UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/CN.9/SR.678
4 April 2001

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 678th MEETING

Held at Headquarters, New York,
on Tuesday, 13 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

CONTENTS

The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4)

Article 2

1. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that one issue relating to article 2 was whether assignments of rights that were non-monetary but could be converted into money would be covered. The Commission might wish to clarify whether they were affected by the United States proposal, in which case they would be discussed in that context at a later stage. The other question was whether assignments of contractual rights other than rights to payment - performance rights - should also be covered. If not, there could be two different regimes covering one assignment of contractual rights: one for the assignment of payment rights and another for the assignment of performance rights. The practical value of the assignment was the receivable, but often other performance rights might have some value as security.

2. The understanding of the Working Group was that statutory assignability was not affected by the draft Convention; however, that was not explicitly stated in the draft text. It might be useful to clarify that issue in the scope provisions in article 2, or in article 4, for example by saying that the draft Convention did not affect statutory assignability or that the assignment of a receivable that was non-assignable under law applicable outside the draft Convention was not covered by the draft Convention. Some additional language might be required in article 9 to ensure that it did not affect statutory assignability, at least other than statutory requirements referring to the assignment of future receivables or to bulk assignments.

3. Unilateral assignments, referred to in paragraph 30 of the commentary, were very rare in practice. When the assignee received the receivable, there was at least an implicit agreement. If a conflict arose before that stage, it might be useful for it to be covered by the draft Convention. The Commission might wish to consider whether those types of unilateral assignment should also be covered.

4. With regard to partial assignments, the words "all or part of the assignor's contractual right to payment" would be included in article 2 and the issue of the debtor's legal position in the case of a partial assignment could be taken up either in the context of the discussion of the debtor's rights in article 17 or 18 or, as suggested by the representative of Canada, in the context of article 11. That was a matter for further discussion. The same was true of paragraph 4 of article 1, which would be discussed in the context of article 40, dealing with the different options available to States with regard to the annex.

5. Ms. SABO (Observer for Canada) suggested that the question of partial assignments should be taken up when the Commission discussed those articles at a later stage.

6. Mr. WINSHIP (United States of America) also wished to consider those issues at a later stage. He asked whether the reference to partial assignments referred to partial assignments and to assignments of undivided interests, which were both covered by article 9. His concern was that the language to be added to article 2 might not cover undivided interests. That issue could appropriately be taken up in the context of article 9, or when the rights of debtors were discussed. When a policy decision had been taken, the drafting group should decide on the language.

7. The CHAIRMAN suggested that the drafting group should be given at least an indication of policy at the present time. He assumed that the position of the United States was that the reference to partial assignments should cover all forms of partial assignments of interests, whether divided or not.

8. Mr. WINSHIP (United States of America) confirmed that assumption, but noted that the debate should take place in the context of article 9. In any event, language should not be adopted without considering both partial assignments and assignments of undivided interests.

9. The CHAIRMAN noted the agreement to defer discussion of that issue until article 9 was discussed and invited the Commission to consider assignments of performance rights.

10. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had reached agreement on the issue of partial assignments or assignments of undivided interests in receivables in the context of article 9. In article 2, the Working Group's suggestion had been to add language to ensure that those types of assignments were covered and that the whole draft Convention applied to them. The other issue was the position of the debtor in the case of an assignment of a partial receivable or an undivided interest in receivables. He understood that the Commission's policy would be to add some language in article 2 to cover those cases, and that the position of the debtor would be discussed later. Also, in the context of article 9, the Commission could consider the appropriateness of the policy decisions and the wording of those articles.

11. The CHAIRMAN noted that there seemed to be little support for making provision for performance rights in the draft Convention. Perhaps the report should show why the Commission had decided not to explicitly provide for those rights.

12. Mr. MORÁN BOVIO (Spain) felt that non-monetary rights and performance rights were a relatively small issue and that those two questions might not fit in well with the objective of the draft Convention. Reference to non-monetary receivables, which could in the future be converted into monetary receivables, might introduce difficulties into the text. The matters raised in paragraphs 30 and 31 of the commentary were relatively new for the Commission.

13. Mr. STOUFFLET (France) agreed that inclusion of non-monetary performance rights would open a door to the unknown. There were prerogatives accessory to the receivables, which in most cases would naturally be transmitted with the receivables, but there would be doubts in other cases. For example, the

commentary referred to the possibility of cancelling the contract, in the case of non-payment of the receivable. It did not seem appropriate that the assignee of a contractual receivable should be able to cancel the contract. It might be advisable to exclude that possibility from the scope of the Convention, since those rights were not clearly defined. The Commission might simply indicate in the commentary in very general and prudent terms that the rights accessory to the receivables were transmitted to the assignee.

14. Mr. SCHNEIDER (Germany) shared the opinion of the French and Spanish delegations. The draft Convention need not cover the assignment of non-monetary performance rights, which were not very often used in practice. As far as partial assignments were concerned, the proposal relating to article 2 would raise both a drafting problem and a policy problem. His delegation would postpone any further remarks on partial assignments until the discussion of article 9.

15. The CHAIRMAN said that it was clear that the Commission as a whole would prefer not to deal with the issue of non-monetary rights. The next issue was statutory assignments. If the Commission decided not to deal with statutory assignments, it might be useful to include the reasons for that decision in the report.

16. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the status of statutory assignments was clear from the definition of assignments, which referred to agreements. The Working Group had decided that only assignments made through an agreement would be covered, and not assignments by operation of law.

17. Statutory assignability was a separate issue, and the Working Group had reached the understanding that it referred to the limitations as to the assignment of certain receivables. The Commission could decide whether that understanding was appropriate and whether it should be explicitly stated somewhere in the draft text. At present there was no such reference. One could deduce that the statutory assignability of receivables was not affected by the draft Convention from articles 11 and 12, which dealt with contractual assignability and contractual limitations but not with statutory assignability. One might arrive at the same deduction from article 9, which dealt with the assignment of future receivables or bulk assignments but not with other types of receivables that might not be assignable under law. It might be useful to make it clear in article 2 or article 4, in the scope part, that the draft Convention applied to receivables, unless they were unassignable by law. Reference could then be made to article 9: future receivables might not be assignable by law but such statutory limitation to assignment would be set aside by the Convention. It should be made clear that with the exception of what was covered in article 9 - limitations to the assignment of future receivables and bulk assignments - the Convention did not affect statutory limitations. That point might also need to be reflected in articles 2 or 4. Paragraph 35 of the commentary gave examples from the European Contract Principles and the UNIDROIT Principles on Assignment.

18. Ms. SABO (Observer for Canada) said that the issue raised by Mr. Bazinas related to the effectiveness of an assignment of a monetary right and would

appropriately be dealt with, if an explicit provision was needed, in article 9. The draft Convention applied to the assignment of a receivable. However, where there was a statutory prohibition on assignment of the kind of receivable in question, which was applicable under national law, the assignment might not be valid. The issue should therefore be dealt with in article 9, and not in the provisions on scope.

19. The CHAIRMAN noted that the issue would be considered in the context of article 9 and invited the Commission to consider the issue of unilateral assignments.

20. Mr. MORÁN BOVIO (Spain) said that, if the door was left wide open for unilateral assignments, the assignor would be able to convey a great many present and future receivables to another person and so deplete its assets and create a difficult situation for other creditors. That very thorny issue should not be included in the text.

21. The CHAIRMAN assumed that the Commission would prefer to leave the text as it was: in other words, unilateral assignments would not be considered within the scope of the draft Convention.

22. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) responding to the comment made by the observer for Canada, said that the question whether an assignment of receivables owed by a government was effective if under other law that receivable was not assignable was indeed an issue of effectiveness. There could be a problem in excluding from the scope of application of the draft Convention receivables that might not be assignable by contract. Whether the debtor was a financial institution or a government, it should be treated consistently.

23. The CHAIRMAN said that the Commission would revert to the issue in the context of article 9.

Article 3

24. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had adopted the text of article 3, which defined an international receivable and an international assignment with reference to the location in different States of the assignor and the debtor, in the case of a receivable, and the assignor and the assignee, in the case of an assignment. One point that might need to be clarified was the critical time for the determination of internationality. The Working Group had noted that, in the case of an assignment of a future receivable, where the internationality depended only on the internationality of the receivable, the assignor and the assignee would not be able at the time of the assignment to determine whether that domestic assignment would be covered by the draft Convention. The Working Group had found that to be an inherent but acceptable weakness.

25. The CHAIRMAN assumed that the Commission was satisfied with article 3.

Article 4

26. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that article 4 (1) (b) was intended to exclude documentary receivables. However, as legal systems differed in their interpretation of what constituted such a receivable, it had been decided to focus on the manner of transfer (delivery and endorsement) of the instrument. Article 4 (2) had been placed in brackets pending the Commission's final decision on the scope of application of the draft Convention. The intention had been to give States a basis for excluding practices not explicitly excluded in the draft Convention.

27. Mr. COHEN (United States of America) said that the words "with any necessary endorsement" in article 4 (1) (b) suggested that the exclusion did not apply if the instrument was delivered without endorsement; in some legal systems, the applicable law was determined by the location of the object rather than by that of the assignor. He would therefore prefer to delete those words but was prepared to leave the matter to the drafting group.

28. Ms. SABO (Observer for Canada) said that, while she supported the substance of the proposal made by the United States representative, she wondered whether the intended result would be achieved by deletion of the words "with any necessary endorsement". She agreed that the matter should be referred to the drafting group.

29. Mr. FERRARI (Italy) asked for confirmation of his delegation's understanding that the assignment of non-consumer receivables for consumer purposes was excluded under article 4 (1) (a).

30. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) confirmed that understanding.

31. The CHAIRMAN said he took it that the Commission wished to refer article 4 (1) (b) to the drafting group, to postpone consideration of article (4) (2) until the scope of the draft Convention had been established and to return to article 4 once the proposal made by the United States delegation had been distributed in all languages.

32. It was so decided.

Article 5

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Commission would doubtless prefer to postpone further discussion of article 5 until the United States proposal had been distributed. However, it might also wish to consider whether to exclude the transfers of dematerialized negotiable instruments. The issue had not been discussed in the Working Group but was mentioned in paragraphs 44 and 176 of the analytical commentary to the draft Convention (A/CN.9/470). The latter paragraph raised the issue of conflicts of priorities; the prevailing view on the matter was that such conflicts were more appropriately governed by the law of the intermediary's location rather than that of the assignor.

34. Mr. SMITH (United States of America) said that his delegation had endeavoured to address the issue of dematerialized securities in its proposal on the scope of the draft Convention and suggested that the issue should be postponed until that proposal had been distributed. The drafting group should also address the problem.

35. Ms. KESSEDJIAN (Observer for The Hague Conference on Private International Cases) said that Australia, the United Kingdom and the United States had made a written proposal on conflicts of law rules relating to dematerialized securities at the May 2000 session of the Special Commission on general affairs and policy of The Hague Conference on Private International Law. She wondered what impact the Commission's decision on the matter would have on the work of the Conference.

36. Mr. SMITH (United States of America) said that the potential for conflict between the decisions taken by different international and regional bodies working in related legal fields did not prevent the Commission from considering such matters.

37. Mr. MORÁN BOVIO (Spain) cautioned against excessive haste in dealing with important issues such as transfers of dematerialized securities and suggested that the Commission should concentrate on clarifying general issues rather than becoming bogged down in specific details.

Article 6

38. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) drew attention to the fact that article 6 (c) and (l) had been placed in brackets.

39. Article 6 (i) provided a definition of location, which was one of the key issues because it determined the draft Convention's scope of application. For example, the law of the State in which the assignor was located was of great importance in the context of articles 24 to 27, which dealt with conflicts between multiple claimants to a receivable.

40. Article 6 (i) was based on the fact that the place where the central administration of the assignor or the assignee was exercised was easily determined and, moreover, was the place where insolvency proceedings relating to the assignor were likely to be opened. However, as noted in paragraphs 69 and 70 of the analytical commentary to the draft Convention (A/CN.9/470), the definition of "location" did not address the question whether priority should be given to the place of central administration in conflicts between the head office and a branch office, or between two branch offices, of a financial institution. At a late stage of the Working Group's deliberations, it had been suggested that in such cases priority should be given to the law of the State in which the branch office rather than the head office was located.

41. The CHAIRMAN proposed that the Commission should consider article 6 (c) together with the preamble to the draft Convention at a later date and that

article 6 (l) should be discussed in the context of the proposal made by the representative of the United States.

42. It was so decided.

The meeting was suspended at 11.20 a.m. and resumed at 11.55 a.m.

43. The CHAIRMAN invited the Commission to continue its consideration of draft article 6 (i).

44. Mr. DUCAROIR (Observer for the European Banking Federation) suggested that discussion of the draft article would be premature, since the final text depended on whether the Commission adopted variant B or the proposal put forward by the representative of the United States at the preceding meeting. In the former case, it would be important to define the word "location" because branch offices were particularly widespread in the banking and financial professions. If, on the other hand, the United States proposal was adopted, financial receivables would ipso facto be outside the scope of the draft Convention. Consideration of the draft article should therefore be deferred until a choice had been made between those alternatives.

45. Mr. MORÁN BOVIO (Spain) drew attention to his delegation's proposal, which appeared in document A/CN.9/472/Add.2. Its purpose was to deal with situations in which it was not clear from the original contract which location was most closely related to the contract, when a debtor had a number of establishments throughout Europe. It was a minor point, but agreement on the proposal had been reached in the Working Group and it would be as well to settle the matter before moving to other issues.

46. Mr. FRANKEN (Germany) was opposed to any deferral of the discussion on draft article 6 (i): branch offices were found not only in banking but also in other industries, such as insurance. In previous discussions, it had been broadly agreed that there was no point in adopting specific provisions relating to branch offices, if such offices had no relation to the main place of business. The phrase "closest relationship to the original contract" provided the most satisfactory solution. The drawback to the suggestion that the location should be deemed the place where a transaction was entered was that that location could not always be determined. In an electronic age, a company might enter all transactions centrally; but, by the same token, branch officials - and the taxation authorities - would insist on immediate access to transactions entered in the branch concerned, which would thus also have its own central book-keeping. He therefore supported the proposal by the representative of Spain. Failing that, the United States proposal might provide an appropriate solution.

47. Mr. SALINGER (Observer for Factors Chain International) said that, after 30 years' experience in factoring cross-border receivables, his organization knew that, in the case of small businesses, it was not always easy to identify the location of the central administration. It had therefore proposed, in document A/CN.9/472/Add.2, that draft article 6 (i) should be amended to specify that, if the assignor had a place of business in more than one State, the place of business was that place where the central administration was exercised. If

the debtor had a number of places of businesses in the same State, the problem did not arise. As for the suggestion by the representative of Spain, the deciding factor should be the State in which the place of business was located to which the invoice was to be addressed, or at least the location from which payment had to be made in accordance with the contract.

48. Mr. STOUFFLET (France) had doubts about identifying the place of business as that with the closest relationship to the original contract. That might be a logical approach when considering the debtor, who was a party to the basic contract, but not as applied to the assignor. He therefore believed that the location should be the place where the assignment contract was made.

49. Mr. MEENA (India) said that, since the phrase "habitual residence" could lead to unnecessary controversy, in that it was difficult to define, it should be replaced by the phrase "ordinary place of residence".

50. Mr. FERRARI (Italy) agreed with the observer for the European Banking Federation that the phrase "more than one place of business" was relevant only when the locations were in more than one country. As for the proposed change from "habitual residence" to "ordinary place of residence", he would, for the sake of consistency with earlier texts adopted by the Commission and those of other organizations, favour retaining the existing text. Moreover, it had become easier to trace a habitual residence.

51. Mr. DOYLE (Observer for Ireland) concurred. Some problems had only an approximate solution and legal definitions could not always be established with mathematical precision. The three proposed amendments should be adopted only if members were adamantly opposed to the existing text.

52. Mr. SALINGER (Observer for Factors Chain International) said that a small company might have its place of business in one country but its central administration elsewhere, for example if the chief executive controlled it from a tax haven. That was why he favoured the phrase "place of business in more than one country" over "more than one place of business".

53. The CHAIRMAN asked how the proposed amendment would be treated in a federal State, which had more than one jurisdiction.

54. Mr. SALINGER (Observer for Factors Chain International), supported by Mr. DESCHAMPS (Observer for Canada), said that, for the purposes of the draft Convention, different jurisdictions would be considered as different States.

55. Mr. FERRARI (Italy) disagreed; he would explain his reasons when the clause relating to federal States was discussed. As for the point made by the observer for Factors Chain International, he said that the draft Convention would not apply to a central administration that was not a place of business. A problem arose only if the central administration was considered a place of business, in which case the debtor could indeed be said to have a place of business in more than one country.

56. Mr. BERNER (Observer for the Association of the Bar of the City of New York) said that the Observer for Factors Chain International had drawn attention

to an ambiguity in the text. If a company had branches at two different places in the same city, the current text could be interpreted to mean that there was more than one place of business, and that could give rise to inconsistency. The text of article 6 (i) could be read in two different ways, which could lead to two different solutions.

57. Mr. SALINGER (Observer for Factors Chain International) said that, if the Italian representative's interpretation of the text was correct, his organization would have no problem. However, to a layman, the text was not clear, as had been pointed out by the previous speaker. His organization's suggestion would deal with that ambiguity.

58. Mr. MORÁN BOVIO (Spain) said that his delegation did not feel that there was any way of improving the drafting of article 6 (i). The suggestion put forward by the Secretariat in paragraph 70 of document A/CN.9/470 could provide a possible formula.

59. Mr. SMITH (United States of America) said that on the issue of how to deal with a contract for the supply of goods to a debtor's branches in several countries, where it was difficult to determine which country had the closest relationship to the contract for purposes of determining the location of the debtor, his delegation would suggest a different approach: the location of the debtor should be the State of the debtor's central administration. If the central administration rule was merely a supplemental rule in cases where the closest relationship could not be determined, a problem would arise because assignors would not want to be concerned about whether their determination of the closest relationship might later be questioned. His delegation felt that that approach would offer greater certainty, and a more objective way of dealing with the problem, if the Commission wanted to address the issue at all.

60. Mr. STOUFFLET (France) said that the location of the assignor had very important consequences because it determined the regulation of conflicts of priorities. The text of article 6 (i) implied that it was always the law of the main place of business that applied. However, it was a common practice for the central banks of a State to receive assignments from branches of foreign banks in the territory of that State, and the central banks would not want such assignments to be governed by the law of the main offices of those foreign banks, which would be the consequence of the text as it stood. The French central banks were therefore insisting that the location of the branches of assigning banks should be determined in the same way as the location of the debtor. If article 6 (i) was left as it stood, some of those central banks would insist that his Government should not sign the Convention.

61. Mr. RENGER (Germany) said that his delegation fully shared the concerns of the French delegation. The problem arose not only for central banks, but for all companies and corporations which had branches. The place of business of the assignor, the assignee, and the debtor should be determined in a consistent manner.

62. Mr. DUCAROIR (Observer for the European Banking Federation) said that the Federation was very concerned about the problem of determining the location of the assignor. The current text of article 6 (i) was not satisfactory to the

profession he represented and, if it was retained, the banks might invoke article 8 and set aside the application of the Convention. The proposals of the European Banking Federation could be found in document A/CN.9/472/Add.1. The current wording of article 6 (i) extended the scope of the draft Convention in an unnecessary and unrealistic manner. The problem arose also in relation to assignments to commercial banks. The text of article 6 (i) therefore needed to be modified.

63. Mr. DESCHAMPS (Observer for Canada) said that his delegation understood the concerns of the delegations of France and Germany. However, it should not be forgotten that the main objective in establishing the location of the assignor was to determine the applicable law in cases of conflicts of priorities between two assignees. The situation in which an assignor made assignments to two different establishments, and the law invoked was different in each case, must be avoided; the problem could not be solved unless the assignor had only one location. It was for that reason that the Working Group had recommended that the location of an assignor with several establishments should be the place of the central administration. While that solution was not perfect, it was not possible to achieve perfection.

64. Ms. STRAGANZ (Austria) said that her delegation aligned itself with the concerns expressed by the representatives of France and Germany, and would support a consistent solution regarding the location of the assignor, the assignee and the debtor.

65. Mr. FERRARI (Italy) said that his delegation supported the comments made by the observer for Canada, and would prefer to leave paragraph 6 (i) as it stood.

66. Mr. MORÁN BOVIO (Spain) said that his delegation fully supported the comments made by the observer for Canada. The solution put forward by the Secretariat in paragraph 70 of document A/CN.9/470 might provide an acceptable formula. If branches and separate offices of a bank, or other entity, that were located in different States were regarded as separate banks, that would avoid the problems described by France and the European Banking Federation.

The meeting rose at 1 p.m.