United Nations A/CN.9/490

General Assembly

Distr.: General
5 April 2001

Original: English

United Nations Commission on International Trade Law
Thirty-fourth session
Vienna, 25 June - 13 July 2001

Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments and international organizations

Contents

I. Introduction

1. At its thirty-third session in 2000, the Commission adopted articles 1 through 17 of the draft Convention on Assignment in International Trade and referred articles 18 through 44 of the draft Convention, as well as the Annex to the draft Convention, to the Working Group.[1] At that session, the Commission requested the Secretariat to distribute for comments the draft Convention after the completion of the work of the Working Group.[2] The Working Group met in Vienna from 11 to 22 December 2000 and adopted articles 18 to 47 of the draft Convention and the annex.[3]

2. By note verbale of 7 February 2001, the Secretary-General forwarded to States and international organizations that are invited to attend the meetings of the Commission and its working groups as observers the consolidated text of the draft Convention which appears in an annex to report of the last session of the Working Group, and requested them to submit their comments on the draft Convention. This note reproduces the first comments received by the Secretariat. Further comments will be issued as addenda to this note and in the order they are received.

II. Compilation of comments

A. States

1. Czech Republic

[Original: English]

General comments

We refer to our previous comments published in A/CN.9/472. Czech Republic is still in the position that our national law differs in some basic aspects from the draft Convention. Owing to the fact that international agreements must be in conformity with national legislation, if we were to adopt the draft Convention, it would be necessary for us to change our Civil or Commercial Code.

The main divergences relate to articles 11 and 12 of the draft Convention. Under Czech law, it is not possible to assign a receivable contrary to an anti-assignment agreement between the assignor and the debtor. In addition, we are concerned about articles 15 and 17, because under Czech law, the assignor is obliged to notify the debtor without undue delay. Another concern relates to article 21. Under our national law any waiver of future defences and rights of set-off is prohibited.

Specific comments

Article 4: We are in favour of excluding in paragraph 1 transfers of negotiable instruments made by book entry in a depository's accounts without delivery or endorsement, as well as of transfers made by mere delivery without a necessary endorsement. As to paragraph 4, we prefer its

[1] Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 A/55/17, paras. 186-188.

[2] Ibid., para. 191.

[3] The report of the Working Group is in document A/CN.9/486.

retention so that States would have the right to exclude by declaration further types of assignment.

Article 17: We think that article 17 is sufficient and does not need to be revised to address consumer protection issues.

New provision on form in chapter V: We are not against a new private international law provision on form in chapter V. We propose that the form of assignment should be governed by the law of the State where the contract of assignment has been concluded.

Article 20: We support the proposal to include in article 20 wording along the lines of article 30 in order to ensure that the rule in article 30 would not be subject to an opt-out by States.

Article 38: We consider that the current wording is sufficient to resolve potential conflicts of the draft Convention with other international agreements.

Article 44: For the sake of consistency with other provisions of the draft Convention that provide for reservations, we prefer "reservations" to "declarations".

Procedure for the final adoption of the draft Convention: We prefer that the draft Convention be submitted to the General Assembly for final adoption.

Conclusions: In conclusion, we have to state that, due to the above-mentioned divergences between our national law and the draft Convention, at this stage, the Czech Republic will not be able to adopt the Convention, since we would have to change our Civil or Commercial Code. However, an important modification of our Constitution is currently being discussed. This modification would change the dualistic system of relation between national and international law and would result in international agreements prevailing over national legislation. In view of this development and of our interest in facilitating international receivables financing practices, such as factoring and forfaiting, in our country, we consider that we will have the opportunity to adopt the Convention in the near future.

2. Peru

[Original: Spanish]

General comments

We note that the draft is a considerable improvement over the one we received and commented on last year.

Specific comments

Article 4: We agree that the assignment of receivables through the endorsement of a negotiable instrument (i.e. a bill of exchange, promissory note or cheque) should be excluded, since the act of assignment is legally distinct from the act of endorsement and has different consequences. Receivables capable of being assigned can be readily distinguished from receivables contained in negotiable instruments, since the latter are transferred by endorsement or by other means distinct from assignment.

Accordingly, transfers of negotiable instruments should be excluded, whether made by delivery and endorsement or my mere delivery (even in cases where endorsement may be necessary). We would think that transfers of dematerialized instruments transferred electronically by means of a book entry would not need to be excluded. However, we could accept their exclusion if consensus is formed in the Commission in favour of an exclusion.

With regard to paragraph 4, we believe that States should be allowed to exclude by declaration further types of assignment.

Article 11, paragraph 3 (a): We believe that the reference to goods should be retained.

Article 17: We agree with the current formulation of article 17. It does not need to be revised to address consumer-protection issues.

Article 20: In our opinion, it is unnecessary to include in article 20 a provision similar to the one in article 30. Article 30 is sufficient.

Article 24, para. 1 (b) and (c): We believe that paragraphs (b) and (c) of article 24 should be retained. We have no way of determining whether or not they are consistent with the work of the Hague Conference on Private International Law.

New provision on form in chapter V: In our opinion, it is not necessary to include in chapter V a new private international law provision on form. Generally applicable private international law rules are sufficient to address the matter. Under Peruvian law, for example, form is subject to either the law of the place where the legal act or transaction is concluded or the documents are executed, or to the law governing the legal relationship arising from the legal act or transaction.

Article 38: We agree with the Working Group's comments contained in paragraph 105 of document A/CN.9/486.

Article 44: We agree with the provision in article 44 providing that no reservations are permitted except those expressly authorized. This rule gives consistency and coherence to the draft Convention.

Annex: The rules contained in articles 6 to 9 of the Annex appear to be adequate.

Procedure for the final adoption of the draft Convention: For practical reasons, we would think that the draft Convention should be referred to the General Assembly for final adoption.

3. United States of America

[Original: English]

General comments

The United States looks forward to completing work on the draft Convention on Assignment of Receivables in International Trade at the upcoming Commission session. Completion of this work and prompt adoption by States of the text, together with appropriate consideration of optional priority rules in the Annex, will make modern commercial financing more readily available in greater amounts and at more affordable rates in all regions and levels of development.

Specific comments

I. Articles bracketed by the Commission in June 2000 (articles 1-17)

Article 1, para. 4: We concur with the decision of the Working Group to remove the brackets from paragraph 4 (A/CN.9/486, para. 75).

Article 4, para. 4: We believe that this paragraph should be retained with the addition of language indicating when an assignor or debtor must be located in a Contracting State (see, for

example, art. 3). The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention's rules may be inappropriate. To the extent that the Commission is able to identify existing practices that should be excluded, the Commission should expressly exclude those practices by reference in the appropriate preceding paragraphs of article 4. Failure to do so will encourage groups that engage in these practices to oppose adoption of the Convention.

Articles 11, para. 3 (a), and 12, para. 4 (a): We think that the word "goods" in these subparagraphs should be retained with the brackets removed. It is unnecessary to substitute a broader term that would cover both tangible and intangible property because the subparagraphs immediately following the cited subparagraphs refer to the types of intangible property important in financing practice.

II. Articles not yet considered by the Commission (articles 18-47, Annex)

Articles 24 and 5 (g): After consultations, we reluctantly conclude that there will be insufficient time at the upcoming Commission session to resolve the complex issues raised by subparagraphs (b) and (c) of paragraph 1. We therefore think that these bracketed subparagraphs should not be retained.

Article 24 addresses the 'priority' of competing rights in a receivable; article 5(g) defines 'priority.' We think that article 24 would be clarified and simplified if the definition of 'priority' were redrafted to clarify what issues are to be resolved when determining whether a person has a right in a receivable superior to the right of another claimant. These issues include whether the right is a property right, whether it is security for indebtedness or other obligations, and whether the right is prior to the right of another claimant. If the definition of 'priority' is amended in this way, paragraph 2 of article 24 would no longer be necessary. With these thoughts in mind, the Commission might consider the following language in substitution of the definition now found in article 5 (g):

> "(g) "Priority" means the right of a person in preference to a competing claimant or other person. The term includes the determination of whether the right is a personal or property right and whether the right arises from an assignment as security for indebtedness or other obligations."

Article 26, para. 2: We believe that in the context of article 26 the reference to "competing claimant" is too broad. An assignee claiming the proceeds as proceeds of the assigned receivable should not necessarily have priority over an assignee that claims the proceeds as original collateral, a purchaser for value of the proceeds, or a person with a right of set-off against the proceeds. Whether the assignee has priority over these competitors should be left to other law. With these thoughts in mind, the Commission might consider the following language for a new paragraph 3:

> "Nothing in paragraph 2 affects the priority as against the assignee, under law outside this Convention, of a right, not derived from the receivable, of (i) a person holding a consensual security right in the proceeds, (ii) a consensual transferee of the proceeds for value, or (iii) a person holding a right of setoff against the proceeds."

The Convention should also clarify whether exclusions under article 4 of types of assignment or of categories of receivables are exclusions for all purposes, including priority in proceeds under article 26, or only for some purposes.

Article 26, para. 2 (b): In practice it is more and more difficult to distinguish between bank accounts and security accounts. We suggest, therefore, that the words 'or securities account' be added after the words 'deposit account' and that the following clause: 'or investment securities purchased with such cash receipts' be added at the end of paragraph 2 (b).

Article 37: To ensure appropriate application of the Convention in some States we believe that

this article must be retained with the brackets removed. The present text of the article will need to be modified so that a State comprised of two or more territorial units may apply its own choice-of-law rules to the extent that they operate only among the territorial units within that State. If the article is so modified, the definition of 'law' in article 5 (i) should note that it is subject to article 37.

Article 38: The Commission will need to consider adding a paragraph to address the special concerns of the aircraft and the air transport industries for which the Convention's rules may not be consistent with existing financing practices of these industries.

Article 41: We think that this article should be retained and the brackets removed. The paragraph provides the necessary flexibility to exclude future financing practices for which the Convention's rules are inappropriate.

Article 42: We believe that a State should be authorized to modify or add to any of the model substantive provisions set out in Sections I, III and IV in order to adapt their provisions to its national law or to financial practices. A paragraph should be added to article 42 to permit a State making a declaration under that article to indicate in its declaration any modifications or additions to Sections I, III or IV it wishes to make.

III. Other issues

Article 4, para. 1 (b): The underlying policy of this subparagraph would be better expressed if the subparagraph stated that nothing in the Convention affected rights to the negotiable instruments or the rights and obligations of parties arising under applicable laws governing negotiable instruments. If the present exclusion is retained, it should be made clear that negotiable instruments may nevertheless be proceeds covered by the Convention.

In any event, the Commission should clarify what instruments fall within "negotiable instruments." We think that the term should be restricted to those instruments that have traditionally been subject to special legislation such as the 1988 United Nations Convention on International Bills of Exchange and International Promissory Notes: bills of exchange (drafts), promissory notes and checks.

Article 4, para. 2: It should be made clear that although this paragraph excludes bank accounts and securities accounts these accounts may be proceeds covered by the Convention. We urge the Commission to exclude foreign exchange transactions not otherwise excluded by the netting or other agreed exclusions. The Convention's rules are not necessary for that market and may disrupt existing practices.

Article 4, para. 2 (f): The exclusion in subparagraph (f) of paragraph 2 may not fully capture the policy decision taken to exclude dealings with financial assets, including negotiable instruments (however defined), held in an indirect holding system. Thus, this subparagraph might state expressly that any financial asset credited to a securities account should be treated the same way as an investment security credited to that account.

Article 5, subpara. (g): We recommend that the definition of subparagraph (g) of article 5 be redrafted to clarify what issues are to be resolved when determining whether a person has a superior right in a receivable to another claimant. Proposed language is set out in connection with the earlier comment on article 24.

Article 9, para. 4: We think that the policy embodied in this paragraph applies equally to questions of form covered by article 8. The paragraph should be amended to state this explicitly.

Article 10: The Commission should reexamine whether this article remains necessary.

B. International organizations

1. European Bank for Reconstruction and Development

[Original: English]

General comments

The EBRD welcomes the recent developments on the draft Convention and hopes that consensus on the draft will be found at the thirty-fourth session of the Commission this summer. The importance of assignment of receivables for countries of Central and Eastern Europe and the Commonwealth of Independent States where the Bank operates cannot be overestimated. Foreign investors in particular need urgently greater certainty as to the rules applicable in this matter.

As a general background comment, we would like to note that the EBRD can only comment on the difficulties it foresees for some of the States that may want to sign and ratify the Convention. In our experience of legal reform in the region, there is a large gap between the and practice existing in this region and what is viewed as appropriate in countries with developed economies. By imposing rules or concept that are too alien, one runs the risk of a complete rejection of the reform by a country. This does not mean that progress is impossible. Beyond a bare set of principles around which there must be a consensus (such as the EBRD Core Principles of Secured Transactions), there must be room for compromise and for finding solutions more adapted to what a country can or wants to absorb, or finds appropriate at a given time.

Below are listed a number of comments on some of the draft Convention's articles. We understand that comments were sought only for the sections that were not adopted at the last session and on which the Working Group has been working in preparation to the next session. However, we feel that our comments may have wider impact than the actual article to which they actually refer.

Specific comments

Article 2: We are concerned that the article rejects the conceptual distinction between the transfer of receivable and the creation of rights in receivables as security for another obligation. To our knowledge, such conceptual distinction is made in most if not all of our countries of operations, with separate regimes applying to one and the other. It would be very difficult to harmonise the Convention with the existing system, especially as the Convention would apply only to international receivables or international assignments. We have also conceptual reservations on treating equally assignments by way of sale and assignment by way of security. As part of the EBRD Model Law and the subsequent assessment we made based on its principles (see www.ebrd.com/english/st.htm), we make very clear that a charge over movable assets (including tangible ones) is conceptually different from a fiduciary transfer of property or indeed a transfer of property with a retention of title clause. In this respect, we differ from the approach adopted under the US Uniform Commercial Code, Article 9. There is evidence that countries of the region have felt more comfortable with keeping the two types of assignments separated.

Article 9, para. 4: The principle expressed in this paragraph is clear but it is unclear how that would work in practice, since the assignment should not only not be ineffective but should be effective *and* enforceable. For example, if a local law does not recognize as valid an assignment of receivables by way of security unless the receivable is clearly identified in the security agreement, and this law becomes applicable, the assignment of generally described receivables will presumably still be valid under the Convention. But we are not sure what would be the priority of the right of an assignee with respect to the right of a secured creditor who was given in security the enterprise, including book orders, and may wish to enforce its security over the enterprise. Presumably, no rule would be available since under local law, the assignment would simply be invalid.

Article 11: It is felt that overriding contractual obligations on subsequent assignments between the parties is not satisfactory, especially when the prohibition was known by the subsequent assignee. Naturally, registration of the assignment would permit to solve the problem of notice and of knowledge on the part of third parties (see comments below).

Article 15: In view of the fact that one of the objectives of the Convention is to remove the formalities usually associated with the notification to the debtor, it would be preferable to be more specific as to the way notification is to be given to the debtor, especially "by all means", or simply in written form. In fact, at the age of electronic communication, it would certainly make sense to explore the ways such notification could be given safely as well as quickly and simply, at a low cost.

Article 20, para. 2: The remark made above applies to the rule contained in article 20, paragraph 2. In effect, as the right of set-off between the assignee's right and the debtor's rights against the assignor depends on the precise time where notification of the assignment is received, it is imperative that clear rules on the proof of the date are spelled out in the Convention. Otherwise, the risk would be that the local law applicable would not provide any satisfactory rule on this essential point.

Article 41: The article is very complex, perhaps unduly, and this is unfortunate as it can create uncertainties.

Annex: In general, we welcome these provisions as they give the message we are trying to convey to the countries of the region EBRD is responsible for, namely that extensive registration can simplify complex rules and provide certainty and simplicity for the priorities rules.

Article 4, para. 1 of the Annex: We feel it is important to have at the time of registration evidence of both parties' consent to the assignment, either by their signature, or by other means. It would avoid the risk of fraud.

Article 5 of the Annex: We do not find the period of five years necessary for the registry to operate properly and we would leave this aspect to the local regulations on registration.

2. European Central Bank

[Original: English]

General comments

The Legal Services of the European Central Bank (ECB) follow this initiative of the Commission closely and with great interest. In particular, we are hopeful that the provisions of the draft Convention will promote an effective and sound regulation of the assignment of receivables.

We have reviewed the report and the provisions of the draft Convention, as elaborated by the Working Group. We have noted in particular the exclusion from the scope of application of the draft Convention of assignments of receivables arising from financial contracts. Financial contracts are generally subject to master agreements governed by the laws of a particular jurisdiction. An assignment of receivables arising from such contracts may interfere with, *inter alia*, the calculations and the pricing made by credit institutions. We, therefore express our appreciation for this exclusion as a result of which the central banking community will not be affected by the provisions of the draft Convention.

Specific comments

Articles 24 and 26: In our view, some guidance may be needed concerning the relation between the draft Convention and the provisions of the proposal by the Hague Conference on Private International Law for a convention concerning the law applicable to dispositions of securities held through one or more intermediaries. This would seem particularly relevant to articles 24 to 26 of the draft Convention. It may, therefore, be advisable to consider and clarify the relation between the two documents.

Furthermore, the conflict-of-laws provision of article 24, paragraph (1) (b) (ii), should promote the approach that interests over securities are governed by the law of the location of the securities account of the relevant intermediary (PRIMA). The exact wording of this principle, however, may require further consideration and should take into account work, which is carried out in this respect in relation to the proposal of the Hague Conference and to the proposed directive of the Commission of the European Union on the use of collateral. In the end, this provision of the draft Convention should be fully consistent with, and in no case contradict, the text that will emerge from the Hague Conference.

Our understanding of article 24, paragraph 1 (c), leads us to the conclusion that this provision seems to go beyond the scope of the draft Convention. Article 24, paragraph 1 (b), appropriately addresses the characteristics and priority of the right of an assignee vis-à-vis a competing claimant. However, the existence and characteristics of the rights of a competing claimant may well be subject to a law other than the law of the assignor's location. This result would be normal and would not negatively affect the certainty provided for by the draft Convention.

3. Factors Chain International

[Original: English]

General comments

The purpose of Factors Chain International (FCI) with about one hundred and fifty members in fifty-one countries is to facilitate the provision of finance and services by its members for the movement of goods and services across international borders. It is therefore of particular interest to FCI that the finalised version of the convention should achieve its objects of encouraging the availability of credit and its provision at reasonable cost for international commerce and trade.

In order to achieve that purpose it appears to us essential that as far as possible our members and others, who finance and give protection for movement of goods and services across international borders, should know with certainty to which law they should look for the purpose of ensuring that their operations are to be carried out with reasonable safety. We consider that, in order to promote such certainty, the following should be taken into consideration.

Specific comments

Article 24: For the provision of finance with reasonable confidence and at fair cost it is essential for the financier, who is relying on an assignment of receivables, to know exactly what his position will be in relation to other claimants in the insolvency of his assignor. Therefore, this article is one of the most important provisions (if not the most important provision) of the draft Convention. It seems to us that article 24 should cover priority issues in relation not only to the receivables themselves but also to their proceeds.

If the financier is to look with confidence to a single law to determine whether his rights to the receivables will survive the insolvency of the assignee he must also be able similarly to know what his position will be as regards the proceeds. As it would be most rare for those proceeds to

consist of anything other than money or instruments of payment (whether or not negotiable), it seems that for the purpose of achieving the purposes of the Convention reference only to bank deposits and such instruments is necessary. It does not seem to us necessary for the Convention to deal with other forms of proceeds.

Articles 20 and 30: To further the purposes of the Convention by making for certainty for the prospective financier, a choice of law rule as in article 30 is necessary. The financier must know before providing finance which law will govern the countervailing rights of the debtors. Only with this knowledge can he properly assess the risks. Article 30 would provide the financier with that certainty. However, article 30 is subject to an opt out which could cause the financier further uncertainty. Therefore, we consider that the same rule should be repeated in article 20.

It has been noted that concern has been expressed that such private international law provisions might make the Convention less acceptable to States. However, if such concerns are to take precedence over the objects of the Convention, then there might be a widely accepted convention that achieved none of its objects.

4. Secretariat of the Intergovernmental Organization for International Carriage by Rail

[Original: English]

The Secretariat of the Intergovernmental Organisation for International Carriage by Rail (OTIF) takes the opportunity to compliment the Commission and the Working Group on International Contract Practices on the excellent work accomplished with regard to the draft Convention on Assignment of Receivables in International Trade ("the UNCITRAL draft Convention").

At the first joint session of the Committee of Governmental Experts for the preparation of a draft Protocol on Matters specific to Railway Rolling Stock, held in Berne on 15 and 16 March 2001, the Governmental Experts discussed, *inter alia*, the relationship between the UNCITRAL draft Convention and the preliminary draft Protocol on Matters specific to Railway Rolling Stock ("the preliminary draft Rail Protocol"). The experts at the joint session felt unanimously that the assignment of receivables taken as security in rail financing should better be dealt within the equipment specific instrument, that is, in the UNIDROIT draft Convention on International Interests in Mobile Equipment ("the UNITROIT draft Convention"), as implemented by the preliminary draft Railway Protocol, rather than in the UNCITRAL draft Convention.

Under these circumstances, the OTIF Secretariat strongly supports the UNIDROIT Secretariat's comments on this subject and suggests that the Commission give favourable consideration to a solution along the lines proposed by the UNIDROIT Secretariat, in other words that the UNCITRAL draft Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in Railway Rolling Stock as defined in the draft Railway Protocol to the UNIDROIT draft Convention.

5. Secretariat of the International Civil Aviation Organization

[Original: English]

The International Civil Aviation Organization (ICAO) in cooperation with UNIDROIT has prepared a draft Convention on International Interests in Mobile Equipment ("the draft Mobile Equipment Convention") and a draft Protocol thereto on Matters Specific to Aircraft Equipment ("the draft Aircraft Protocol"). Those texts have been approved by the competent bodies of both organizations and will be submitted for adoption to a diplomatic conference to be held under the

joint auspices of ICAO and UNIDROIT in Cape Town, South Africa, from 29 October to 16 November 2001.

It has been strongly advocated by the parties so far involved in the intergovernmental consultations arranged by ICAO and UNIDROIT that the draft Convention on Assignment of Receivables in International Trade ("the draft Assignment Convention") should not apply to an assignment of receivables arising from an agreement which creates or provides for an international interest in, *inter alia*, aircraft objects as defined in the draft Aircraft Protocol.

It has been considered that this result can be achieved by way of:

(a) an outright exclusion of the assignment of such receivables from the scope of application of the draft Assignment Convention; or (if the draft Assignment Convention fails to do so)

(b) the inclusion of a provision in the draft Mobile Equipment Convention stating that it shall supersede the draft Assignment Convention as it relates to the assignment of receivables that are rights associated with international interests in objects covered by the draft Mobile Equipment Convention.

In view of the fact that it is not certain which convention will be adopted first, a provision along the lines of the foregoing paragraph (b) has been included in the draft Mobile Equipment Convention (article 46) as a measure to prevent any conflicts between the two conventions from arising.

The parties involved in the intergovernmental consultations arranged by ICAO and UNIDROIT have considered that this matters should be addressed in a specific provision in either one of the draft conventions at issue, rather than be left to the provisions of article 30 (on the application of successive treaties relating to the same subject matter) of theVienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969.

6. Secretariat of the International Institute for the Unification of Private Law

[Original: English]

The Secretariat of the International Institute for the Unification of Private Law (UNIDROIT) takes this opportunity to compliment the Commission and the Working Group on the excellent work accomplished at their last sessions. It notes, however, that neither of the principal proposals that it submitted to the Commission at its thirty-third session (see A/CN.9/472/Add.1 and 4) have found their way into the text of the draft Convention. It will be recalled that on that occasion the UNIDROIT Secretariat proposed, first, that due recognition be given in the preamble to the debt owed by the draft Convention to the UNIDROIT Convention on International Factoring and, secondly, that the assignment of receivables that become associated rights in connection with the financing of those categories of aircraft equipment, railway rolling stock and space property encompassed by the draft UNIDROIT Convention on International Interests in Mobile Equipment ("the draft UNIDROIT Convention") as implemented by the draft Protocol on Matters specific to Aircraft Equipment ("the draft Aircraft Protocol"), the preliminary draft Protocol on matters specific to Railway Rolling Stock ("the preliminary draft Rail Protocol") and the preliminary draft Protocol on matters specific to Space Property ("the preliminary draft Space Property Protocol") respectively should be excluded from the sphere of application of the draft Convention.

Relationship between the draft Convention and the UNIDROIT Convention on International Factoring

The Working Group has already indirectly acknowledged the debt the draft Convention owes to the UNIDROIT Convention on International Factoring (see A/CN.9/466, para. 193). The UNIDROIT Secretariat would accordingly submit that an appropriate manner in which to recognize this fact would be through the introduction in the preamble to the draft Convention of a clause indicating that it has built on the achievements of the aforesaid UNIDROIT Convention. This would have the considerable merit of alerting States coming to the draft Convention for the first time of the relationship between the two instruments as well as clarifying the intention announced at the outset by the Working Group of safeguarding the application of the UNIDROIT Convention.

Relationship between the draft Convention and the draft UNIDROIT Convention and the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol

In their preparation of the draft UNIDROIT Convention and the various draft and preliminary draft Protocols thereto, the authors of these texts have at all times striven to avoid entering into conflict with the draft Convention. Evidence of this concern is to be seen in the delimitation of the draft UNIDROIT Convention by reference to interests in mobile equipment protected by registration against identified assets. It is to be noted that the decision was taken early on not to go for a debtor-based registration system and not to deal with perfection requirements and priority rules relevant to receivables financing detached from the underlying asset.

The different categories of mobile equipment contemplated by the draft UNIDROIT Convention are of a kind traditionally recognised as enjoying special status. Various aspects of the structure of the proposed new international regimen correspond to the specificity of the categories of equipment covered: first, each category of equipment covered by the draft UNIDROIT Convention will be the subject of a separate Protocol, to contain those rules necessary to adapt the general rules contained in the Convention to the special characteristics particular to the financing of each such category; secondly, for the registration of each category of equipment and the establishment of priority ranking as between each such registration a separate International Registry will be created. The specificity of the assets covered by the proposed new international regimen is a key feature of the draft UNIDROIT Convention.

All three special working groups established under the authority of the President of UNIDROIT to monitor the application of the draft UNIDROIT Convention to aircraft equipment, railway rolling stock and space property and to act as a conduit for the expertise of each sector (each made up of representatives of manufacturers, users/operators and financiers as also the relevant international Organizations), namely, the Aviation Working Group, the Rail Working Group and the Space Working Group respectively, have reiterated a clear desire to see the assignment of receivables taken as security in aircraft, rail and space financing dealt with in equipment-specific instruments, that is, the draft UNIDROIT Convention as implemented by the draft Aircraft Protocol, the preliminary draft Rail Protocol and the preliminary draft Space Property Protocol, rather than in the draft Convention. They have emphasised the strong interest of their constituencies in seeing distinct regimes that would reflect aviation, rail and space financing practices and structures.

The value of assets like aircraft equipment, railway rolling stock and space property lies in the income that may be realised from their sale or lease. It would undermine the concept underlying the draft UNIDROIT Convention if the debtor could assign receivables derived from such an asset under a system different from that applicable to the pledging or other encumbering of the asset. The indivisibility of the asset and the income that may be realised from its sale or lease is enshrined in articles 7 (1) and 9 of the draft UNIDROIT Convention, relating to rights on default, and article 12, relating to interim relief.

In the case of aircraft, rail and space financing structures there is an inextricable link between the aircraft equipment, railway rolling stock and space property, on the one hand, and the associated receivables, on the other. In the case of space financing structures, for instance, much of the value placed on a satellite is derived from the various rights associated with the operation of that satellite, in particular the associated receivables. Such rights are an essential element of the commercial value of a satellite and without such rights the satellite will have very little commercial value. It is therefore appropriate for security rights relating to both the asset and the associated receivables to be subject to a common regimen, in the interest of avoiding not only conflict of laws problems but also the resultant lack of commercial predictability and increases in transaction costs.

Against the alternative solution referred to in the report on the last session of the Working Group (see A/CN.9/486, para 105 *in fine*), which would consist in allowing the draft UNIDROIT Convention and the various draft and preliminary draft Protocols thereto to supersede the draft Convention, a number of disadvantages are to be noted.

Many national legal systems currently contain assignment rules that are more in line with aircraft, rail and space financing practices than those proposed in the draft Convention. It is submitted that there is no need to disrupt such national legal systems that work well for aircraft, rail and space financing unless the resulting changes are specifically designed with their specific financing requirements in mind. As the draft UNIDROIT Convention may be adopted after the draft Convention, unsatisfactory rules may be applicable to transactions entered into in the interim. That being the case, the finalization and ratification processes relating to the draft Convention may be complicated and even delayed by virtue of aviation-, rail- and space-related objections and the need for further national and international consultations.

The alternative approach raises rather than resolves potential problems associated with sphere and temporal applications of the two instruments. Commercial predictability will decrease, resulting in increased transaction costs. Such an approach would not address the potential conflict between the draft Convention and the Geneva Convention on the International Recognition of Rights in Aircraft. In this connection, it is worth noting that the draft UNIDROIT Convention/Aircraft Protocol contain detailed provisions dealing with the co-ordination between the last two texts and the Geneva Convention.

The draft UNIDROIT Convention and the draft Aircraft Protocol are due to be adopted at a diplomatic Conference to be held in Cape Town from 29 October to 16 November 2001 and the omens for their early entry into force could not be better. The preliminary draft Rail Protocol, having already been the subject of a first session of governmental experts, held in Berne on 15 and 16 March 2001, is already well on the way to completion. In the meantime, the preliminary draft Space Property Protocol is down for discussion at the fortieth session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space, to be held in Vienna from 2 to 12 April 2001, with a view to ascertaining *inter alia* the interest of the United Nations in exercising the functions of Supervisory Authority in respect of the future International Registry for space property, and the UNIDROIT Secretariat would anticipate being in a position to transmit it to Governments later in the year.

In these circumstances, the UNIDROIT Secretariat, being of the view that particular urgency attaches to the finding of a satisfactory solution to the problem of the relationship between the draft Convention and the draft UNIDROIT Convention and the different draft/preliminary draft Protocols thereto, has the honour to propose that the Commission give favourable consideration to a solution along the lines of the one that it tabled during its last session, a decision regarding which the Commission however decided on that occasion to defer, in particular so as to "allow Governments to undertake the necessary consultations with the relevant industries" (see A/55/17, para. 96 *in fine*), namely the inclusion in the draft Convention of language along the following lines:

"This Convention shall not apply to an assignment of receivables arising from an agreement which creates or provides for an interest in aircraft objects, railway rolling stock or space property as defined in the relevant Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment."