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

Compilation of comments by Governments and international organizations

Addendum

CONTENTS

States

IRELAND

[Original: English]

Ireland will, as suggested by the Secretary General of the United Nations, confine itself largely to those matters specified in the note of 29th November 1999.

Title and preamble

As regards the title, Ireland has no very strong preference. On the whole, Ireland believes the words in the second set of square brackets "of receivables in international trade" are preferable. As regards the preamble, we would regard it as generally satisfactory. In the second and fifth indents, the words in square brackets can be retained. The third indent, however, seems excessively long and cumbersome. Much in the language in square brackets should be dropped. We propose the wording "desiring to establish principles and to adopt rules relating to assignment of receivables that would create certainty and transparency and promote modernisation of law relating to assignment of receivables while protecting existing practices and facilitating the development of new practices". The remaining language in the draft text is largely superfluous.

Conflict of laws (chapter V)

Ireland is of the view that chapter V should be omitted.

Exclusion or special treatment of certain practices (articles 4 and 5)

The proposal to limit the definition of receivable so as to exclude certain practices is a matter of difficulty. The view Ireland took at the last meeting of the Working Group was that, in view of misgivings expressed to us by the Irish Banking Federation, we would prefer to narrow the definition if possible. For that reason, Ireland strongly favours the proposal to give special treatment to receivables which are not trade receivables (see A/CN.9/466, paragraphs 71-77). As regards deposit accounts Ireland would broadly favour the formula proposed in A/CN.9/466, paragraphs 64-65. As regards "swaps" and derivatives, Ireland has no strong preference. As regards aircraft and similar types of mobile equipment, this is a matter of difficulty in view of the draft Unidroit Convention presently being considered. On the whole, Ireland favours a simple exclusionary rule for such receivables.

Definition of "location" (article 6 (i))

The question of "location" has given difficulty. Ireland regretfully finds it impossible to express a preference for any of the alternatives proposed in relation to the location of branch offices.

Annex

The annex is a matter which has given difficulty at successive Working Group sessions. On the whole, Ireland would favour its deletion.

Effects of declarations on acquired rights (article 41 (5))

As regards the effects of a declaration on rights acquired before a declaration becomes effective, Ireland would not favour permitting such a declaration to have retrospective effect.

ROMANIA

[Original: English]

Title and preamble

The title of the draft Convention should be: "Convention on Assignment of Receivables in International Trade". The fifth paragraph of the preamble should read: "Being of the opinion that the adoption of uniform rules governing assignments in receivables would facilitate the development of international trade and promote the availability of capital at more affordable rates."

Definition of "receivables financing" (article 6 (c))

The definition in article 6 (c) should read: " 'financing through receivables' means financing using any transaction in which value, credit or related services are provided for value in the form of receivables. The financing through receivables includes but is not limited to factoring, forfaiting, securitization, project financing and refinancing."

Conflict of laws

In articles 28 (1) and 29, the text within square brackets should be deleted. The rest should remain unchanged.

Application of the annex (article 40)

In article 40, the first set of bracketed language should be deleted. The rest should remain unchanged.

Transitional application of the draft Convention (articles 41 (5), 41 (3) and 43 (3))

The brackets around articles 41 (5), 43 (3) and 44 (3) should be deleted.

SPAIN

[Original: Spanish]

1. GENERAL COMMENTS

The Government of Spain wishes to extend its congratulations to the United Nations Commission on International Trade Law (UNCITRAL) on the conclusion of the work of the Working Group on International Contract Practices devoted to the preparation of the draft Convention on Assignment of Receivables in International Trade ("the draft Convention").

These congratulations reflect the general view of the Government with regard to the draft Convention, which it considers to be an appropriate and effective instrument for achieving progress towards a uniform law in the area of the assignment of receivables in international trade. The Government thus regards the draft Convention as having a very high degree of acceptability. The comments are structured in accordance with the note of the UNCITRAL Secretariat inviting comments (LA/TL 133 (18) CU 99/247).

II. SPECIFIC COMMENTS

Title and preamble

The title should include a reference to "international trade" but not to "receivables financing". The term "financing" could give rise to problems of interpretation, since it is not universally understood in the same way. The definition in article 6 (c) would not eliminate those problems entirely. Furthermore, including a reference to "financing" might result in creating the impression that the scope of the draft Convention is narrower than it actually is. For the same reasons, the reference to "financing" in the preamble could be deleted. However, in view of the fact that facilitating financing practices is the main objective of the draft Convention, the commentary on the draft Convention should include a list of financing practices to be covered with appropriate explanations. The commentary should, in particular, explain that normally the assignor and the assignee would be business persons. Such an explanation would also serve to clarify the meaning of the exclusion in article 4 (1) (a). In conclusion, the title should be as follows: "Draft Convention on Assignment of Receivables in International Trade".

Scope of application of chapter V (article 1 (3))

The purpose of article 1 (3) is to introduce certainty as to the law applicable to assignment-related transactions in an international context in cases where such transactions lie within or outside the scope of application of the draft Convention. For chapter V to apply, a transaction has to have an international element, as defined in article 3, but there is no need for a party to be in a Contracting State. The value of chapter V is that it codifies certain generally accepted principles, such as the principle of party autonomy (article 28) and the principle of debtor protection (article 29), while it addresses certain other matters, such as priority issues (article 30), on which current private international law rules, including article 12 of the Rome Convention, are not very clear.

Spain agrees that chapter V should be applicable to cases where there is some element of internationality, as defined in article 3, even where there is no territorial connection between a party and the draft Convention. In this connection, no serious obstacles can be seen to the introduction of a mini private international law convention, although any potential conflict with the Rome Convention should be avoided. The view that chapter V may usefully supplement the substantive law part of the draft Convention can be also supported. Therefore, article 1 (3) and chapter V should be retained with some minor drafting changes.

Financial receivables (article 5)

The assignment of financial receivables should be treated in some respects differently from the assignment of trade receivables. However, there is no reason to define in the draft Convention either category of receivables. Any definition would fail to capture all practices and would leave out practices to be developed in the future. This is the problem with the definition of "trade receivable" in article 6 (l). In any case, if it is felt necessary to include a definition, this definition should be formulated in broader terms. The following formulation could be considered: "'trade receivable' means any receivable arising under an original contract in respect of goods or services which are not exclusively financial".

Between variants A and B, variant B has the disadvantage that it refers the overall validity of the assignment to private international law. On the other hand, variant A has the advantage that it offers a flexible regime which may better meet the needs of practice. Such flexibility is evident in that the validity of the assignment as between the assignor and the assignee is preserved, while the rights of the debtor are protected, if the debtor needs such a protection. Therefore, variant A should be adopted.

Definition of "location" (article 6 (i))

Subparagraphs (i) and (iv) of article 6 (i) do not require any comment (they are standard provisions in UNCITRAL texts). Subparagraph (iii) of article 6 (i) establishes a provision which will suffice for the vast majority of cases where the debtor has more than one place of business. In such cases, the place of business of the debtor will be that with the closest relationship to the original contract. However, article 6 (i) (iii) may not work as well in the case of a contract for the supply of materials for the debtor's facilities in different countries, if it is not sufficiently clear from the contract which of those locations is the place of business most closely related to the contract. It would, therefore, be advisable to incorporate an additional provision which, in the event that the principal requirement is not fulfilled, offers a way to determine the debtor's location. Furthermore, this provision should apply the same criterion established in the draft Convention to determine where the assignor (or the assignee) is deemed to be located. In order to accommodate this proposal, the following sentence should be added at the end of article 6 (i) (iii): "If the place of business of the debtor cannot be determined, the place of business is that place where the debtor's central administration is exercised".

Subparagraph (ii) of article 6 (i), which refers to the place of central administration, offers the advantage of clarity, since the place of central administration is normally a known point of reference in the business world. This rule, therefore, deserves support, although it may require some minor modifications. The rule would be appropriate for multinational corporations operating through

subsidiaries, since each subsidiary should be treated as a separate entity even if instructions come from the parent company. However, treating branch offices as separate entities, as suggested (see A/CN.9/466, para. 99), may not be appropriate. Referring to the place of the branch, in whose books a receivable appears prior to the assignment, presents the problem of lack of transparency, since, in view of confidentiality requirements, it may not be evident to third parties where a receivable is booked. In addition, in the case of multinational corporations, there is nothing to prevent a transaction, which is being conducted and arranged in one country, from becoming directly entered on the books of the parent company and vice versa. There is certainly nothing to prevent the contract from containing an agreement regarding the place in which such entries should be made. However, such an agreement is equivalent to one in which the assignor and the assignee determine where the transaction is deemed to have been performed and, thus, determine whether the draft Convention applies or not. Such an approach would run counter to the regime envisaged in the draft Convention which does not permit parties to affect with their agreement the rights and obligations of third parties (article 7). The reason for the approach in article 7 is the need for certainty with regard to the law applicable to rights of third parties. In view of the above, a separate rule for branch offices should be avoided.

Relationship with other international texts (article 36)

The main question arising in this connection is the relationship between the draft Convention and the preliminary draft Convention and protocols being prepared by Unidroit and other organizations. Those preliminary texts, in their current formulation, are intended to address a number of assignment-related issues, including validity of the assignment, enforceability as against the debtor and priority based on registration.

Article 36 adopts an approach taken in other UNCITRAL texts (e.g. article 90 of the United Nations Sales Convention), giving precedence to other international agreements, without making a particular reference to any agreement. Bearing in mind the more general character of the UNCITRAL draft Convention and the fact that, in all probability, the UNCITRAL draft Convention will be adopted before the Unidroit instruments, the Unidroit instruments should be left to establish their own limits. The UNCITRAL draft Convention does not need to explicitly deal with a hypothetical, future and uncertain conflict. There is an additional reason to take this position. While, assuming that both instruments are in force and apply to the same situation, conflicts could arise, arrangements for the financing of high-value mobile equipment (satellites, aircraft, etc.) tend to be subject to a separate regime. It is, therefore, difficult in practice to conceive of a situation in which the two regimes might apply simultaneously to a single assignment transaction. Therefore, article 36 should be retained as is.

Articles 35 to 39

Articles 35 to 39 refer to a "State" making a declaration. In all those articles, reference should be made to a "Contracting State". In the absence of such a reference, for example, article 37 would appear imposing a special regime (e.g. that of chapter V) on those non-Contracting States that did not make a declaration (e.g. under article 37).

Application of the annex (article 40)

The second set of bracketed language in article 40 would be preferable. It seems to give more flexibility to States than the first set of bracketed language and it better clarifies the options of States and the effects of each declaration. Furthermore, it clearly sets out what is sought by the annex as a whole and by each of its sections. The annex is useful in that it provides States an option between two sets of substantive law priority rules. The annex also usefully supplements the private international law provisions of the draft Convention that refer priority issues to the law of the assignor's location. If the State of the assignor's location opts into one of the two sets of priority rules contained in the annex, those rules would govern the priority conflicts set forth in articles 24 and 26.

With regard to the registration system foreseen in the annex, it could be noted that it is viewed today with justifiable scepticism, mainly because it may affect fundamental aspects of national law. However, with the increase in the volume and the further development of electronic communications, it may become more acceptable in the future. For this reason, although our legal system does not coincide with the registration-based system envisaged in the annex, we feel that it is preferable to retain it. In conclusion, only the second set of bracketed language should be retained in article 40 and the annex should be retained as is.

Effects of declarations and transitional application issues (article 41)

Paragraphs (1) to (4) of article 41 reproduce provisions of other UNCITRAL texts (e.g. article 97 of the United Nations Sales Convention and article 26 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit). There is no reason for departing from the approach adopted in those two Conventions. Paragraph (5), aimed at protecting rights acquired before a declaration or its withdrawal take effect, is a new provision. Its rationale, however, is not new. It underlies paragraphs (3) and (4), which provide for a period of six months between the date a declaration or its withdrawal is made and the date it takes effect.

It should be noted that declarations may be made with respect to key questions, such as the application of the draft Convention to territorial units of a federal State (article 35), the applicability of chapter V, the function of articles 11 and 12 of the draft Convention in the case of a sovereign debtor (article 38), the possibility of excluding specific practices listed in the declaration (article 39) and the application of the annex (article 40). Such declarations by States extend beyond the strictly public sphere of Government and have a direct effect on assignors, assignees, debtors and other third parties. Respect for the citizens of a State and, in particular of a State other than the State making the declaration, dictates the need for the safeguards adopted in article 41 (5). If a different position were to be taken, certainty as to the rights of parties under the application of the draft Convention would be severely compromised. Therefore, article 41 should be retained as is.

UNITED ARAB EMIRATES

[Original: Arabic]

I. GENERAL COMMENTS

Overall, we do not see any conflict between the draft Convention and the laws in force in our State (we have not received the comments of all competent bodies and may forward any further comments as soon as we receive them). However, in the Arabic text of the draft Convention, the meaning of a number of articles is obscure. This is due to the use of incomprehensible terms (such as the Arabic term for "factoring" in article 6 (c)) or to the structure of certain provisions (e.g. articles 19 (6), 20 (3) and 22 (1)).

II. SPECIFIC COMMENTS

Title

The title should be: "Draft Convention on Assignment of Receivables in International Trade" (with a change in the Arabic word for "assignment").

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

We are of the opinion that the principle established by article 28 that the law applicable to the rights and obligations of the assignor and the assignee in the absence of [their] choice of a law is "the law of the State with which the contract of assignment is most closely related" is not sufficiently specific. Nevertheless, we note that article 37 permits a State to declare at any time that it will not be bound by chapter V.

Treatment of receivables other than trade receivables (article 5)

The text of variant A contains numerous references to other subsequent articles, which in turn refer to some other articles. This results in a fragmentation of the substantive integrity of the provisions of the draft Convention and in obscuring their meaning. The same comment is applicable to many of the articles of the draft Convention. We propose that variant B be adopted, as it addresses the same provisions with fewer references and is therefore clearer.

International organizations

FACTORS CHAIN INTERNATIONAL

[Original: English]

I. GENERAL COMMENTS

The Factors Chain International ("FCI") commends the UNCITRAL Working Group on International Contract Practices for the work achieved so far. The draft Convention on Assignment of Receivables ("the draft Convention") constitutes a balanced text which should facilitate, inter alia, factoring transactions. For this reason, FCI supports the work of UNCITRAL on this topic. As to the issues that remain pending, we would note the following.

II. SPECIFIC COMMENTS

Title

The following title of the draft Convention would seem to provide the clearest indication of its contents: "Draft Convention on Assignment of Receivables in International Commerce". If this were to be adopted, the definition of "Receivables Financing" in article 6 (c) should be omitted.

Scope of chapter V (article 1 (3))

We have no comment on the proposal to retain article 1 (3) which is at present in square brackets because we have in the past recommended the deletion of chapter V except for article 29 which should be moved to section II of chapter IV.

Assignments of receivables other than trade receivables (article 5)

As regards the exclusion of certain banking practices from some provisions of the draft Convention, we believe that the best way forward is the suggestion contained in A/CN. 9/466, para. 71 so that receivables other than trade receivables may be dealt with separately from trade receivables.

Definition of "location" (article 6 (i))

We have expressed serious reservations regarding the use of the place of central administration to define the location of an assignor with more than one place of business. We consider that for some small and medium sized enterprises that place may be difficult to determine. In spite of that reservation, in the absence of a more certain definition acceptable to the majority of the Working Group we would support a definition on the lines of article 6 (i) (A/CN.9/466, annex I). However, we consider it more logical that subparagraph (ii) of article 6 (i) should be as follows: "if the assignor has a place of business in more than one State, the place of business is that place where the central administration is exercised". We do not see why the assignee should have to try to determine where

the central administration of the assignor is exercised when the assignor has more than one place of business but all are in one State so that there is no doubt how subparagraph (i) will apply.

Conflicts with other international texts (article 36)

As regards the possible conflict with the proposed Unidroit draft Convention on mobile equipment, we understand that no provision would be made in the draft Convention so that the normal principles of treaty law would provide for the more specific and later Convention (i.e. Unidroit) to prevail.

Annex

We see no reason for the annex as it stands at present. Both regimes for the determination of priorities are less acceptable to us than that which gives priority to the assignee whose assignment is first notified to the debtor; that rule has worked generally in a satisfactory manner in all those jurisdictions in which the law is based on English law.

Registration may be a better system but it is unlikely to be adopted by some of the important trading states. Priority for the first assignment in time may have most unsatisfactory results for those who provide trade credit. If the annex is to be retained, then a third choice should be included.

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