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

Compilation of comments by Governments

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V.00-52428

INTRODUCTION

1. At its thirty-first session, held in Vienna from 11 to 22 October 1999, the Working Group on International Contract Practices adopted the draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] and requested the Secretariat to transmit the draft Convention to all States and interested international organizations for comments. With a view to assisting delegates in finalizing the draft Convention at the thirty-third session of the Commission, to be held in New York from 12 June to 7 July 2000, the Working Group also requested the Secretariat to prepare an analytical compilation of those comments (A/CN.9/466, para. 215)

2. This note sets forth, with minimal editorial modifications, the first comments received from Governments. Any further comments will, upon receipt by the Secretariat, be included in an addendum to this note.

COMPILATION OF COMMENTS

CZECH REPUBLIC

[Original: English]

I. GENERAL COMMENTS

We highly appreciate all activities and work done by the UNCITRAL with a view to increasing the availability of lower-cost credit in assignments of receivables in international trade. In our country, legal regulation of assignments of receivables is very general. Nevertheless, it differs in some aspects from the draft Convention.

Our most serious concern relates to articles 11 and 12 of the draft Convention. Under Czech law, it is not possible to assign a receivable contrary to an agreement between the assignor and the debtor. Any assignment effected by violation of such an agreement is null and void. The same problem arises in relation to article 5, variant A.

In addition, we are concerned about articles 15 and 17, which leave the notification of the debtor to the discretion of the assignor or the assignee. Under Czech law, the assignor is obliged to notify the debtor without undue delay. Another concern relates to article 21, which permits waivers of future defences and rights of set-off. Under our national law, such a waiver is null and void.

II. SPECIFIC COMMENTS

Title and preamble

We have no particular preference with regard to the title and the preamble. We do not object to the deletion of article 6 (c), as long as the preamble contains an indicative list of practices to be covered by the draft Convention.

Scope of chapter V (article 1 (3))

We agree with the retention of article 1 (3).

Exclusion or special treatment of certain practices (article 5)

We support the exclusion of practices relating to the assignment of financial receivables from the scope of articles 11 and 12, as proposed in A/CN.9/466, para. 71. In article 5, for the reasons mentioned above, we would prefer variant B.

"Location" (article 6 (i))

We agree with the definition reflected in A/CN.9/466, para. 96. The proposal in A/CN.9/466, para. 99, as to branch offices of financial service providers is also acceptable to us.

Application of the annex (article 40)

As to article 40, we prefer the second set of bracketed language.

Effects of declarations on third parties (article 41 (5))

We agree with the proposed wording in square brackets.

III. CONCLUSION

In conclusion, we have to state that, due to the divergences between our national legal system and the draft Convention mentioned above, at this stage, the Czech Republic will not be able to adopt the draft Convention, since this would require a change in our Civil or Commercial Code. At this stage, the harmonization of our law with the law of the European Union is a matter of higher priority for our country.

While we recognize the practical significance of practices to be covered by the draft Convention, we would note that they are rather new in the Czech Republic (developed in the last eight years) and they relate to a small part of the market (although, one of the reasons for this situation is the lack of sufficient legislation). For this reason, we are very interested in the draft Convention and we hope to have the opportunity to adopt it in the future.

DENMARK

[Original: English]

I. GENERAL COMMENTS

Generally, Denmark appreciates and welcomes the preparation of the UNCITRAL draft Convention on Assignment [in Receivables Financing] [of Receivables in International Trade] ("the draft Convention"). Furthermore, Denmark finds that, if adopted in a sufficient number of States, the draft Convention could lead to an improvement of the possibilities of obtaining credit by assignments of receivables.

II. SPECIFIC COMMENTS

Denmark wishes to make the following comments with respect to articles 1 (3), 6 (i), 24, 25 (2), 26 and 36.

Scope of chapter V (article 1 (3))

In order to indicate the importance of regulation of the international private law, in particular on priorityquestions, chapter V should be retained as a part of the draft Convention with an opt-out possibility (see A/CN.9/WG.II/WP.104, pages 37-38; and A/CN.9/466, para. 148).

"Location" (article 6 (i))

In order to establish certainty and transparency, the place of business, to which the contract has its closest connection, should be considered as the connecting factor in the definition of the term "location" in article 6 (i) (see A/CN.9/466, para. 96, variant A, and paras. 25-30). Such a place of business is visible to third parties, while the place of "central administration" or the "center of main interests" is not always obvious and predictable for third parties, who need to know which law will apply to a future assignment. Furthermore, regardless of which connecting factor is chosen, the connecting factor should be clearly explained in the commentary on the draft Convention, so as to facilitate its understanding.

Change of location of the assignor and law applicable to priority (article 24)

While a change in the location of the assignor will probably not take place often, we would suggest that the Commission considers whether a provision dealing with a change in that location is needed (e.g. similar to the regulation in article 9 of the U.S. Uniform Commercial Code).

Super-priority rights (article 25 (2))

Article 25 (2) of the draft Convention deals with claims which according to local insolvency law are entitled to super-priority (i.e. priority over an assignee). Article 24 leaves priority to the law of the assignor, thus ensuring that an assignee can rely solely on the law of the assignor's location and calculate its risk, including the risk of any super-priority claims.

However, as an exemption to article 24, article 25 (2) preserves super-priority claims under an insolvency law other than the law of the assignor's location (in practice, the law of the debtor). As a result, in order to evaluate the risk of any super-priority claims, the assignee has to examine both the law of the assignor's and the debtor's location. This result may lead to higher transaction costs.

It would not be appropriate to delete article 25 (2), since such an approach may bring the draft Convention in conflict with the European Union draft Insolvency Regulation (articles 2 (g), 4 and 28). However, the Commission may wish to consider limiting the scope of article 25 (2) to cases where the insolvency proceedings with respect to the assignor are opened in a State in which the assignor has an establishment. Such an approach might reduce the assignee's risk without conflicting with the draft Insolvency Regulation and should be sufficient in protecting the interests of local creditors.

Furthermore, regardless of whether the scope of article 25 (2) is limited as suggested, the Commission may wish to consider making the declaration of any super-priority rights, which can be invoked in a secondary insolvency proceeding, mandatory. Such an approach would, at least, make a discovery of non-assignor law easier for the assignee. If States agree that lower transaction costs would improve access to credit, a duty to declare super-priority rights should not render the draft Convention unacceptable.

Meaning of proceeds (article 26)

In order to limit possible conflicts with national law on secured credit in assets other than receivables and to avoid addressing the complexities of re-perfection of security interests in proceeds, the Commission may wish to consider limiting the scope of article 26 to cash proceeds (e.g. money, checks, deposit accounts). This result could be obtained by defining proceeds in article 6 (k) as cash proceeds only. In such a case, the last sentence of article 6 (k), referring to returned goods, would be unnecessary and could be deleted.

Conflicts with other international texts (article 36)

According to article 36, the draft Convention does not prevail over other international agreements dealing with matters governed by the draft Convention. If the goal is to obtain a uniform approach, which would ensure the largest degree of predictability, the approach followed in article 36 may not be appropriate. For example, it would be uncertain to what degree article 12 of the Rome Convention deals with the matters governed by the draft Convention, and, if it does, which text would prevail (the Rome Convention contains a similar provision). In a comment to the draft Convention, it

is stated that the conflicts between the Rome Convention and the draft Convention are minimal and that the prevailing view is that the Rome Convention does not deal with priority aspects (A/CN.9/466, para. 193). However, it should be noted that there exists national case law in Europe which seems to assume that the Rome Convention in fact deals with the law applicable to priority issues. While it may be argued that the draft Convention prevails since it is a substantive law text (A/CN.9/466, para. 194), this argument may not be fully correct, since, with regard to priority issues, the draft Convention (chapter IV, sec. III and chapter V, article 30) is in fact, to a large extent, a private international law text.

Consequently, in order to minimize the legal uncertainties arising from conflicting international agreements, it may be more appropriate if the draft Convention were to prevail over other texts, with the exception of texts listed in a declaration (A/CN.9/466, para. 192) and, perhaps, texts dealing with rights in receivables arising from the sale and lease of aircraft (A/CN.9/466, para. 83). Alternatively, the Commission could consider providing that the draft Convention would not prevail over other texts, with the exception of texts listed in a declaration. If article 36 is not revised, the commentary to the draft Convention should include explicit comments about conflicts with existing international agreements.

FRANCE

[Original: French]

Title of the draft Convention

France proposes the formulation "Convention on Assignment of Receivables in International Trade", which it feels is more in harmony with the vast scope of the text.

Non-contractual receivables (article 2 (a))

Article 2 (a) refers to the "assignor's contractual right to payment of a monetary sum", a formulation which has the effect of excluding non-contractual receivables from the scope of application of the draft Convention. France would like to see non-contractual receivables covered by the draft Convention, at the very least, through the introduction of an optional system.

Limitations on receivables other than trade receivables (article 5)

The draft Convention intends to allow assignment of receivables even in circumstances where the agreement concluded between the assignor and the debtor contains an anti-assignment clause (article 11). A provision of this kind is incompatible with the global set-off mechanisms, which are

applicable to reciprocal debts and receivables and on which all framework agreements that regulate operations on financial markets are based.1/

The Working Group on International Contract Practices put aside the idea of excluding financial receivables, defined as receivables other than trade receivables, from the scope of application of the draft Convention on the grounds that such an exclusion would have unduly curtailed the scope of the draft Convention. In fact, however, such a broad exclusion is not necessary, since the only receivables that might give rise to problems are those covered by a set-off mechanism and not all financial receivables in general.

Therefore, since it seems that financial receivables are to remain within the scope of the draft Convention, we must, at least, find a solution to ensure that the anti-assignment clauses necessary for the proper operation of framework set-off agreements retain their effectiveness. As it happens, the use of such framework agreemenst is encouraged by central banks and bank supervisory authorities because of their positive impact on the management of bank risks.

In A/CN.9/466, two solutions are proposed for article 5, "Limitations on receivables other than trade receivables", one proposed by the delegation of the United States of America (variant A) and the other proposed by the delegation of Canada (variant B). Variant A would validate an assignment as between the assignor and the assignee, but not as against the debtor, unless the debtor consented to the assignment. Variant B would leave the validity of an assignment, made in violation of an anti-assignment clause, to other law (which could treat such an assignment as invalid).

In principle, variant B is simpler than variant A, because it avoids the complications that would result from making a distinction between effect as between the parties and effect with regard to third parties, a distinction on which variant A is based. Furthermore, both variants are intended to apply to assignments of "receivables other than trade receivables" and reference is made to the definition of trade receivables in article 6 (l).

Article 6 (l) (which is still bracketed in the Working Group's report) defines the term "trade receivable" as "a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services". Yet, as we have explained above, not all receivables arising from financial-service contracts justify an exclusion from the scope of the draft Convention, but only those that are governed by a set-off agreement.

Accordingly, whether we retain variant B or variant A, it would be wise to formulate the definition of "trade receivable" in such a way that the scope of the exception introduced in article 5

1/ This applies, for example, to the "Global Master Repurchase Agreement" of the Public Securities Association and the International Securities Market Association, the "Master Agreement" of the International Swaps and Derivatives Association, the "European Master Agreement" of the Banking Federation of the European Union, the "Framework Convention of the French Bankers Association relating to Repurchase Transactions", the "Framework Convention of the French Bankers Association relating to Forward Transactions", and the Framework Agreements of the German Bankers Association on Repurchase Transactions and on Forward Transactions.

would be limited to what is really necessary. One might, for example, suggest the following formulation in article 6 (l):

> "'trade receivable' means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services when these latter are provided within the framework of an agreement that provides for set-off of all reciprocal debts and receivables of the parties".

Examples of such financial services (pensions, swaps, payment services, etc.) could usefully be given in the commentary, which the UNCITRAL Secretariat will be preparing on the draft Convention.

Definition of location (article 6 (i))

The French Government is in favour of the definition of location in article 6 (i). However, it wishes to observe that this is problematic if the mechanism for assignment of receivables laid down in the draft Convention is to be used for refinancing branches of banks. The objective is, after all, to define the assignor's location, if it has more than one establishment, as the State in which its central administration is located. In particular, the location of the assignor would determine the priority rules to which the assignee's rights would be subject.

In practice, the definition in article 6 (i) would mean, in connection with an assignment of receivables between, for example, the Bank of France (as assignee) and a Paris branch of a foreign bank (as assignor), that the location of the assignor would be the State of its central administration, that is, the State where the headquarters of the foreign bank is located. The assignment of receivables would thus be subject to the law of that State, notably with regard to the applicable priority rules. Such a result would be completely unacceptable for the refinancing bank, whether it were a central bank or some other credit institution.

If we want to avoid seriously hampering the application of the draft Convention for purposes of inter-bank refinancing, a special regime must be found for branches of banks. A system of this kind would be all the more justified as bank branches are subject to the same obligations, notably with regard to consent, as banks which are legal entities under local law, subject, of course, to the special arrangements resulting from the "European passport". Even if the prudential supervision of banks remains within the competence of the authorities in the country where the bank's headquarters are located, responsibility for the provision of liquidity (i.e. refinancing) still belongs, even within the European framework, with the authorities of the host country (see article 14-2 of EEC directive No. 89/646, known as the second directive on coordination of bank legislation).

The special regime, of which we have been speaking, might consist of placing bank branches in the same category as the debtor, for which the relevant place of business is that "which has the closest relationship to the original contract" (subparagraph (iii)).

Application of the annex to conflicts of priority among competing assignees (articles 1 (4), 24 and 40)

It will be very difficult to make an instrument operate well, if several parallel priority rules may be applicable to a conflict of priority between several assignees who obtain the receivables from the same assignor. For example, if an assignment has priority under the law of State A, which has opted for sections I and II of the annex (registration), and another assignment has priority under the law of State B, in which the assignor is located and which has opted for the priority rules in section III of the annex (time of the contract of assignment), it is not clear whether the conflict before a court in State A will be resolved in conformity with section I and II, or with section III of the annex.

It seems obvious that a court in a State, in which the assignor is located and which is a Contracting State, should apply the criteria of article 1 (1) (a) in determining whether the draft Convention, including article 24, applies. However, the text of the draft Convention is not sufficiently clear about this matter. Article 40, concerning the application of the annex, confines itself to indicating that "A Contracting State may ... declare that [it will be bound either by sections I and/or II or by section III of the annex to this Convention]". Paragraph (2) of article 40 stipulates that, for the purposes of article 24 (which governs the law applicable to competing rights of other parties), the law of a Contracting State that has made a declaration is the set of rules set forth in either section I of the annex or in section III. Article 1 (4) provides that the annex applies in a Contracting State which has made a declaration under article 40. It is, therefore, proposed that article 1 (4) should be amended as follows: "The annex to this Convention applies to the assignments referred to in a declaration made under article 40 by the Contracting State in which the assignor is located."

Consumer protection (articles 17 to 23)

With the exception of articles 21 and 23, the provisions in section II of chapter IV of the draft Convention do not go far enough in protecting the rights of consumer debtors. The Working Group decided that assignments to consumers are not excluded from the scope of the draft Convention, unless they are made for consumer purposes. It is, therefore, essential that the legal position of a consumer, whose debt to a bank results from a loan, secured by either movable or immovable property, or from an overdraft facility or from the use of a credit card, should not be affected by the instrument we are preparing. In this connection, the arguments developed in A/CN.9/WG.II/WP.106, para. 58, are valid not only for articles 21 and 23 but for all the articles in this section, since in France, as in many other countries, national law protects consumers in all those situations envisaged by the draft Convention, and most of these provisions of national law are mandatory law provisions.

Generally speaking, consumers, as debtors protected by law, cannot accept renunciation by contract of provisions reflecting public policy (e.g., French law No. 78-23 of 10 January 1978 on consumer credit). Moreover, the consumer is protected against unfair clauses, which the professional might be tempted to propose to him, by a Community Directive (No. 93/13 of 5 April 1993) and by French law (article L 132-1 of the Consumer Code, together with an annex comprising clauses considered to be unfair; and recommendations of the Commission on Unfair Clauses, notably the recommendation concerning clauses of implicit consent and the summing-up recommendation). Moreover, article 19, which provides that, when the debtor receives notification of the assignment, it

only has to make payment to the assignee, should not apply to consumer debtors. Law No. 88-1201 of 23 December 1988 on Common Receivables Funds provides that the assignor remains obliged, apart from any guarantee obligation, to collect the receivables assigned (article 36) or to entrust collection on an obligatory basis to some other French credit institution or to the Bank for Official Deposits, advising the debtor of that action.

Consequently, France wants all the articles in this section II of chapter IV concerning the debtor to be "without prejudice to the laws of the State of location of the debtor concerning protection of the latter in transactions for personal, family or household purposes".

Coordination with the Unidroit draft Convention concerning interests in mobile equipment (article 36)

With regard to the relationship between the UNCITRAL draft Convention and the Unidroit draft Convention, it should be pointed out that article 36, which seems to apply the principle of "*lex specialis derogat legi generali*", does not seem to offer an appropriate means of settling a potential conflict between the two instruments in the event that the chapter on assignment of interests is maintained in the Unidroit draft Convention.

Chapter IX of the Unidroit draft Convention deals in effect with assignments of international interests. While, in most legal systems, a security is generally considered to be accessory to the receivable that is secured, in the system, proposed under the Unidroit draft Convention, the receivable constitutes the accessory security. The approach taken by in the UNCITRAL draft Convention is altogether different [under article 12, the security right follows the secured obligation]. The UNCITRAL draft Convention deals with assignments of receivables in international trade and international assignments of receivables.

Let us recall that this question is to be considered at the next joint session of Unidroit and ICAO (Rome, 20 to 31 March 2000), which is to draft a convention on interests in mobile equipment, and that a working document on this subject prepared by the French delegation, which presents different options, is to be discussed. We, therefore, consider it preferable to await the results of the discussions, to be held under the aegis of Unidroit and ICAO, before trying to arrive at a final decision on this question within the framework of UNCITRAL, since the very existence of this chapter in the Unidroit draft Convention on assignments of interests is still contested.

GERMANY

[Original: English, German]

I. GENERAL COMMENTS

The German Government supports the objectives pursued with the UNCITRAL draft Convention on Assignment in Receivables Financing. Different national regulations on the requirements for effective assignments, on the status of the assignor, the assignee and the debtor, as well as different national regulations on the possibilities for global assignments and on the assignment

of future receivables limit the cross-border use of receivables for financing purposes. It seems to be necessary to remove legal uncertainties without disturbing existing financial practices.

The German Government welcomes the progress achieved to date on the ongoing UNCITRAL project, but notes that certain essential problems have not been resolved yet.

II. SPECIFIC COMMENTS

Scope of application/receivables other than trade receivables

The Working Group originally recommended a rather broad scope of application for the draft Convention. The German delegation supported this approach. During the discussion of specific provisions, however, it became clear that due to the particular nature of certain receivables, an unlimited scope of application would be unsuitable. This is the case with receivables from financial futures, loans on collateral securities, sale and repurchase schemes, and receivables processed through clearing systems.

Financial futures, loans on collateral securities, and sale and repurchase schemes are in practice concluded under master agreements. The aim of such agreements, in the event of non-performance or the insolvency of one of the parties, is to make possible the unitary termination and settlement (so-called "netting")2/ of all individual transactions. The master agreement restricts in particular any right which the insolvency administrator may have to make selective decisions. Thus, it is no longer possible for the insolvency administrator to fulfil individual (from the point of view of the insolvent debtor's assets as a whole) valuable transactions while terminating others (so-called "cherry-picking"). In order to secure the objective of the general agreement (i.e. the reduction of risks and the exclusion of "cherry-picking") or rather, to protect it from circumvention, master agreements, typically used in Germany and internationally, make provision that the assignment of receivables, arising from the individual transactions included in the agreement, made by one party requires the prior (written) consent of the counter-party.3/

2/ The "mechanics" of netting can be described as follows: the individual transactions concluded within the framework of the general agreement constitute, together with the master agreement, one unitary obligation. Notice may only be given with respect to all transactions as a whole and only in certain cases (e.g., in the event of failure to make payment, of insolvency, of a worsening of the financial standing due to reorganization). It is not possible to give notice with respect to individual transactions. Where a general agreement is cancelled, all individual transactions are terminated. The reciprocal claims which arise as a result of this (e.g., for payment of money or delivery of securities) are reimbursed through a unitary settlement claim. The amount of the settlement claim is calculated on the basis of the current market values of the individual transactions. To the extent that positive and negative current market values are balanced against one another, these cancel each other out.

3/ Cf. for example section 7 of the ISDA Master Agreement 1992 as well as No. 10 of the German general agreement for financial futures. This requirement for consent is referred to hereafter as "assignment prohibition".

The above-explained "mechanics" of the termination and settlement as a whole can also be found in clearing systems which make provision for multilateral netting of the payments made through the system. The objective is the same as the one with respect to financial futures, loans on collateral securities, and sale and repurchase schemes, whereby within the framework of reducing risks, alongside the risks of insolvency, settlement risks are the most important consideration. In addition, all agreements on multilateral netting make provision for a limitation of assignability.

The German Government is of the opinion that established practices should not be hindered by the UNCITRAL draft Convention, and that a special regulation for the transactions concerned should, therefore, be introduced, either through a corresponding limitation of the scope of application of the draft Convention (solution of exclusion) or in the form of exemption of the relationship between debtor and assignor from the scope of certain provisions of the draft Convention (special-treatment solution).

In view of the recommendation of the Working Group to make the scope of application as broad as possible, it seems that it would not be possible to come to an agreement on the solution of exclusion. Within the framework of a special-treatment solution, which would in any case be necessary, a concept should be created which is transparent and easy to apply in practice. With respect to this consideration, the approach of excluding the above-mentioned receivables from the applicability of articles 11 and 12 of the Convention, where assignment prohibitions exist between the parties, would seem to be appropriate.

In any case, acceptance of such an approach will depend on whether the receivables to be covered by the special-treatment solution can be clearly identified. To this extent, recourse to the term "trade receivables" would appear to be problematic, particularly due to its reference to "financial services", since there is no uniform interpretation of the term under the different legal systems. Against this background, receivables resulting from financial futures, loans on collateral securities, and sale and repurchase schemes, as well as receivables which are processed through clearing systems, should be defined with due consideration to international practice (for example, the definitions in customary standard master agreements used internationally).

"Location" (article 6 (i))

The term "location" is of central importance for the draft Convention, not only with respect to the scope of application but also with respect to certain provisions of debtor protection and certain private international law rules. To date, it has not been possible for the Working Group to come to an agreement on the definition of the term "location".

The German Government is of the opinion that the definition of the term "location" must be unequivocal, clear, always identifiable and do justice to the actual legal situation. Doubts exist with respect to article 6 (i) to the extent that it makes no distinction between head office and branch office. Only such a distinction will be able to take account of both European and international business practice, in which banks, in particular, are often active in foreign countries, not through subsidiaries, but through dependent branch offices.

If the provisions on the scope of application and on the relevant conflict-of-laws rules merely refer to the head office, one arrives at the unacceptable result that transactions which are made through

foreign branch offices are subject to the legal order of the head office, although the head office does not have any relation to the specific assignment in question.

For the above-mentioned reason, at the thirty-first session of the Working Group, it was suggested that reference be made to the location of the branch in the books of which a receivable appears immediately prior to an assignment. There are significant objections with respect to this proposal. At the point in time an assignment takes place, often the location, where the receivable is booked, cannot be determined. In addition, in an age of electronic media, the location of a book entry can often only be determined with difficulty; and, in the case of registers held transnationally, book entries may relate to receivables of branch offices in different countries.

Other issues of private international law (chapter V)

Provisions relating to private international law should be placed at the end in chapter V, if possible, and not in different places in the draft Convention. Accordingly, article 26 and the brackets around article 30 should be deleted. The Commission may need to examine whether the special public policy provision in article 30 (2) could also be deleted, since article 32 contains a general clause pertaining to public policy. Article 31 (2) is detrimental to legal certainty, since the meaning of the term "close connection" is vague and can be subject to debate. In this connection, the question arises whether one could not dispense with this provision as well.

Conflicts with other international agreements (article 36)

With respect to the issues addressed in article 36, it should be noted that the Member States of the European Union have to pay regard to the fact that they are, under international law, already bound by article 12 of the Convention of 19 June 1980 on the Law Applicable to Contractual Obligations. In addition, it should be noted that legal instruments of the European Union (regulations and directives) of higher priority within the field of private international law (on the basis of articles 61 ff. of the Treaty on European Union in the version of the Treaty of Amsterdam) would not be affected by the draft Convention. In view of the above and of the complexity of article 36, the second half of that article may need to be deleted.

Furthermore, article 36 seems to create doubtful consequences for State Parties to the Ottawa Convention on International Factoring. According to the rule of speciality and notwithstanding its narrow scope of application, the Ottawa Convention might preempt the UNCITRAL draft Convention. As a result, States parties to the Ottawa Convention would be entitled to make a reservation to the rule validating assignments made in violation of contractual limitations (article 18 of the Ottawa Convention). With respect to factoring contracts outside the Ottawa Convention but within the scope of the UNCITRAL draft Convention, only the latter one is applicable. The non-applicability of the Ottawa Convention may be attributed to the specific nature of the contract, but it may also be attributed to the geographic sphere of application of the Ottawa Convention which is different from the geographic sphere of application of the UNCITRAL draft Convention. Even if the objectives of those Conventions do not differ, the provisions of the UNCITRAL draft Conventions are more comprehensive and contain more substantive law. Beyond that, the requirements for the assertion of

claims are determined differently and the two conventions set out different regulations on assignment prohibition.

Similar problems will occur under the Unidroit/ICAO draft Convention on International Interests in Mobile Equipment and the Protocol on Matters Specific to Aircraft Equipment. An expert working group within the Unidroit/ICAO project will convene in early March this year. The German Government expects this group to present a solution to be acceptable for both projects.

LITHUANIA

[Original: English]

Title of the draft Convention

The title of the Convention should be "Convention on Assignment of Receivables in International Trade".

Exclusion of assignments for consumer purposes (article 4 (a))

It would be more precise to state in article 4 (a) that the draft Convention is not applicable where the claim arising from the consumer contract is transferred to a consumer.

Treatment of receivables other than trade receivables (article 5)

Variant B of article 5 would be preferable.

Party autonomy (article 7)

The scope of article 7 seems to be doubtful. We think that the limitation to the principle of party autonomy should apply only with respect to the mandatory provisions of the draft Convention. For example, according to its content, article 13 should be regarded as a mandatory norm. Therefore, the parties should not be allowed to set it aside. The draft Convention contains further provisions of a mandatory nature which the parties should not have the right to derogate from. The draft Convention may become meaningless, if parties are able to introduce different rules than those of the mandatory provisions of the draft Convention. Thus, a reservation should be made in article 7 enabling parties to establish by agreement other rights and obligations, except in cases where the draft Convention determines the rights and obligations of the parties by way of a mandatory norm.

Time of assignment (article 10)

Article 10 of the draft Convention refers to the time of the conclusion of the contract of assignment. However, the time when a contract is deemed to be concluded is defined differently in the

national legislation of various States. Therefore, it would be preferable to determine in the draft Convention the time when a contract of assignment is deemed to be concluded.

Contractual limitations on assignment (article 11)

Article 11 (1) is inconsistent with basic principles of Contract Law. Where the parties agree that the creditor will not relinquish the claim, such agreement is considered to be binding. A derogation from this principle might be possible only in relation to some specific contracts, like the factoring contract. However, it should not be established as a general rule applicable to all contracts. Article 11 (1) ignores a completely reasonable and legitimate interest of a debtor to deal with a specific creditor.

Principle of debtor protection (article 17)

In article 17, it would be useful to provide for the compensation of any expenses incurred by the debtor as a result of any alteration of the payment instructions.

Conflicts of priority (article 24)

The need for article 24 is doubtful. The purpose of the draft Convention is to unify the material law but not private international law. Therefore, the regulation of the issues of applicable law is hardly justifiable. Private international law issues could be decided within the framework of the Hague Conference on Private International Law.

Public policy exceptions (article 25)

Article 25 restricts significantly the possibility of applying the *lex fori*. We think that the draft Convention should allow the forum to set aside a rule of the law applicable law if that rule is manifestly contrary, not only to the public policy of the forum, but also to mandatory norms of the *lex fori*.

Private international law provisions (chapter V)

We believe that chapter V should be omitted and the issues of the applicable law should be regulated by means of some other convention, since the draft Convention aims at the unification of material law but not of private international law and, in any case, under article 37 States may declare that they are not bound by chapter V.

Exceptions as to sovereign receivables (article 39)

Article 39 and other articles provide States with numerous possibilities for derogating from the application of one or more articles of the draft Convention. Such a wide possibility for derogation might reduce the effect of the draft Convention.

PERU

[Original: Spanish]

Title of the draft Convention

The most appropriate title of the Convention is: "Convention on Assignment of Receivables in International Trade".

Scope of application (articles 1 and 5)

In view of article 5, article 1, which establishes the scope of application, should specify that the draft Convention will apply only to trade receivables or, more precisely, to receivables arising from international commercial transactions.

"Future receivable" (article 6 (b))

In article 6, the concept of "future receivable" should be covered by a separate subparagraph, in the same way as other terms defined in article 6.

"Location" (article 6 (i))

Article 6 (i) should specify that it relates to the domicile of the persons involved in the assignment. In certain articles, for example articles 23, 24, 25 and 30, reference is made to "location". It should be specified that the concept being dealt with here is that of "domicile".

"Parts of receivables" (article 9)

Article 9 refers to "parts" of receivables. This term would need to be defined in article 6.

Form requirements relating to the creation of rights securing receivables (article 12 (5))

Article 12 (5) needs to be clarified, since it gives the impression that the provisions of the draft Convention will prevail over those of domestic law. In Peru, for example, mortgages and non-possessory liens or judicial liens need to be publicly registered, which in turn calls for certain formalities to be observed.

Defences and rights of set-off of the debtor (article 20)

Paragraph (3) refers [in the Spanish version] to article 10, whereas the reference should be to article 11.

Modification of the original contract (article 22)

Paragraph (1) is confusing. There appears to have been an error in the drafting since it states that an agreement concluded before notification of the assignment is effective, whereas such an agreement ought not to be effective. Subparagraph (2) (b) refers to a "reasonable" assignee, but it would be more appropriate to refer to a "diligent" assignee.

Law applicable to the relationship between the assignor and the assignee (article 28)

The provision set forth in article 28 (2) departs from the corresponding rule of private international law which is contained in the Peruvian Civil Code. According to the latter rule, if the applicable law is not chosen by the parties, the law of the place of performance of the contract is applicable or, if the contract is to be performed in different countries, the applicable law is that which governs the principal obligation or, if that cannot be determined, the law of the place where the contract was concluded. This comment also concerns articles 29 and 30, except as regards creditors of the assignor and the insolvency administrator, whose rights and obligations are regulated by a separate legal regime. This comment and that made with respect to article 12 (5) are qualified by articles 37 and 38, which make it possible for a State to declare, at its own discretion, that it will not be bound by those provisions.

REPUBLIC OF KOREA

[Original: English]

I. GENERAL COMMENTS

Korea considers that an international convention that aims to improve assignability of receivables in international transactions will enhance international trade and finance by making credit available at lower cost. Korea, therefore, supports the draft Convention that is currently discussed in the United Nations Commission on International Trade Law, provided that the draft Convention is effective in improving assignability of receivables and that it duly protects the rights of the parties affected by the assignment. While recognizing the economic objective of the draft Convention, Korea also notes that the rules on assignments of receivables have social and political implications which deserve serious considerations. In addition, Korea wishes to emphasize that certain domestic rules on the assignment of receivables are an integral part of the domestic legal system that cannot accommodate drastic changes. With these general observations, Korea wishes to make specific comments on the following issues.

II. SPECIFIC COMMENTS

The title, the preamble and the definition of receivables financing in article 6 (c)

Korea does not consider it necessary to limit the scope of the draft Convention to assignments in receivables financing. Korea is of the view that the draft Convention should apply generally to the assignment of receivables in international trade. Therefore, the title should reflect this idea, eliminating the term "financing" and replacing it with the words "international trade". The formulation of the preamble should be also aligned with this change. Consequently, Korea does not consider that the definition of receivables financing is necessary in the draft Convention.

Scope of chapter V (article 1 (3))

Korea considers that the scope of chapter V should be consistent with the scope of the draft Convention. Therefore, chapter V should apply to "assignments of international receivables and to international assignments of receivables as defined in chapter I."

Practices relating to the assignment of financial receivables (article 5) and practices relating to the assignment of receivables arising from the sale or lease of aircraft and similar types of mobile equipment (article 36)

It is inappropriate to apply the draft Convention to certain financial transactions that are technically assignments of receivables but are not intended to provide credit (e.g. repurchase and swap transactions). The application of the draft Convention to those types of assignments will only interfere with the established practices and create confusion. Therefore, those transactions should be excluded entirely from the scope of application of the draft Convention.

The draft Convention should not include any rule referring explicitly to the assignment of receivables arising from the sale or lease of aircraft and similar types of mobile equipment to be covered by the preliminary draft Convention, currently prepared in the context of UNIDROIT. Korea is of the view that the relationship between those two Conventions should be left to be decided in accordance with the rules of international law. Any provision on the relationship between those texts, which is consistent with the rules of international law, would be redundant, while a provision, which would be inconsistent with the rules of international law, would only create a conflict.

"Location" (article 6 (i))

The definition of "location" should be clear. At the same time, the definition should also designate a certain place as the location where the relevant transaction is actually agreed upon and takes place. Therefore, Korea can accept the place of business as the location. If the assignor or the assignee has more than one place of business, Korea proposes that the place of business is that which has the closest relationship to the original contract. Korea further proposes that the place of central administration is presumed to be such place in the absence of proof to the contrary. This proposition would provide a clear reference to "location" and would also accommodate a range of exceptional

cases where transactions are agreed upon locally at a branch level, as is often the case with banking transactions.

Application of the annex to the draft Convention (article 40)

Korea prefers to provide for the application of the annex in line with the second bracketed proposal in article 40, since this proposal better clarifies the various options for States.

Other exclusions and effects of declarations (articles 39, 41 (5), 43 (3) and 45 (3))

Korea supports strongly the adoption of article 39, which allows States to exclude further practices from the application of the draft Convention. Financial systems of States are in significantly different stages of development. Certain financial practices are also considerably different from State to State. In addition, the fast development in the area of finance may make the application of the draft Convention to certain types of assignments of receivables inappropriate. Therefore, a State may find it inevitable to exclude certain practices from the application of the draft Convention. This indicates that the safety net provided by article 39 is essential. With respect to the effect of declarations, Korea wishes to adopt all bracketed proposals in articles 41, 43, and 44 of A/CN.9/466, Annex 1 with the rest of the provisions in those articles.

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