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Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments and international organizations

Addendum

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I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490, A/CN.9/490/Add.1, A/CN.9/490/Add.2 and A/CN.9/490/Add.3. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

II. Compilation of comments

1. European Federation of Factoring Associations

[Original: English]

The European Federation of Factoring Associations (EUROPAFACTORING) compliments UNCITRAL for the work done and the results accomplished so far, expecting that the fruitful

debate carried on so far will now reach a final positive result. In its comments on the latest draft, Factors Chain International (FCI) already pointed out the importance of certainty for the financier as to which law is applicable (see A/CN.9/490), and we certainly join FCI in stressing this point important not only to factors but to all financiers worldwide. We also express our appreciation to the Secretariat for the thoughtful commentary on the draft Convention. Its well founded explanations made it easier for all to understand the complexity of the problems dealt with in the draft Convention.

Specific comments

Article 8: Article 8, which is intended to give certainty to the assignee as to which rules are to be followed with respect to form, is a "safe haven" rule (if form requirements of the place of location of the assignor are fulfilled, the assignment is as to "form"). However, form in article 8 may be too broad. Whether or not an assignment has to be notified to the debtor may be a matter of form covered in article 8, although it is already dealt with in the Convention (article 9), and no such notification is required under the Convention. Furthermore, if under the law of the assignor's location priority is determined on the basis of notification, the question arises whether such notification has to follow the rules of the Convention or of other law. The current version of article 8 leaves room for discussion on this issue. We would therefore suggest that the matter be clarified in either article 8 or in article 24.

Article 38, paragraph 2: We reiterate our support for the policy of article 38, paragraph 2. The draft Convention should take precedence over the Ottawa Convention, whenever both conventions are applicable, but should not preclude the application of the Ottawa Convention if the draft Convention does not apply with regard to a particular debtor. The second sentence of article 38, paragraph 2 may not be sufficient to achieve the latter result. We therefore suggest that it be reformulated along the following lines: "To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to that debtor".

2. Financial Markets Lawyers Group

[Original: English]

The Financial Markets Lawyers Group welcomes this opportunity to provide further comments on the draft Convention. We applaud the continued efforts of the Commission to facilitate greater cross-border trade financing and, as we noted in comments last year (see A/CN.9/472/Add.1), we believe that adoption of the draft Convention will lead to greater harmonization of the rules currently governing cross-border transactions.

We appreciate the Commission's responsiveness to our previous concerns and we feel that the draft Convention addresses many of the issues that we raised about the impact of the draft Convention on the international over-the-counter (OTC) financial markets. We would, however, like to raise a few additional points that we believe would improve the draft Convention and contribute to the legal certainty and clarity under which these markets operate.

Article 5 (k) and (l): While we believe that the draft Convention's definitions of "financial contract" and "netting agreement" cover almost all of the agreements that should be excluded from the draft Convention, the following clarifications of the scope of these definitions would contribute to legal certainty for the transactional arrangements of participants in the OTC financial markets.

With respect to "financial contract," as we noted in our comments last year supporting the comments of the European Banking Federation ("EBF"), we believe that the definition should

include reference to the collateral and credit support arrangements used by counter-parties to manage their counter-party credit risk in connection with the other enumerated "financial contracts." Typically, these collateral and credit support arrangements are documented under the same industry standard master agreements governing the trading of "financial contracts" and related netting provisions and operate pursuant to the set-off and netting provisions of these master agreements. Exclusion of such collateral and credit support arrangements from the draft Convention, would lead to further certainty and predictability with respect to the set-off and netting provisions of the standard market agreements pursuant to which these important risk management arrangements operate. Language along the following lines could be used in article 5 (k): " 'Financial Contract' means any spot…and any combination of the transactions mentioned above, *and any and all collateral and credit support related to any transaction mentioned above;* (this language is based on the EBF proposal last year; see A/CN.9/472/Add.1).

With respect to "netting agreement," we believe that it would be desirable to clarify that the draft Convention should not apply to receivables arising out of multilateral netting arrangements such as those used by payment and securities settlement systems. Allowing the assignment of these multilateral netting payments is likely to substantially undermine the fluid operations of such systems and impair the certainty and finality of settlements. As such, we suggest that the definition of "netting agreement" should clearly include netting arrangements between two or more parties. Language along the following lines could be used in article 5 (l): " 'Netting agreement' means an agreement *between two or more parties* that provides for one or more of the following:

(i) The…or otherwise;
(ii) Upon…and netting into a single payment by *or to the defaulting party*; or
(iii) The set-off…netting agreements;"

In addition, as discussed in our comments last year, we understand that "netting agreements" include within its scope agreements that provide for the close-out of some but not all transactions in certain situations such as where it may be in contravention of relevant law to close-out certain transactions. The commentary may usefully clarify this matter.

Finally, regarding whether or not issues of priority with respect to certain types of assets, the assignment of which has been excluded from the draft Convention, should be addressed if those assets are proceeds of receivables which would be subject to the draft Convention, we support the last alternative described by the Secretariat in document A/CN.9/491, para. 10. The commentary could elaborate on the PRIMA approach and cite its growing acceptance. This approach would have the advantage of avoiding potential language conflicts with any forthcoming text from the Hague Convention. We believe that PRIMA represents the consensus approach in this area and would minimize uncertainty in cross-border transactions.

We urge the Commission to include these changes so that the OTC financial market retains clarity and certainty with respect to the expectations of market participants. These changes will ensure that the legal basis under which parties transact in this market is not undermined and that the techniques for managing counter-party credit risk continue to allow counter-parties to appropriately manage their exposures. Again, we commend the Commission's efforts to develop a legal regime under which global trade financing can better flourish, and we acknowledge the care that has been taken thus far to supply the proper treatment of OTC financial market transactions.

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