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Thirty-third session

SUMMARY RECORD OF THE 687th MEETING

Held at Headquarters, New York,
on Monday, 19 June 2000, at 3 p.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 3.10 p.m.

ELECTION OF OFFICERS (continued)

1. Mr. FERRARI (Italy) nominated Mr. Morán Bovio (Spain) for the office of Rapporteur.

2. Mr. RENGER (Germany), Mr. MARADIAGA (Honduras) and Ms. POSTELNICESCU (Romania) seconded the nomination.

3. Mr. Morán Bovio (Spain) was elected Rapporteur by acclamation.

4. Mr. HERRMANN (Secretary of the Commission) said that, since the Chairman and Rapporteur had been drawn, respectively, from the Groups of Asian and Western European and other States, the Groups of Latin American and Caribbean, African and Eastern European States should hold consultations and nominate the three Vice-Chairmen.

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

5. The CHAIRMAN recalled that there had been strong support at the previous meeting for the deletion of original article 4 (2) of the draft Convention, which corresponded to square-bracketed article 4 (3) in the draft report of the ad hoc group introduced at that same meeting.

6. Mr. MARADIAGA (Honduras) said that he supported the statements made by the Spanish and French representatives at the previous meeting, since the main goal of the draft Convention was to unify law.

7. Ms. GAVRILESCU (Romania), Ms. MANGKLATANAKUL (Thailand) and Mr. WHITELEY (United Kingdom) said that their delegations were not yet ready to support deletion and suggested that a decision on the matter should be deferred until the issue of the exclusion of receivables arising from real estate transactions had been discussed.

8. The CHAIRMAN accordingly invited the Commission to resume consideration of a definition of interbank payment systems to be included under a revised article 6. The European Banking Federation (EBF) had drafted an article 6 (m) defining the term "payments or securities settlement system" as any contractual arrangement between three or more participants (A/CN.9/472/Add.1, p. 12). It would be recalled that the Commission, in connection with its consideration of the report of the ad hoc group concerning exclusions under article 4, had decided that the draft Convention should not apply to receivables arising under interbank payment systems or investment securities settlement systems.

9. Mr. DESCHAMPS (Observer for Canada) asked why a definition of interbank payment systems was needed.

10. Mr. DUCAROIR (European Banking Federation (EBF)) said that the concept of interbank payment systems had already been defined for the member countries of

the European Union in a recent EEC glossary directive. After much controversy, it had been decided to confine the definition of interbank payments to arrangements involving three or more participants. Unless the term "interbank payments" was defined, it might be interpreted differently by the various States, according to their practice, which might, for instance, include bilateral correspondent banking.

11. Mr. SMITH (United States of America) said that there were two issues: whether there should be a definition at all; and if so, what the definition should be. The United States was perfectly content not to have a definition, but if the Commission felt it was required, his delegation believed that it should refer to two or more participants rather than three or more. The United States was familiar with two-bank payment systems, either between two banks in the same location which agreed that their debits and credits would be combined, or between a central bank branch and an individual bank. If the criterion was three or more participants, the exclusion of receivables arising from such payments would be too narrow.

12. The CHAIRMAN asked whether, without a definition, the proposed exclusion of receivables arising under interbank payments systems or investment securities settlement systems (draft article 4 (2) (d) in the report of the ad hoc group would be clear to all.

13. Mr. SMITH (United States of America) said he thought that it would. The fact that the European Union had adopted a narrower definition for the purposes of European Union community law did not mean that the draft Convention had to follow suit. The commentary to the relevant article could make it clear that the Convention definition was broader than that in European Union law.

14. Mr. DUCAROIR (European Banking Federation (EBF)) said that he would support the United States position since the matter was not of major concern. A clarification in the commentary to the draft Convention would, however, be welcome.

15. Mr. RENGER (Germany) said that the matter was of concern to his delegation. Its understanding was that interbank payments always involved three or more participants. If the Convention introduced two different definitions for a term which by law already had an established meaning in Europe, the European Union countries would find it hard to adopt the Convention.

16. Mr. SMITH (United States of America) said that often terms used in international conventions were defined differently in national law. The search for common formulations made that unavoidable. The purpose of the term used by the ad hoc group in the text of the Convention might well be different from that of the term used to define an interbank payment system in a European Council directive. He guessed that for the European Union it meant a system where payments were regulated under certain rules among banks and where the concerns were the solvency and systemic risk of the overall banking system. In the Convention, however, it was used merely to exclude assignment of the receivable in question, and the exclusion had been proposed merely because a payment owed by one bank to another was not usually the type of receivable the Convention was designed to address. In many countries, payments between even two banks were

subject to other areas of the law, where the Convention was not needed. Bearing in mind those totally different purposes for using the term, it did not seem a problem to the United States to propose exclusion of payments owed by one bank to another if one viewed that as an interbank payment system.

17. Mr. MORÁN BOVIO (Spain) observed that in Europe the system required three or more participants; yet the concrete relationship of the payment was usually bilateral. Since the matter was very technical and could have different interpretations under different legal systems, he supported the position just taken by the European Banking Federation, that it should be left to the commentary to make it clear that the European Union definition was one of several possible ones and explaining what precisely was being excluded from the Convention.

18. Mr. SMITH (United States of America) said that there would be no problem in including the EBF definition in the commentary as one of the systems covered by the term "interbank payment system".

19. Mr. RENGER (Germany) said that his delegation accepted the Spanish suggestion.

20. Mr. HERRMANN (Secretary of the Commission) cautioned against counting on the commentary as an escape hatch by referring all disputed questions to it. There was some question as to whether the final text would include a commentary at all. Draft conventions referred to the General Assembly normally did not, whereas those referred to a diplomatic conference for adoption usually did. Moreover, in the case of the absolutely final text adopted by a conference, the practice had been to consider the commentary official only if the Commission or the conference had approved the text of it as such. In cases where the Commission had asked the General Assembly to act as or in lieu of a diplomatic conference, however, it had not necessarily always prepared a commentary. A further possibility would be to invite the Commission secretariat, together with a few experts, to prepare a commentary after the fact, based on the final text of the Convention, but the degree of authority such a commentary would have remained to be determined.

21. The CHAIRMAN observed that, in any case, the decision had been made not to include the EBF definition of interbank payments in the text of the Convention itself.

22. Mr. COHEN (United States of America) said that the proposed exclusion in article 4 (1) (b) dealt with assignments of a negotiable instrument. A negotiable instrument as a materialized right was treated as a thing and, in many respects, the law of the State in which the negotiable instrument was located was considered to be the law that would govern that right. More generally, as a materialized right, the negotiable instrument was often considered to be different from a mere receivable. While most cases involving negotiable instruments would involve delivery and all necessary endorsements, there were some cases in which delivery was made without endorsement and even some in which the agreement to assign was made without actual delivery. In all such cases, the right of the assignee with respect to the negotiable instrument should not be governed by the Convention. The ad hoc group consisting of

representatives of the United States and Germany and the observer for EUROPAFACTORING had therefore proposed that article 4 (1) (b) should simply read "Of a negotiable instrument".

23. Mr. DESCHAMPS (Observer for Canada) said that the Commission should have time to consider the implications of the proposal and make sure that the new wording did not lead to more exclusions than those intended.

24. Mr. STOUFFLET (France) said that his delegation was in favour of retaining the text of article 4 (1) (b) as originally drafted.

25. Mr. RENGER (Germany) said that his delegation agreed in principle with the proposal of the United States delegation. In many cases, negotiable instruments were transferred without endorsement. The use of the words "To the extent made by [through] a negotiable instrument" would be more appropriate. Under German law, the delivery of a negotiable instrument based on a contract was regarded not as an assignment but rather as a transfer of rights, as in the case of the transfer of goods. Therefore, if the wording proposed by the United States delegation was accepted, the Commission should consider amending the chapeau of article 4 (1) to read: "This Convention does not apply to the transfer of rights" or "This Convention does not apply to assignments and/or the transfer of rights".

26. Mr. DOYLE (Observer for Ireland) said that his delegation was in favour of retaining the original text of article 4 (1) (b). The text had been arrived at after many sessions of the Working Group on International Contract Practices and, in view of the Commission's heavy workload, it was not wise to begin making amendments that did not necessarily improve the text. Moreover, it was difficult for the Commission to assess the ramifications of amendments proposed at such short notice.

27. Mr. MORÁN BOVIO (Spain) said that perhaps the amendment proposed by the United States of America was much broader in scope than might appear at first glance. If the requirement of endorsement and delivery was removed from article 4 (1) (b), the scope of the exclusion would surely be much broader.

28. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Working Group had decided to refer to "assignments" in article 4 (1) (b) in order to reflect the meaning of "assignment" as defined in article 2. The reference to "delivery of a negotiable instrument" or "delivery and endorsement" had been intended to reflect the focus on the means by which the negotiable instrument was transferred instead of on the type of the receivable involved, since different legal systems might have a different understanding of a negotiable instrument or a documentary receivable. The words "To the extent made" were meant to reflect the idea that, if the same receivable that existed in the form of a negotiable instrument also existed under a contract and the receivable under the contract was assigned, that assignment should not be excluded.

29. Mr. COHEN (United States of America) said that, in the majority of transactions in which negotiable instruments were assigned, the instruments were assigned with delivery and any necessary endorsement. Therefore, the deletions

proposed by his delegation would not dramatically expand the scope of the exclusion but would ensure that it applied in some very important contexts. For example, if an assignor located in the United States of America under the location rules of the Convention owned and possessed a negotiable instrument in France and assigned that negotiable instrument to a person in France but neglected to endorse the instrument, under the Convention the law of the United States would determine priority because the assignor was located in the United States. While that might be an acceptable rule for tangible rights, it was inconsistent with the general understanding in many States regarding rights to intangible things, such as negotiable instruments. While most negotiable instruments were transferred by delivery with endorsement, in some contexts endorsements were not made, such as in interbank mortgage transfers and, in some cases, transfer was even made without delivery. While that was only one small corner of the negotiable instruments market, his delegation believed that the Convention should deal appropriately - or not at all - with that small corner. The deletions proposed in article 4 (1) (b) would remove the language that prevented the exclusion from applying to such assignments.

30. Ms. McMILLAN (United Kingdom) said that her delegation could support the United States proposal since nothing would be lost by deleting the words "To the extent made by the delivery" and "with any necessary endorsement".

31. Mr. DESCHAMPS (Observer for Canada) said that, if the United States proposal was accepted, the assignment of a negotiable instrument would be excluded from the scope of application of the Convention even if there was no negotiation and even if there was no delivery of the instrument. The United States representative had given an example of an assignment made with delivery. Canada was concerned that the exclusion from the Convention of an assignment without negotiation or without delivery might have unintended consequences. The Commission should therefore have more time to consider all the implications of the proposal.

32. The CHAIRMAN said that he would give the Commission more time to study the proposal, which would be taken up again at a subsequent meeting. He invited the Commission to consider article 7 of the draft Convention.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the purpose of article 7 was to recognize the right of parties to derogate from or change by agreement provisions of the Convention relating to their rights as long as the rights of persons not parties to the agreement remained unaffected. The Working Group believed that such an approach was necessary because an agreement under the Convention could affect parties other than the parties to that agreement. For example, an agreement between the assignor and the debtor could affect the assignee, and an agreement between the assignee and the assignor could affect the debtor. The Working Group also believed that the concept reflected in article 7 was in keeping with the general notion of party autonomy, which meant that parties could change their agreement as long as they did not affect the rights of third parties.

34. Under article 21 of the draft Convention, waivers of defences between the assignor and the debtor restricted party autonomy in that such a waiver required a document signed by the debtor so that the debtor was aware of the rights that

he was waiving and the consequences of the waiver. The Working Group had decided that, for public policy reasons, certain rights reflected in article 21 (2) should not be subject to a waiver; such rights arose from fraudulent acts on the part of the assignee or defences based on the debtor's incapacity. In the light of that limitation to party autonomy, the Commission might wish to state in article 7 that the rule contained in article 7 was subject to article 21 (2).

35. In considering article 7, the Commission had to decide whether or not agreements between the assignee, the new creditor and the debtor were covered by that article. It was also necessary to clarify whether or not article 7 applied to agreements between the assignee and the debtor to waive the rights of the debtor; that matter could be dealt with in the commentary, as long as the Commission reached an understanding on the subject.

The meeting was suspended at 4.25 p.m and resumed at 5 p.m.

36. The CHAIRMAN invited the Commission to consider article 7 of the draft Convention dealing with party autonomy. He noted that the Secretariat, in its commentary (A/CN.9/470), had raised the issue of consistency between article 7 and article 21 and the need to include a specific reference to an agreement between the assignee and the debtor, either in the text of article 7 or in the commentary or report.

37. Mr. MORÁN BOVIO (Spain) said that his delegation felt that a reference to relations between the debtor and the assignee was desirable and should be introduced into the text of article 7 itself. Such a provision would enhance the possibility that, once a debtor received notification of assignment, it could reach an agreement with the assignee, if the parties so desired.

38. Mr. FERRARI (Italy) noted that the wording of article 7 differed from provisions on party autonomy in many other recent commercial law conventions, notably from article 6 of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, which allowed the parties to opt out of the Convention entirely. That Convention, of course, dealt with two-party transactions, whereas an assignment necessary implied the existence of three parties.

39. Perhaps article 3 of the UNIDROIT Convention on International Factoring, Ottawa, 1988, which dealt with exclusion of the Convention, would be a more appropriate model. It might be useful to allow the parties to exclude the draft Convention, that is, to opt out of it entirely, with, of course, some limitations. They should not, for example, be allowed to derogate from the draft Convention in such a way as to affect the rights of third parties and exclude them from the draft Convention.

40. There were a few other issues that needed clarification. His delegation felt that there were potential problems with the assignor-debtor relationship. Paragraph 75 of the commentary (A/CN.9/470) referred to the possibility that the parties might derogate from the draft Convention by referring to the law of a non-Contracting State or to the domestic law of a Contracting State, but he did not believe that that would actually result in exclusion.

41. With regard to the debtor-assignee relationship, his delegation felt that, if article 7 was left as it stood, it would allow the debtor and the assignee to conclude an agreement excluding the draft Convention, subject to the limitations mentioned in the commentary.

42. Mr. TELL (France) said that, because of the close relationship between the two articles, article 7 should begin with the standard proviso "Without prejudice to the provisions of article 21". He would like to remind the Commission that the Working Group had made the decision not to exclude assignments of consumer receivables or assignment to consumers, as a general rule. Nevertheless, in many countries, consumers were protected by mandatory national law provisions, as was recalled in article 21. He agreed with the Italian representative that the present wording of article 7 would allow a debtor to conclude an agreement with an assignee derogating from the provisions of the draft Convention, a result inconsistent with the provisions of article 21.

43. Without taking a position, for the moment, on the inclusion of a specific reference in article 7 to an agreement between a debtor and an assignee, as suggested by the representative of Spain, he would merely point out that any such agreement would have to be without prejudice to mandatory law provisions preventing certain classes of debtors from waiving certain rights or defences, and not only those mentioned in article 21.

44. Mr. DOYLE (Observer for Ireland), supported by Mr. BURMAN (United States of America), said he thought that it was too late to take an entirely new approach to article 7. The question raised in paragraph 75 of the commentary (A/CN.9/470) whether article 7 should apply to derogating agreements between the debtor and the assignee had been answered in paragraph 150 of the commentary, which noted that the Working Group had assumed that agreements between assignees and debtors were outside the scope of the draft Convention. If that was the case, then article 7 did not cover such agreements, and there was no need to mention them. Article 7 could stand as currently worded.

45. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that he apologized for any ambiguity in the commentary between paragraphs 75 and 150. It should be borne in mind that, while article 7 and its commentary dealt with any derogating agreements between the parties, article 21 and its commentary dealt with the narrower issue of waivers of defences. What paragraph 150 did make clear was that agreements between the debtor and the assignee whereby the debtor waived certain defences were considered to be outside the scope of the draft Convention and were not covered by article 21. Assuming that such was the correct interpretation, article 7 should be made consistent with it.

46. Mr. FERRARI (Italy) said that there did seem to be a policy difference, since some delegations obviously felt that debtor-assignee agreements should not be covered by the draft Convention at all, whereas his delegation felt that they should be covered except for the waivers of defences mentioned in article 21 (2). Certainly that was the conclusion one must draw from the present wording of article 7, which mentioned the assignor, the assignee and the debtor without drawing distinctions.

47. The CHAIRMAN suggested that the matter of reconciling the two articles, including a proviso along the lines proposed by the French representative, should be left, for the time being, to the drafting group, and the Commission should move on to consideration of article 8 of the draft Convention dealing with principles of interpretation.

48 Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the wording of article 8 had been modelled on similar provisions in other UNCITRAL texts and other international conventions. Paragraph 1 stressed the international character of the draft Convention and the need for uniformity in its application and good faith in international trade. Paragraph 2 addressed the question of matters governed by the draft Convention which were not expressly settled in it and stated that they were to be settled in conformity with its general principles or, in the absence of such principles, in conformity with the rules of private international law.

49. Mr. FERRARI (Italy) said that his delegation supported the policy underlying the article but would like to suggest some modifications. With regard to paragraph 1, the principles contained in the preamble to the draft Convention should be mentioned either in the text itself or in the commentary or report.

50. There was a larger problem with paragraph 2, which could be taken up in conjunction with the consideration of chapter V on conflict of laws. His delegation agreed with the wording as it stood, but not if it was to be extended to chapter V as well. In relation to chapter V, the draft Convention should not allow the creation of private international law by judges. His delegation therefore proposed an amendment to article 8 (2) specifying that it did not extend to chapter V. The amendment could be left in brackets until it was determined whether or not the draft Convention would include chapter V.

51. It might be helpful in the report actually to list the general principles referred to. His delegation, for example, did not consider party autonomy to be one of those principles, whereas it certainly included adequate debtor protection among them.

52. Mr. BURMAN (United States of America) said that his delegation agreed with the Italian proposal regarding article 8 (1). It was important to make specific mention of the preamble, so that other parties who had not been closely involved in the elaboration of the draft Convention would realize its importance for interpretation.

53. Regarding article 8 (2), he shared the concerns expressed by the representative of Italy. There was a need for an amendment stating explicitly that, where a matter governed by the Convention was not expressly settled by it or by the general principles on which it was based, the law applicable as determined by the draft Convention should first be applied and then, as necessary, the law applicable through the general conflicts rules of the jurisdiction concerned. That point could of course be made in the commentary, although the Commission would have to take a decision on the type of commentary it wished to include before deciding whether such a solution would be

acceptable. The Commission might want to return to article 8 (2) when it considered chapter V.

54. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that, if the provision in question remained as currently drafted, judges charged with its application would refer first to domestic rules of private international law. If those rules led them to apply the law of a State party, they would then refer to the rules of the Convention itself, and, only under those circumstances, would the provisions of chapter V be applied. The Commission must exclude chapter V from the scope of article 8 (2) if indeed it decided to retain that chapter.

55. Mr. Al-NASSER (Observer for Saudi Arabia) said that his delegation agreed that article 8 (2) appeared to call on judges to refer first to domestic rules of private international law.

56. Mr. FERRARI (Italy) pointed out that, in accordance with article 1 (3), the provisions of chapter V applied to assignments of international receivables and to international assignments of receivables as defined in that chapter independently of whether the requirements in article 1 (1) and (2) were met. That being the case, judges should refer directly to the provisions of chapter V, before having recourse to national rules of private international law. However, he agreed that there was a need to distinguish clearly in every instance between the two concepts of private international law provided for in the Convention.

57. Ms. McMILLAN (United Kingdom) said that for those States which, like the United Kingdom, intended to exercise their right under article 37 to opt out of chapter V, the wording of article 8 (2) presented no difficulties.

58. Ms. WALSH (Observer for Canada), noting that Canada also intended to make the declaration under article 37, said that, as she understood it, if a forum State opted out of chapter V, the appropriate rules of international law would be those applicable in that State, whereas, if it did not do so, the appropriate rules would be those contained in chapter V.

59. Regarding the proposed inclusion in article 8 (1) of a reference to the preamble, which her delegation supported in principle, it might be prudent to defer a decision on the matter until the wording of the preamble itself had been finalized.

60. Mr. TELL (France) said that his delegation wished to associate itself with the views expressed by the representative of the United Kingdom and the observer for Canada concerning article 8 (2). The problem with the wording was that it assumed that chapter V applied, whereas it was in fact an optional chapter.

61. The CHAIRMAN suggested that the Commission should revert to article 8 (2) when it took up chapter V. As to article 8 (1), one of the fundamental principles of interpretation was that the preamble of any document was intended to assist in its interpretation. However, if the Commission so wished, he would request the drafting group to consider the proposal to include in article 8 (1) a reference to the preamble of the draft Convention.

62. Mr. FERRARI (Italy) said that article 8 (1) must refer specifically to the preamble as one of the elements to be taken into account in interpreting the Convention. The wording of article 4 (1) of the Ottawa Convention might serve as a model.

63. The CHAIRMAN invited the Commission to consider articles 9 and 10 on effectiveness of bulk assignments, assignments of future receivables and partial assignments, and time of assignment respectively.

64. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that he wished to highlight a number of problems with respect to the form of an assignment raised in the analytical commentary to the draft Convention (A/CN.9/470, paras. 80-82). Matters of formal validity were not dealt with in the draft Convention and, while certain matters of material validity were settled in it, others were referred to the law of the assignor's location. As a result, an assignee, in order to establish priority, would first have to establish the formal validity of the assignment. The draft Convention, however, gave no indication as to what law would govern formal validity. The assignee would then have to establish that the assignment was effective between himself and the assignor and, lastly, that he had priority under the law of the assignor's location.

65. There was a need to address those problems in order to simplify the position of assignees. The Working Group, however, had been unable to reach consensus on either a substantive law rule or a private international law rule that would resolve the issue of formal validity. The Commission might wish to include in the draft Convention an applicable law rule dealing with the formal validity of the transfer of proprietary rights in the receivable and to subject that limited issue to the law of the assignor's location, or to establish a "safe harbour" rule to the effect that an assignment was effective if it met at least the form requirements of the law of the State in which the assignor was located.

66. Mr. MORÁN BOVIO (Spain) said that a "safe harbour" rule would represent a most satisfactory solution to the problem of formal validity since it would also address many of the thorny issues raised in paragraph 81 of the commentary. He also welcomed the proposals made in paragraphs 85, 88 and 95.

The meeting rose at 6 p.m.