loans, as well as transactions involving central and local Governments, any subdivisions thereof and public entities would be covered.

5. It may be noted that the Unidroit Convention on International Factoring (Ottawa, 1988; hereinafter referred to as "the Ottawa Convention") allows States to enter a reservation with regard to a rule very similar to draft article 10, but in relation to all types of debtors. Of the six States parties to the Ottawa Convention two have entered such a reservation. In one State party, the rule in the Ottawa Convention is said to have led to a change in the domestic law in the direction of validating assignments in a commercial context despite the existence of anti-assignment clauses in the relevant contracts.

* * *

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Remarks

Unlike the other provisions of the draft Convention which deal with assignment as a transfer of property rights (whether full property or security rights) in receivables, the provisions contained in this section deal with issues that are subject to party autonomy and are normally addressed in the contract of assignment. The usefulness of these provisions lies in the fact that they allocate risks and responsibilities in the absence of an agreement between the parties to the contract of assignment.

* * *

Article 13. Rights and obligations of the assignor and the assignee

(1) The rights and obligations of the assignor and the assignee as between them 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 14. Representations of the assignor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion 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 15. Right to notify the debtor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of the assignment and a payment instruction, but after notification is sent only the assignee may send a payment instruction.

(2) A notification of the assignment or payment instruction sent in breach of any agreement referred to in paragraph (1) of this article is not ineffective for the purposes of article 19 by reason of such breach. 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.

Remarks

The Working Group may wish to consider moving the first sentence of 15 (2) to draft article 19, since this sentence deals with the debtor's discharge in the case of a notification sent in breach of an agreement between the assignor and the assignee.

* * *

Article 16. Right to payment

(1) Unless otherwise agreed between the assignor and the assignee and whether or not a notification of the assignment has been sent:

(a) if payment with respect to the assigned receivable is made to the assignee, the assignee is entitled to retain whatever is received in respect of the assigned receivables;

(b) if payment with respect to the assigned receivable is made to the assignor, the assignee is entitled to payment of whatever has been received by the assignor.

(2) If payment with respect to the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of whatever has been received by such person.

(3) The assignee may not retain more than the value of its right in the receivable.

Remarks

1. The commentary will explain that "payment" includes both payment in cash and in kind (e.g., returned goods). However, the Working Group may wish to consider the question whether this matter needs to be explicitly clarified in the text of draft articles 16 and 26 by referring to payment "or other discharge" with respect to the assigned receivable. In addition, the Working Group may wish to define proceeds by reference to whatever is received in payment or other discharge of the assigned receivables (which includes proceeds of receivables and proceeds of proceeds). The drafting of draft articles 16 and 26 may be substantially simplified if a definition of proceeds were to be adopted.

2. In order to align paragraph (2) with paragraph (1), the Working Group may also wish to consider reformulating paragraph (2) so as to state clearly that it deals with the right to payment as between the assignor and the assignee and is subject to contrary agreement between those parties. In its current formulation, it would appear that paragraph (2) does not belong in section I of Chapter IV or draft article 16, dealing with the relationship between the assignor and the assignee (see remark 3 to draft article 26).

3. In order to ensure that the assignee has a right in any interest for late payment, and not the assignor (a matter that may not be clear in all legal systems), after the word "value" in paragraph (3) words along the following lines may be inserted: "including interest" (see remark 2 to draft article 2 and draft article 26*bis* (2) and (3)).

* * *

Section II. Debtor

Article 17. Principle of debtor-protection

(1) Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

(2) A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) change the currency of payment specified in the original contract, or

(b) change the State specified in the original contract, in which payment is to be made, to a State other than that in which the debtor is located.

* * *

Article 18. Notification of the debtor

(1) A notification of the assignment and a payment instruction are effective when received by the debtor, if they are in a language that is reasonably expected to inform the debtor about their contents. It shall be sufficient if a notification of the assignment or a payment instruction is in the language of the original contract.

(2) A notification of the assignment or a payment instruction may relate to receivables arising after notification.

(3) Notification of a subsequent assignment constitutes notification of any prior assignment.

* * *

Article 19. Debtor's discharge by payment

(1) Until the debtor receives notification of the assignment, the debtor is entitled to discharge its obligation by paying in accordance with the original contract.

(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (8) of this article, the debtor is discharged only by paying the assignee or as otherwise instructed.

(3) If 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 first notification received.

(4) If the debtor receives more than one payment instruction relating to a single assignment of the same receivables by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

(5) If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

(6) If 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.

(7) 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.

[(8) This article does not affect any ground on which the debtor may be discharged by paying a person to whom an invalid assignment has been made.]

Remarks

1. Paragraph (1) implies that the debtor may discharge its debt by paying the assignee before notification (the debtor "is entitled to"). This result is also obtained under draft articles 8 (1), 9 and 16 (1), according to which the assignment is effective as against the debtor as of the time of the conclusion of the contract of assignment (although formal validity is left to law outside the draft Convention; see remarks to Chapter III). While such a rule may be appropriate in principle, it may negatively affect practices, such as undisclosed invoice discounting or securitization, in which the debtor is expected to continue paying the assignor (A/CN.9/420, paras. 106-108). Thus, the Working Group may wish: to consider introducing an exception to the rule embodied in paragraph (1) as to the practices mentioned; or to revise the basic rule to the effect that before notification the debtor would be discharged only by paying the assignor; or to leave the matter to other law applicable outside the draft Convention. With a view to achieving certainty, the last alternative should be avoided, if possible.

2. The Working Group may wish to provide in paragraph (6) that until the debtor receives the proof requested, it can discharge its debt by paying the assignor. Otherwise, if the debtor's obligation to pay becomes due shortly after notification, the payment obligation would need to be suspended or the debtor would be in default (and be liable to pay damages and interest). The effect of such a rule would be that the assignee would have to provide with the notification adequate proof to the debtor that an assignment took place (which includes a written confirmation from the assignor).

3. In addition, the Working Group may wish to reconsider paragraphs (7) and (8). Paragraph (7) seems to inadvertently allow a debtor who receives notification from an assignee under the draft Convention to pay the person entitled to payment under the law applicable outside the draft Convention (e.g., the assignor, who may be entitled to payment, since the assignment of future receivables or the assignment in violation of an anti-assignment clause may be invalid under that law). Such an approach may have the unintended effect of increasing the risk that the assignee may not be able to collect from the debtor and thus have a negative impact on the cost of credit.

4. The relevant provision of the Ottawa Convention, from which paragraph (7) originates, provides that the Ottawa Convention does not affect "other grounds" based on which the debtor is discharged by paying the factor (i.e. the person entitled to payment under the Ottawa Convention, if the notification does not meet the requirements of the Ottawa Convention; however, in factoring, notification is normally given by the assignor and the Ottawa Convention provides that the assignee may notify the debtor only if authorised by the assignor).

5. Thus, the Working Group may wish to revise paragraph (7) so as to ensure that, after notification under the draft Convention from the assignee and possibly subject to the provision of adequate proof, the debtor is discharged only by paying the person entitled to payment under the draft Convention. As to discharge by payment into court and the like, the Working Group may wish to retain it only if several notifications are involved. Such a provision would ensure that, if law outside the draft Convention provides this alternative and the debtor is faced with several notifications, the debtor would not be precluded from being discharged by paying into court or a deposit fund. In such a case, conflicts among several claimants would be settled in accordance with the law applicable to priority by virtue of draft articles 24 to 26.

6. As to paragraph (8), it may be noted that it either states the obvious or inappropriately places on the debtor the risk of the assignment being non-existent or null and void. If paragraph (8) is meant to state the rule that the debtor does not obtain a discharge if the debtor pays an assignee, the assignment to whom was null and void (e.g., because the assignor did not have the capacity to act or was under duress or was defrauded), it is not necessary. If no assignment exists, draft article 19 or the draft Convention as a whole does not apply and it is rather unlikely that any law would allow the debtor to be discharged if the assignment was non-existent or null and void and the draft Convention does not change anything in this regard. This matter may be explained in the commentary. In any case, with the suggested revision of paragraph (6) (see remark 2 above), the risk of the debtor paying an assignee, to whom the assignment was null and void would be substantially reduced. The exceptional cases where nullity of the assignment could result in the debtor having to pay twice may be left to other law (in particular the case of fraud which is not easily addressed in any trade law text). In the case of subsequent assignments, in which nullity would be particularly difficult to discover, the debtor should be able to recover the payment wrongfully made on the basis of breach of implied representations or unjust enrichment principles.

7. If, on the other hand, paragraph (8) is intended to introduce an additional, good faith requirement for the debtor to be discharged, it is inconsistent with the Working Group's decision not to make the debtor's discharge conditional upon the debtor's good faith or the debtor's knowledge of the validity of the assignment (A/CN.9/434, para. 180; for the various arguments, see also A/CN.9/432, paras. 167-172 and A/CN.9/420, paras. 99-104).

8. Thus, the Working Group may wish to delete paragraph (8) and to include in the commentary the explanation that the debtor is not discharged by way of payment to an assignee, the assignment to whom was null and void (on the understanding that this is a very rare case which can be left to other law). Wording along the following lines may be considered:

> "(1) Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.
> eceives notification of the assignment, subject to paragraphs (2) to (6) of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such instructions.
>
> [insert paragraphs (3) to (5) renumbering them (2) to (4)].

"(5) If the debtor receives notification of the assignment from a person who purports to be an assignee ("purported assignee"), the debtor is entitled to request the purported assignee to provide within a reasonable period of time adequate proof that an assignment has been made and, until such proof is received by the debtor, the debtor is discharged by paying in accordance with the original contract. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

"(6) Notwithstanding paragraphs (1) to (5), this article does not affect any other ground on which payment by the debtor to:

(a) the person entitled to payment under this Convention; or

(b) in the case of several notifications or payment instructions, to a competent judicial or other authority, or to a public deposit fund

discharges the debtor."

* * *

Article 20. 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 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.

(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 10 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 21. Agreement not to raise defences or rights of set-off

(1) Without prejudice to the law governing the protection of the debtor in transactions made primarily for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a signed writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. 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.

(3) Such an agreement may only be modified by an agreement in a signed writing. The effect of such a modification as against the assignee is determined by article 22 (2).

Remarks

The Working Group may wish to clarify whether the writing referred to in paragraph (3) needs to be signed by both the assignor and the debtor or only by the debtor.

* * *

Article 22. 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.

* * *

Article 23. Recovery of payments

Without prejudice to the law governing the protection of the debtor in transactions made primarily for personal, family or household purposes in the State in which the debtor is located and the debtor's rights under article 20, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

* * *

Section III. Other parties

Article 24. Competing rights of several assignees

(1) Priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located.

(2) An assignee entitled to priority may at any time subordinate unilaterally or by agreement its priority in favour of any existing or future assignees.

Remarks

1. In order to avoid the risk of *renvoi*, the Working Group may wish to include in the text of the draft Convention (possibly in draft article 5) a provision along the following lines: "For the purposes of this Convention, "law" means the law in force in a State other than its rules of private international law" (see article 15 of the European Union Convention on the Law Applicable to Contractual Obligations, Rome, 1980; hereinafter referred to as "the Rome Convention"). Alternatively, the matter may be explained in the commentary.

2. The Working Group may wish to consider the question whether the forum should be able to set aside the rules applicable under draft article 24 if they are manifestly contrary to its mandatory law ("*loi de police*") or to public policy. Such an approach is consistent with normal practice in private international law texts. While it may be rather unlikely that an issue of mandatory law or public policy will arise in relation to a conflict of priority between several assignees receiving the same receivables from the same assignor, the possibility of such an issue arising cannot be excluded. If the Working Group approves this approach, draft articles 30 and 31 should be made applicable to draft article 24, as well as to all the private international law provisions of the draft Convention (which may be placed in one Chapter), draft articles 25 (3) and (4) and 26 (5) could be deleted. Draft article 25 (5) may also be deleted on the understanding that, while draft article 31 may operate only to set aside the applicable law, draft article 30 may have both a negative and a positive function in that it may result both in setting aside the applicable law and in the application of domestic rules as to preferential non-consensual rights.

* * *

Article 25. Competing rights of assignee and creditors of the assignor or insolvency administrator

(1) Priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

(2) In an insolvency proceeding, priority between the assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

(3) Notwithstanding paragraphs (1) and (2), the application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

(4) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, except as provided in this article, this Convention does not affect the rights of the insolvency administrator or the rights of the assignor's creditors.

(5) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any [non-consensual] [preferential] right or interest which under the law of the forum State would have priority over the interest of an assignee has such priority notwithstanding paragraph (2). [A State may deposit at any time a declaration identifying those [non-consensual] [preferential] rights or interests which have priority over the interests of an assignee notwithstanding application of the priority rule set out in paragraph (2).]

(6) An assignee asserting rights under this article has no less rights than an assignee asserting rights under other law.

Remarks

1. In paragraph (2), the term “assignor’s creditors” has been substituted for the term “insolvency administrator”, since: in some legal systems, the insolvency administrator does not become the holder of the rights of the creditors; and, in some reorganization proceedings, there may be no insolvency administrator (A/CN.9/WG.II/WP.102, remark 1 to draft article 24). However, in view of the fact that, in other legal systems, the insolvency administrator does become the holder of the creditors’ rights, a reference to the insolvency administrator should be inserted in paragraph (2).

2. If paragraphs (3) to (5) are retained (see remark 2 to draft article 24), they may need to be reformulated. The application of paragraph (3) should be limited to cases in which an insolvency or other proceeding is commenced in a jurisdiction other than the main jurisdiction of the assignor. If such a proceeding is commenced in the assignor’s main jurisdiction, any conflict with the *lex loci concursus* or the *lex fori* will be resolved by the rules of that jurisdiction. In paragraph (4), it may need to be further clarified that the assignee with priority retains its priority, but the assignment may be challenged by the insolvency administrator, e.g., as a preferential or a fraudulent transfer (the words “except as provided in this article”may not reflect the intended effect of paragraph (4)). In paragraph (5), the second sentence may be deleted. It is rather unlikely that any State would make a declaration limiting the non-consensual preferential rights that it would wish to preserve.

3. Paragraph (6) may also be deleted. It appears suggesting that, although a conflict of priority is covered by the draft Convention, a law other than the law of the assignor’s location may be applicable. Paragraph (6) was originally intended to ensure that an assignee asserting priority under the substantive law provisions of the draft Convention would not have less rights than if it asserted priority under substantive law outside the draft Convention (A/CN.9/455, para. 40; and A/CN.9/445, para. 44). Once the Working Group decided to turn the priority rules of the draft

Convention into private international law rules (A/CN.9/445, para. 22), paragraph (6) does not appear to be appropriate.

* * *

[Article 26. Competing rights with respect to payments

(1) If payment with respect to the assigned receivable is made to the assignee, the assignee has a property right in whatever is received in respect of the assigned receivable.

(2) If payment with respect to the assigned receivable is made to the assignor, the assignee has a property right in whatever is received in respect of the assigned receivable if:

(a) what is received is money, cheques, wire transfers, credit balances in deposit accounts or similar assets ("cash receipts");

(b) the assignor has collected the cash receipts under instructions from the assignee to hold the cash receipts for the benefit of the assignee; and

(c) the cash receipts are held by the assignor for the benefit of the assignee separately from assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

(3) With respect to the property rights referred to in paragraphs (1) and (2) of this article, the assignee has the same priority as it had in the assigned receivables.

(4) If payment with respect to the assigned receivable is made to the assignor and the requirements of paragraph (2) are not met, priority with respect to whatever is received is determined as follows:

(a) if what is received is a receivable, priority is governed by the law of the State in which the assignor is located;

(b) if what is received is an asset other than a receivable, priority is governed by the law of the State in which it is located.

(5) Paragraphs (3) to (5) of article 25 apply to a conflict of priority arising between an assignee and the insolvency administrator or the assignor's creditors with respect to whatever is received.]

Remarks

1. Unlike draft articles 24 and 25, according to which the issue of priority in receivables and the remedies available to an assignee are left to the law of the assignor's location, paragraphs (1) and (2) are intended to give to the assignee, in certain cases, a proprietary right (right *in rem*) in proceeds. They are not meant, however, to change the order of priority, which is established in paragraphs (3) and (4). The operation of draft article 26 may be better illustrated with the following examples. In

a conflict with respect to proceeds among several assignees of the same receivables, the order of priority will be established according to the law applicable by virtue of paragraphs (3) and (4). In such a case, priority does not depend upon whether any assignee has a right *in rem* or *ad personam* (i.e. the senior assignee with a personal claim prevails over a junior assignee with a proprietary claim). In a conflict with respect to proceeds between an assignee and the assignor's creditors or the administrator of the insolvency of the assignor, the order of priority will still be determined by the law applicable by virtue of paragraphs (3) and (4). Whether the assignee with priority in proceeds has a proprietary or a personal claim in such proceeds is also subject to the law governing priority in proceeds under paragraphs (3) and (4), with the exception of the situations addressed in paragraphs (1) and (2), in which the assignee with priority in proceeds is given a proprietary claim in such proceeds.

2. In order to better reflect this understanding, the Working Group may wish to separate issues of priority in proceeds from the question of the remedies available to an assignee with priority and to address the former in a provision containing paragraphs (3), (4) and (5) and the latter in another provision containing paragraphs (1) and (2). The Working Group may also wish to consider the question whether the rule embodied in paragraph (2) could be extended to proceeds other than cash proceeds provided that they meet the requirements of paragraph (2). If such an approach were to be adopted, subparagraph (a) could be deleted along with any reference to cash proceeds in subparagraphs (b) and (c). In subparagraph (c), the requirement that the proceeds need to be "reasonably identifiable", which is already implied, may need to be stated explicitly.

3. In addition, the Working Group may wish to align paragraphs (1) and (2) with draft article 16 to ensure that the assignee's right to the proceeds will not exceed the value of its right in the receivable. However, complete consistency with draft article 16 (2) may not be feasible, since so far the Working Group has not agreed to give the assignee in the case of payment to a person other than the assignee or the assignor (e.g., a competing assignee or a creditor of the assignor) a right *in rem* in the proceeds (thus, introducing in draft article 26 a rule along the lines of draft article 16 (2) would not be appropriate). Wording along the following lines may be considered:

"Article 26. Priority in proceeds

"(1) Priority among several assignees of the same receivables from the same assignor and between the assignee and the assignor's creditors or the insolvency administrator with respect to whatever is received in payment [, or other discharge,] of the assigned receivable is determined as follows:

(a) if what is received is a receivable, priority is governed by the law of the State in which the assignor is located;

(b) if what is received is an asset other than a receivable, priority is governed by the law of the State in which it is located.

"(2) Paragraphs (3) to (5) of article 25 apply to a conflict of priority arising between an assignee and the assignor's creditors or the insolvency administrator with respect to whatever is received in payment [, or other discharge,] of the assigned receivable.

"Article 26*bis*. Rights *in rem* in proceeds

"(1) With the exception of the cases foreseen in paragraphs (2) to (4) of this article, whether an assignee [has a right *in rem* or *ad personam* in] [is entitled to claim and retain] whatever is received in payment [, or other discharge,] of the assigned receivable is subject to the law governing priority under article 26 of this Convention.

"(2) If payment [, or other discharge,] with respect to the assigned receivable is made to the assignee, the assignee with priority over the assignor's creditors or the insolvency administrator under article 26 of this Convention has [a right *in rem* in] [the right to retain] whatever is received up to the value of its right in the receivable[, including interest].

"(3) If payment [, or other discharge,] with respect to the assigned receivable is made to the assignor, the assignee with priority over the assignor's creditors or the insolvency administrator under article 26 of this Convention has [a right *in rem*] [the right to retain] whatever is received up to the value of its right in the receivable[, including interest,] if:

(a) the assignor has received payment [, or other discharge,] under instructions from the assignee to hold whatever it received for the benefit of the assignee; and

(b) whatever the assignor received is held by the assignor for the benefit of the assignee separately and is reasonably identifiable from assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee."

* * *

CHAPTER V. CONFLICT OF LAWS

Remarks

1. The Working Group may wish to consider the scope or the purpose of the private international law rules of the draft Convention (on this matter, see A/CN.9/WG.II/WP.102, remarks 18-20 to draft article 1). In principle, it would not be appropriate to limit the application of private international law rules on the basis of the substantive law notions contained in Chapter I (i.e. only to assignments as defined in draft article 2, or only to international transactions as defined in draft article 3 or only if the assignor is located in a Contracting State). If the forum State is a Contracting State, it should be allowed to apply Chapter V if the transaction at hand has any international element and irrespective of whether the assignor or the debtor are located in Contracting States or whether the transaction involves an assignment of contractual or non-contractual receivables.

2. Such an approach would allow States that do not have adequate private international law rules on assignments or no rules at all to benefit from the rules contained in Chapter V. Admittedly, those rules reflect general principles which would need to be supplemented by other principles of private international law. However, in their generality the provisions of Chapter V introduce rules that may be useful for many States and clarify matters (e.g., priority issues) over which a great degree of

uncertainty prevails in private international law. Those States that have adequate rules on assignment may always opt out of Chapter V.

3. As to the question of whether it is a correct legislative policy to include private international law provisions in a substantive law text, the Working Group may wish to note that complex financing transactions, such as those involving assignments, can only be regulated in a meaningful way if they are regulated in a text that addresses in an as consistent and comprehensive way as possible both substantive and private international law aspects. Unless private international law issues are addressed in Chapter V, a great degree of uncertainty will remain with regard to all those issues that the draft Convention has, by necessity, left to law outside the draft Convention (for a list of those issues, see A/CN.9/WG.II/WP.98, remark 2 to draft article 8). In addition, once the priority rules in draft articles 24 to 26 have become generally acceptable, there is no reason to limit their application on the basis of the substantive law notions contained in Chapter I, thus missing the opportunity to clarify a matter on which great uncertainty prevails in current private international law texts.

4. Should the Working Group decide to follow this approach, the opening words in draft articles 27 to 29 should be deleted and draft article 1 (3) (which may be placed at the beginning of Chapter V) should be revised to read along the following lines: "The provisions of chapter V apply independently of the provisions of chapter I. However, those provisions do not apply if a State makes a declaration under article 34."

5. The hierarchy between the substantive and the private international law rules of the draft Convention, namely that a Contracting State would apply first the substantive law provisions and, only if the matter is not settled by the substantive law provisions, the private international law provisions, may also need to be addressed. Wording along the following lines may be considered for inclusion at the beginning of Chapter V: "If the provisions of this Convention outside chapter V do not apply to an assignment, the provisions of chapter V apply". Thus, if the forum is a Contracting State, would apply Chapter V instead of its own private international law rules.

6. Alternatively, the Working Group may wish to consider retaining Chapter V, without draft article 27. Draft article 27 addresses the contractual aspects of assignment, which is not the main focus of the draft Convention and may already be sufficiently regulated (even though the principle of freedom of choice of applicable law may not be common to all systems). The Working Group may wish to consider other alternatives, including: to limit the application of Chapter V to international transactions as defined in Chapter I, without the other limitations of Chapter I (for a precedence, see articles 21 and 22 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit), or only to international transactions with all the limitations as to substantive and territorial application set forth in Chapter I. In the latter case: for the reasons mentioned, draft article 27 may be deleted; draft article 29 may also be deleted, since the matter of priority would be sufficiently covered in draft articles 24 to 26; and draft articles 30 and 31 may be cast in the context of draft articles 24 to 26. In such a case, the Working Group may wish to consider whether draft article 28 should be placed in the context of section II of Chapter IV, without being subject to an opt-out, since it reflects generally acceptable principles.

* * *

Article 27[29].9/ Law applicable to the contract of assignment

(1) [With the exception of matters which are settled in this Convention,] the contract of assignment is governed by the law expressly chosen by the assignor and the assignee.

(2) In the absence of a choice of law by the assignor and the assignee, the contract of assignment is governed by the law of the State with which the contract of assignment is most closely connected. In the absence of proof to the contrary, the contract of assignment is presumed to be most closely connected with the State in which the assignor has its place of business. If the assignor has more than one place of business, reference is to be made to the place of business most closely connected to the contract. If the assignor does not have a place of business, reference is to be made to its habitual residence.

(3) If the contract of assignment is connected with one State only, the fact that the assignor and the assignee have chosen the law of another State does not prejudice the application of the law of the State with which the assignment is connected if that law cannot be derogated from by contract.

Remarks

In order to more clearly reflect the matters that should be subject to party autonomy, the Working Group may wish to consider substituting for "the contract of assignment" the terms "the conclusion, validity and the rights and obligations of the assignor and the assignee arising under the contract of assignment". In addition, the Working Group may wish to consider whether paragraph (2) is necessary. If the thrust of draft article 27 is to recognise party autonomy without going into any detail, paragraph (2) may not be absolutely necessary, in particular in view of the fact that the transactions intended to be covered are highly negotiated by highly sophisticated parties who normally include a choice of law clause in their contracts. If paragraph (2) is retained and a definition of location is adopted along the lines suggested above (see remark 4 to draft article 5), the third and the fourth sentence of paragraph (2) could be deleted. As to paragraph (3), the Working Group may wish to consider whether it is useful without any detailed rules as to the relevant connecting factors (e.g., characteristic performance under article 4 (2) of the Rome Convention with the fall-back position of article 4 (5) of the Rome Convention if the characteristic performance cannot be determined). Moreover, the Working Group may wish to consider dealing in Chapter V with the issue of the form of the assignment (paragraph (1) is intended to deal with substantive validity only; see remarks to Chapter III).

* * *

Article 28[30]. Law applicable to the rights and obligations of the assignee and the debtor

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9/ The number in square brackets indicates the number of this provision in the annex to document A/CN.9/455, from which the provisions in Chapter V and Chapter VI, with the exception of the underlined wording in Chapter VI, originate.

[With the exception of matters which are settled in this Convention,] the law governing the receivable to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Remarks

1. The Working Group may wish to reconsider its decision not to deal with the issue of the law applicable to rights of set-off (A/CN.9/456, 197). Rights of set-off of the debtor against the assignee arise often and are bound to affect the availability and the cost of credit.

2. The general principle as to contractual rights of set-off is that they are governed by the law of the contract from which they arise. This means that the law governing the right of set-off will be the same as the law governing the receivable, if the right of set-off arises from the original contract, and different, if the right of set-off arises from another contract. A rule along those lines would enhance certainty and may have a beneficial impact on the cost of credit. Wording along the following lines may be considered: "Rights of set-off arising from the original contract are governed by the law governing the receivable. Rights of set-off arising from any other contract are governed by the law governing that contract."

3. As to the statutory assignability, it should be noted that the application of the law governing the receivable would not be appropriate in the case of statutory assignability. Such an approach could inadvertently result in allowing the assignor and the debtor to evade possible statutory limitations, which involves matters of mandatory law or public policy, by choosing a convenient law to govern the receivable. Statutory limitations may be aimed at protecting the assignor (as, e.g., in the case of a statutory limitation as to the assignability of wages and pensions) or the debtor (as, e.g., in the case of a limitation as to the assignment of receivables owed by a sovereign debtor). The Working Group will recall that it decided not to include any additional provisions in draft article 28 on the understanding that statutory limitations to assignability, which would normally flow from mandatory law, would be preserved under draft article 30 (A/CN.9/456, para. 117).

4. Whether or not the opening words are retained, if Chapter V has a scope beyond Chapter I, draft article 28 would cover statutory assignability and contractual assignability for transactions beyond those covered in the draft Convention, while draft article 10 would cover contractual assignability with regard to the transactions falling under the draft Convention. If the opening words are retained and Chapter V is subject to Chapter I, draft article 10 would cover contractual assignability and draft article 28 would cover statutory assignability (A/CN.9/456, para. 95).

* * *

[Article 29[31]. Law applicable to conflicts of priority

[With the exception of matters which are settled in chapter IV:]

(a) priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located;

(b) priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located;

(c) priority between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located;

[(d) if an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any non-consensual right or interest which under the law of the forum would have priority over the interest of an assignee has such priority notwithstanding subparagraph (c), but only to the extent that such priority was specified by the forum State in an instrument deposited with the depositary prior to the time when the assignment was made;]

(e) an assignee asserting rights under this article has no less rights than an assignee asserting rights under other law.]

Remarks

If Chapter V, including draft article 29, is retained, subparagraph (d) has to be aligned with draft article 25 (5) (provided also that that provision is retained). As was suggested with regard to draft article 25 (5), subparagraph (e) may need to be deleted (see remark 3 to draft article 25).

* * *

Article 30[32]. Mandatory rules

(1) Nothing in articles 27 and 28 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

(2) Nothing in articles 27 and 28 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

* * *

Article 31[33]. Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

* * *

CHAPTER VI. FINAL PROVISIONS

Article 32[41]. Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

* * *

Article 33[42]. Conflicts with international agreements

(1) Except as provided in paragraph (2) of this article, this Convention prevails over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.

(2) A State may declare at any time that the Convention will not prevail over international conventions or other multilateral or bilateral agreements listed in the declaration, which it has entered or will enter into and which contain provisions concerning the matters governed by this Convention.

Remarks

Conflicts may arise with the Ottawa Convention, the Rome Convention and the EU Insolvency Convention (as to potential conflicts with the Unidroit draft Convention, see remarks 8 to 16 to draft article 4). The potential conflicts with the Ottawa Convention are minimal, since the scope of the Ottawa Convention is narrower than the scope of the draft Convention and, in any case, the provisions of the draft Convention are, to a large extent, similar to those of the Ottawa Convention (with the exception, e.g., of the reservation to the rule on contractual limitations to assignment and the rule on recovery from the assignee of payments made by the debtor). Potential conflicts with the Rome Convention are also minimal since draft articles 27 and 28 are almost identical with article 12 of the Rome Convention. As to the law governing priority, the prevailing view is that article 12 does not address this matter. However, even if draft article 12 addresses issues of priority, neither of the laws applicable under article 12 (i.e. the law chosen by the parties or the law governing the receivable) is appropriate (perhaps with the exception of the assignment of single, present receivables). No significant conflicts appear to arise with the EU Insolvency Convention. The notion of central administration is almost identical with the centre of main interests used in the EU Insolvency Convention (see remark 10 to draft article 5) and that Convention does not affect rights *in rem* in a main insolvency proceeding (article 5). While the EU Insolvency Convention may affect rights *in rem* in a secondary insolvency proceeding (articles 2 (g), 4, and 28), draft article 25 (4) would be sufficient to preserve, for example, the right of the assignor's creditors and the insolvency administrator to invalidate the assignment as a fraudulent or preferential transfer. In any case, the rights of the assignor's creditors and the insolvency administrator would be preserved if draft articles 30 and 31 were to replace draft articles 25 (3) and (4). In such a case, the law of the assignor's location could be displaced by the *lex concursus* or the *lex fori* (see remark 2 to draft article 24).

* * *

Article 34[42*bis*]. Application of chapter V

A State may declare at any time that it will not be bound by chapter V.

Remarks

If the Working Group decides to delete draft articles 27 and 29-31, and to move draft article 28 to section II of Chapter IV, draft article 34 may be deleted (a new article providing for a reservation to draft articles 10 and 11 with regard to sovereign debtors may be inserted here; see remarks to draft article 12).

* * *

[Article 35[42*quater*]. Other exclusions

A State may declare at any time that it will not apply the Convention to certain practices listed in a declaration.] 10/

* * *

Article 36[43]. Application of the annex

A State may declare at any time that it will be bound either by [sections I and II or by section III] of the annex to this Convention.

Remarks

If the Working Group substitutes the provisions on the revision and amendment of the draft Convention for the annex (see remarks to the annex below), draft article 36 may be deleted. If the annex is retained, draft article 36 may need to be revised to ensure that a State may opt into the registration-based priority rules (section I), or into the registration rules (section II) or into both (A/CN.9/455, paras. 122 and 131).

[Article 37[44]. Insolvency rules or procedures not affected by this Convention

A State may declare at any time that other rules or procedures governing the insolvency of the assignor shall not be affected by this Convention.]

Remarks

In view of the general formulation of draft article 25 (4), the Working Group may wish to consider that draft article 37 is not necessary and may be deleted.

10/ The text underlined in the provisions of Chapter VI reflects suggestions made by the Secretariat in document A/CN.9/WG.II/WP.102.

* * *

Article 38[45]. Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until … .

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Remarks

The Working Group may wish to consider the length of the period during which the draft Convention should be open for signature by States. It may be noted that in conventions prepared by UNCITRAL this period ranges between one and two years. In its considerations, the Working Group may take into account: the need to allow sufficient time for States to consider signing the draft Convention, indicating their intention to ratify; and the need not to have a very long period of time which may inadvertently give the impression that there is no urgency in the draft Convention being promptly ratified and entering into force.

* * *

Article 39[46]. Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which the Convention does not extend, this location is considered not to be in a Contracting State.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

* * *

Article 40[47]. Effect of declaration

(1) Declarations made under articles 34 to 37 and 39 (1) at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under articles 34 to 37 and 39 (1) may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

[(5) A declaration or its withdrawal does not affect the rights of parties arising from assignments made before the date on which the declaration or its withdrawal takes effect.]

* * *

Article 41[48]. Reservations

No reservations are permitted except those expressly authorized in this Convention.

* * *

Article 42[49]. Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of six months from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of the deposit of the appropriate instrument on behalf of that State.

(3) This Convention applies only to assignments made on or after the date when the Convention enters into force in respect of the Contracting State referred to in paragraph (1) of article 1.

* * *

Article 43[50]. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

[(3) The Convention remains applicable to assignments made before the date on which the denunciation takes effect.]

* * *

ANNEX

Remarks

1. The Working Group may wish to consider whether the annex serves its intended purpose to provide States with some guidance as to a substantive law priority regime. It would appear that, in view of the fact that the annex does not contain one but two recommended priority regimes, both of which need to be supplemented by a substantial number of additional provisions, the annex may not achieve its stated purpose.

2. The Working Group may, therefore, wish to further expand the annex into a more comprehensive set of model legislative rules or, alternatively, if expanding the annex appears to be an exercise beyond the current project, to reformulate it into one or more provisions which would leave the development of an international registration system to a procedure normally foreseen for the revision and amendment of an international convention.

3. Such provisions, which could be added to the final provisions, could read along the lines of articles 32 and 33 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) as follows (changes to the articles mentioned are underlined):

"Article X. Revision and amendment

"1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

"2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

"Article Y. Revision of the priority regime

"1. Notwithstanding the provisions of article X, a conference of Contracting States only for the purpose of establishing an international regime for the public filing of notices to address issues of priority arising in the context of assignment of receivables under this Convention is to be convened by the depositary in accordance with paragraph 2 of this article.

"2. A revision conference is to be convened by the depositary when not less than one fourth of the Contracting States so request. The depositary shall request all Contracting States invited to the conference to submit such proposals as they may wish the conference to examine and shall notify all Contracting States invited of the provisional agenda and of all the proposals submitted.

"3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The conference may adopt all measures necessary to establish an effective international regime for the public filing of notices to address priority issues arising in the context of the assignment of receivables under this Convention. No State shall be bound to participate directly or indirectly in the international regime so established.

"4. Any amendment adopted is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information. Such amendment enters into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect with the depositary.

"5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

"6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended."

* * *

Section I. Priority rules based on registration

Article 1[34].11/ Priority among several assignees

As between assignees of the same receivables from the same assignor, priority is determined by the order in which certain information about the assignment is registered under this Convention, regardless of the time of transfer of the receivables. If no assignment is registered, priority is determined on the basis of the time of the assignment.

* * *

Article 2[35]. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to articles 25(3) and (4) of this Convention and 4 of this annex an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

(a) the receivables [were assigned] [arose] [were earned by performance], and information about the assignment was registered under this Convention, before the commencement of the insolvency proceeding or attachment; or

(b) the assignee has priority on grounds other than the provisions of this Convention.

* * *

Section II. Registration

Article 3[36]. Establishment of a registration system

A registration system will be established for the registration of data about assignments under this Convention and the regulations to be promulgated by the registrar and the supervising authority. The regulations will prescribe the exact manner in which the registration system will operate, as well as the procedure for resolving disputes relating to registration.

* * *

Article 4[37]. Registration

11/ The numbers in square brackets indicate the numbers of the relevant provisions in document A/CN.9/WG.II/WP.96, from which the provisions of the annex originate. The underlined part of the text reflects suggestions by the Secretariat explained in that document.

(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the name and address of the assignor and the assignee and a brief description of the assigned receivables.

(2) A single registration may cover:

(a) the assignment by the assignor to the assignee of more than one receivable;

(b) an assignment not yet made;

(c) the assignment of receivables not existing at the time of registration.

(3) Registration, or its amendment, is effective from the time that the data referred to in paragraph (1) are available to searchers. Registration, or its amendment, is effective for the period of time specified by the registering party. In the absence of such a specification, a registration is effective for a period of [five] years. Regulations will specify the manner in which registration may be renewed, amended or discharged.

(4) Any defect, irregularity, omission or error with regard to the name of the assignor that results in data registered not being found upon a search based on the name of the assignor renders the registration ineffective.

* * *

Article 5[38]. Registry searches

(1) Any person may search the records of the registry according to the name of the assignor and obtain a search result in writing.

(2) A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:

(a) the date and time of registration; and

(b) the order of registration.

* * *

Section III. Priority rules based on the time of the contract of assignment

Article 6[39]. Priority among several assignees

(1) If a receivable is assigned several times, the right thereto is acquired by the assignee whose contract of assignment is of the earliest date.

(2) The earliest assignee may not assert priority if it acted in bad faith at the time of the conclusion of the contract of assignment.

(3) If a receivable is transferred by operation of law, the beneficiary of that transfer has priority over an assignee asserting a contract of assignment of an earlier date.

(4) In the event of a dispute, it is for the assignee asserting a contract of assignment of an earlier date to furnish proof of such an earlier date.

* * *

Article 7[40]. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to articles 25(3) and (4) of this Convention and 4 of this annex,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

(a) the receivables were assigned before the commencement of the insolvency proceeding or attachment; or

(b) the assignee has priority on grounds other than the provisions of this Convention.

* * *