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United Nations Commission on International Trade Law

Thirty-fourth session

Summary record of the 711th meeting

Held at the Vienna International Centre, Vienna, on Monday, 25 June 2001, at 10.30 a.m.

Temporary Chairman: Mr. Jeffrey Chan (Singapore)

Chairman: Mr. Pérez-Nieto Castro (Mexico)

Contents

Opening of the session

Election of officers

Adoption of the agenda

Draft Convention on Assignment of Receivables in International Trade

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The meeting was called to order at 10.30 a.m.

Opening of the session

1. **The Temporary Chairman**, opening the thirty-fourth session as outgoing chairman of the thirty-third session, paid tribute to the Secretariat and others who had helped him during his term of office and expressed particular satisfaction at having presided over the completion of the work on the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects. He gave the floor to the Secretary of the Commission to outline the work of the session.

2. **Mr. Sekolec** (Secretary of the Commission) said that the main tasks before the Commission were to complete the consideration of the draft Convention on Assignment of Receivables in International Trade and the draft UNCITRAL Model Law on Electronic Signatures. During the third week of the session, the Commission would consider a number of other items listed in the provisional agenda (A/CN.9/482).

3. In accordance with the wishes of the General Assembly, he informed the Commission of the costs involved in covering the session. There would be 28 meetings—two a day—for which simultaneous interpretation would be provided. Over 500 pages of documentation had already been prepared, about 100 more would be generated during the session, and the report would run to another 70 pages, at a total cost of just over US\$ 1,000 per page in the six official languages. In addition, summary records would be provided for the first two weeks. The hourly cost of servicing the meetings, including interpretation and summary records, would be US\$ 4,400.

4. Thursday, 12 July had been reserved for an informal meeting, conducted in English only, of national correspondents for the system for the collection of case law on UNCITRAL texts (CLOUT). From 2 to 4 July, a colloquium would be held on public-private partnerships, sponsored jointly by the Commission and the Public-Private Infrastructure Advisory Facility of the World Bank. Through the generosity of a private donor, interpretation would be provided into and from English and French, and also from Spanish. On 27 June a forum would be held, organized jointly with the University of Vienna, at which Professor Catherine Walsh would speak on “Secured transactions as a future work topic for

UNCITRAL”. Lastly, he drew attention to the UNCITRAL web site, which had become an increasingly useful tool for participants, particularly with regard to the status of conventions and model laws.

Election of officers

5. **The Temporary Chairman** said that the work of the Commission would be conducted by two Committees of the Whole.

6. **Mr. Cachapuz de Medeiros** (Brazil), speaking on behalf of the Group of Latin American and Caribbean States, nominated Mr. Ogarrio Reyes-España (Mexico) for the office of Chairman of the Commission and Mr. Pérez-Nieto Castro (Mexico) for the office of Chairman of the Committee of the Whole on the draft Convention on Assignment of Receivables in International Trade.

7. **Mr. Olivencia Ruiz** (Spain) and **Mr. Alvarez Goyoaga** (Uruguay) seconded the nominations.

8. *Mr. Ogarrio Reyes-España (Mexico) was elected Chairman by acclamation.*

9. *Mr. Pérez-Nieto Castro was elected Chairman of the Committee of the Whole on the draft Convention on Assignment of Receivables in International Trade by acclamation.*

10. *In the absence of Mr. Ogarrio Reyes-España (Mexico), Mr. Pérez-Nieto Castro (Mexico) took the Chair.*

11. **The Chairman** said that the other regional groups should, after consultations, propose nominations for the posts of vice-chairmen and rapporteur.

Adoption of the agenda (A/CN.9/482)

12. *The agenda was adopted.*

Draft Convention on Assignment of Receivables in International Trade (A/CN.9/486, A/CN.9/489 and Add.1, A/CN.9/490 and Add.1-4 and A/CN.9/491 and Add.1)

13. **The Chairman**, after stressing the need for dispatch if the Commission was to complete its work on articles 18 to 47 and the draft Convention as a whole in the next week, said that only substantive issues would

be considered in plenary; any editorial amendments would be considered later by the drafting group.

Article 18

14. **Mr. Bazinas** (Secretariat) recalled that the relevant documents before the Commission were A/CN.9/486, comprising the report of the Working Group on International Contract Practices, which contained the consolidated text of the draft Convention; A/CN.9/491, which contained suggestions by the Secretariat on issues referred to the Commission by the Working Group, relating to draft articles 18 to 47 and the Annex, and on issues left pending by the Commission or referred to it by the Working Group on draft articles 1 to 17; A/CN.9/491/Add.1, which contained a note by the Secretariat on the cost estimate for a diplomatic conference in Vienna; A/CN.9/489 and Add.1, which contained an article-by-article commentary by the Secretariat; and A/CN.9/490 and Add.1-4, which contained comments by Governments and international organizations on the draft Convention. There were no issues pending in relation to draft article 18. It had been suggested at the previous session that the reference to the language of notification in paragraph 1 of that article was inappropriate and should be included among the definitions. The Working Group had, however, left the provision unchanged.

15. **Mr. Al-Nasser** (Observer for Saudi Arabia) expressed the hope that, in order to avoid subsequent difficulties, notification would be only in the language of the original contract.

16. **Mr. Morán Bovio** (Spain) said that the merit of the existing text, which had been extensively debated by the Working Group and at the thirty-third session, was that, while not precluding the use of the language of the original contract, it kept open the options for a broader range of possibilities. The draft text should therefore remain unchanged.

17. On a procedural matter, he proposed that, as at previous sessions, the Commission should infer from the absence of any expression of support for an amendment proposed by a single delegation that the proposal had been rejected.

18. **The Chairman**, stressing the desirability of such a procedure in the light of the time constraints at the current session, said he took it that the Commission

wished to adopt the proposal made by the representative of Spain.

19. *It was so decided.*

20. **Mr. Meena** (India) said he had reservations about the provision in article 18, paragraph 1, to the effect that notification of the assignment or payment instruction was effective when received by the debtor. It was unclear what should be done in a case where a debtor was deliberately avoiding receipt of the notification. He suggested amending the text to ensure that the debtor was deemed to have received the notification or payment instruction.

21. **The Chairman**, noting that there were no further comments, said he took it that the Commission wished to adopt article 18 as it stood.

22. *Draft article 18 was approved.*

Article 19

23. **Mr. Kobori** (Japan), referring to article 19, paragraph 2, drew attention to the need for clarification of the extent to which a debtor was required to confirm that the assignee was the true assignee. What happened if there was no assignment or the assignment was null and void?

24. On paragraph 7, he expressed the view that the assignee should be required to provide adequate proof of all prior assignments, including duplicate assignments.

25. **Mr. Ducaroir** (Observer for the European Banking Federation) said that paragraph 6, as currently worded, would impede the partial assignment of a receivable because the debtor could either act on the notification or disregard it and continue paying the assignor. In seeking to protect the debtor, the Working Group had clearly overlooked the implications. The reference in paragraph 12 of the commentary to the case of several notifications relating to partial assignments was misleading since article 19 mentioned only one partial assignment. In practice, where a very large receivable was assigned only in part, the financial institutions concerned would have an interest in ensuring that notification of the partial assignment was treated in exactly the same way as notification of the full assignment.

26. **Mr. Stoufflet** (France) supported the previous speaker. While conceding that a debtor required

protection in the case of incompatibility between the notification of a full assignment and the notification of a partial assignment, he saw no reason why in other cases the notification of a partial assignment should not be fully honoured by the debtor.

27. **Mr. Brito da Silva Correia** (Observer for Portugal) expressed support for the point made by the previous two speakers.

28. **Mr. Morán Bovio** (Spain) said he had no problem with paragraph 6 as currently worded. The last sentence should be interpreted in the light of the preceding sentence. If the debtor paid in accordance with the notification in the case of a partial assignment, the debtor was discharged only to the extent of the part or undivided interest paid.

29. **Mr. Bazinas** (Secretariat) said that article 19 did not deal with the effectiveness of a partial assignment, which was covered by article 9. The main thrust of article 19 was to provide debtors with a clear procedure for discharging their obligations. In the case covered by paragraph 6, that of one or more notifications of partial assignments, a debtor who was required to pay several different assignees would possibly incur additional costs in the process. The main purpose of paragraph 6 was to ensure that provision was made for the coverage of any additional costs incurred in fulfilling such an obligation. Rightly or wrongly, the Working Group had taken the view that, in the case of a valid partial assignment, the debtor should have a choice between paying in accordance with the notification or disregarding the notification and paying the assignor, in which case the assignees would have to recover the receivables from the assignor and incur the risk of the latter's insolvency.

30. It was his understanding that the representative of Japan wished to include a reference in paragraph 7 to duplicate assignments. But that case was already covered by paragraph 4.

31. With regard to paragraph 2 and the question whether the debtor had to confirm that the assignee was the true assignee, the Working Group had decided that the issue did not arise sufficiently frequently to merit a reference in the Convention. If an assignment was null and void, the debtor was not, of course, discharged by paying the assignee.

32. **Mr. Kobori** (Japan) said that paragraph 4 did not cover all cases relating to duplicate assignments, for

example those involving both subsequent and duplicate assignments.

33. **Mr. Doyle** (Observer for Ireland) said he felt that the difficulties some delegations were experiencing with paragraph 6 were matters of drafting rather than of substance, and might be resolved by deleting the words "in accordance with the notification or" from the first sentence.

34. **Mr. Schneider** (Germany), referring to paragraph 7, said that his delegation was concerned at the watering down of debtor protection. Debtors would not be discharged if, as a result of one invalid notification in a chain of assignments, they inadvertently paid to a non-creditor. Debtors should not be placed in that situation.

35. There was also a lacuna in the same paragraph, concerning the debtor's entitlement to request the assignee to provide proof of the assignment. Where payment of a receivable became due before the reasonable period of time to establish proof had elapsed, it was unclear who would then be liable to pay interest. It should not fall to the debtor to bear that risk.

36. **Mr. Bazinas** (Secretariat), replying to the first point made by the representative of Germany, said that the Working Group had decided that the nullity of one assignment in a chain of assignments was not an issue that needed to be covered by the draft Convention, since it raised no problems in practice.

37. With regard to the second point, it was recalled that a notification did not in itself necessarily trigger a payment obligation, or alter the payment terms of the original contract. The Working Group had considered a suggestion by the Secretariat that paragraph 7 should state expressly that the obligation would be suspended if it became payable during the period allowed for the establishment of proof. However, it had decided to reject that suggestion, because, with respect to countries where a mechanism existed enabling debtors to make payments to a deposit fund or similar institution pending establishment of proof, the matter was covered by the provisions of paragraph 8. However, where no such mechanism existed under national law, the Working Group was of the view that the provisions of paragraph 7 implicitly freed the debtor from the obligation to pay interest during the period allowed for provision of adequate proof. Otherwise, the entitlement to such a period would be

meaningless. The Commission must now decide whether to accept the conclusions of the Working Group in that regard.

38. **The Chairman** reminded the Commission that before the discussion continued on paragraph 7 the issue raised by the representative of the European Banking Federation with regard to paragraph 6 needed to be resolved.

39. **Mr. Whiteley** (United Kingdom) said that the substantive rule in paragraph 6 should not be changed. It should be read in conjunction with article 26, paragraph 2, so that if an assignor received payment in relation to a partial assignment, the assignee would be able to claim those proceeds. While acknowledging that that created some risks for the assignee, in his view, the rule was an appropriate compromise between the interests of all those involved.

40. **Mr. Meena** (India) said that the first sentence of paragraph 6 referred to full discharge “in accordance with the notification”, whereas the second referred to partial discharge, also “in accordance with the notification”. In his view, there was some doubt whether the same notification was being referred to in both cases, in which case there appeared to be a contradiction. If different notifications were being referred to, that should be stated more clearly.

41. **Mr. Ducaroir** (Observer for the European Banking Federation) said he was not entirely convinced by the arguments put forward by the Secretariat and supported by, among others, Spain. While he was aware that article 19 did not deal specifically with the legal effectiveness of assignment, it certainly dealt with its practical financial effectiveness, which was at least as important. It established the conditions for a debtor’s discharge by payment. However, article 19, paragraph 2, did not extend to cases of partial assignment of a receivable. As currently drafted, paragraph 6 could therefore lead to a situation in which an assignor with a receivable of, say, US\$ 1 billion, seeking a bank loan of US\$ 500 million, could be asked to transfer the entire receivable as security for the loan, simply because only then could the prospective lender be certain of receiving payment; for the lending bank would be aware that if it notified the original debtor of the assignment of only part of the receivable, the debtor could ignore the notification, and continue to pay the assignor. Without any certainty, given the ever-present threat of insolvency, that the

assignor would be in a position to transfer the proceeds to the assignee, the prospective lender would be reluctant to enter into such an agreement.

42. **Mr. Bazinas** (Secretariat) said that the first question was whether a partial assignment was possible under the Convention, to which the reply was in the affirmative, pursuant to article 9. The second question was whether an assignee could obtain payment in the case of a partial assignment; and article 19 implied that that might not be possible if notification was given of the partial assignment; for the debtor could then choose whether to pay in accordance with the notification, or according to the other provisions of the article, namely, paragraphs 2, 3 and 4. The representative of the United Kingdom had drawn attention to the possibility of an assignee structuring a transaction in such a way as to ensure payment, by arranging payment to an account held by the assignor on behalf of the assignee, segregated from the assignor’s other assets. The assignee could also ensure payment by coming to an agreement with the debtor that a partial assignment would be honoured. Hence, paragraph 6 allowed the debtor the choice of paying in accordance with the other provisions of the article, if it considered partial assignment to be a significant problem; and, in that knowledge, the assignee would tend to structure the transaction in such a way as to avoid making a notification of a partial assignment. The real question was whether the Commission believed that the solution provided in article 26, paragraph 2, was the best available solution.

43. **Mr. Al-Nasser** (Observer for Saudi Arabia) supported the proposal by the observer for Ireland with regard to paragraph 6. He also sought clarification of the basis on which an agreement could be reached between assignee and debtor to ensure payment.

44. **Mr. Bazinas** (Secretariat), referring to paragraph 19 of the report of the Working Group (A/CN.9/486), said that paragraph 6 had been designed to protect the debtor in a sufficient but flexible way, without prescribing in a regulatory manner what the assignor, the debtor or the assignee ought to do and without creating liability.

45. **Mr. Machetta** (Italy) said he shared the concerns expressed by the observer for Saudi Arabia and the representative of the European Banking Federation, and supported the formulation proposed by the observer for Ireland. The question of the suspension of

a payment obligation had still to be resolved and, in his view, could be a source of controversy. One possibility might be to limit the period allowed for the establishment of adequate proof by the debtor.

46. **Mr. Ikeda** (Japan) said that his delegation agreed with the comments made by the representative of France concerning assignment in part. When the debtor received notification of a partial assignment, the debtor had to pay in accordance with that notification. The provision that the debtor was obliged to pay even in cases where it did not receive notification was unfair and somewhat contradictory. The wording of paragraph 6 should therefore be improved.

The meeting was suspended at 12.20 p.m. and resumed at 12.40 p.m.

47. **The Chairman** inquired whether the European Banking Federation wished to make a proposal on paragraph 6.

48. **Mr. Ducaroir** (Observer for the European Banking Federation) said that it would present its proposal at the beginning of the next meeting.

49. **The Chairman** invited the Commission to consider the comments of the representative of Germany concerning paragraph 7.

50. **Mr. Schneider** (Germany) reiterated his delegation's concerns regarding the provisions of paragraph 7. His delegation did not agree with the view that the nullity of one assignment in a chain of assignments was not a situation that arose in practice. As to the problem of determining who would pay the interest, the Secretariat had put forward a good proposal in that regard. However, the rule was subject to misinterpretation and it was necessary to deal with the issue in so far as payment to a depository or a court would give rise to costs.

51. **Mr. Machetta** (Italy) said that his delegation agreed with the remarks made by the representative of Germany. Under Italian law, payments by deposit did not discharge the debtor. That situation might lead to a conflict between the provisions of the Convention and national legislation.

52. **Mr. Stoufflet** (France) said that, while his delegation shared Germany's concerns, it failed to see how the problem could be solved, since the Commission had agreed that notification could also be

given by the assignee. One possible solution would be for the assignor to make the notification. While such a solution might remove some of the difficulties, he was not sure that the Commission would be willing to accept it.

53. **Mr. Bazinas** (Secretariat) said that the representative of France had hit the nail on the head. In its discussion of paragraph 7, the Working Group had recognized the issues raised by the representative of Germany but had decided not to address them. The introduction of a new provision stating that only the assignor could give notification would radically alter the text agreed over a five-year period. The Working Group had decided that the assignee should notify the debtor independently of the assignor because, when notification was required, the relationship between the assignor and the assignee was often not good enough to permit cooperation between the two, particularly in cases of insolvency.

54. **Mr. Winship** (United States of America) said that the question raised by the representative of Germany had been debated by the Working Group on no fewer than three separate occasions. The Working Group had come up with a text that sought to strike a balance among the parties. Any belated attempt to redraft the text of paragraph 7 would upset the balance not only of that paragraph but perhaps also of other paragraphs.

55. **Mr. Brink** (Observer for the European Federation of Factoring Associations—Europafactoring) said that he failed to see the practical relevance of the first issue raised by the representative of Germany. For the purposes of a notification, the assignee must have certain information concerning the receivable because the receivable had to be described in the notification. It would be strange to expect a third party to give a notification to a debtor requesting payment without that third party's having any information about the receivable.

56. The second issue, concerning the suspension of payment and the question of who would be liable for costs and interest, could be addressed in the commentary in such a way as to make clear that, during the period needed to establish the evidence and check the evidence presented to it by the assignee, the debtor would be entitled to withhold payment for a reasonable length of time.

57. **The Chairman** said that the issues raised by the representative of Germany had been sufficiently discussed and resolved to the satisfaction of all.

58. **Mr. Al-Nasser** (Observer for Saudi Arabia) said that, in the discussion of paragraph 6, the Secretariat had provided information on the period of time during which the debtor would be checking proof of payment. In its explanation, the Secretariat had referred to the person who would have to bear the costs. It would be unfair to expect the debtor to pay interest during that period, since the debtor would have no way of knowing how long it would take to establish the proof.

59. **The Chairman** said that the Commission had taken note of the concern expressed by the representative of Saudi Arabia, and would consider the European Banking Federation's proposal on the wording of paragraph 6 at its next meeting. If there were no further comments on article 19, the Commission could begin its consideration of article 20.

Article 20

60. **Mr. Bazinas** (Secretariat) said that article 20 dealt with the debtor's defences and rights of set-off. The purpose of paragraph 1 was to ensure that the debtor had all the defences and rights of set-off that it could raise against the assignor even after notification but only in cases where those rights arose from the original contract or a related contract.

61. Paragraph 2 provided that the debtor could raise rights of set-off from contracts not related to the original contract against the assignee only if such contracts had been available at the time of notification. After notification, the rights of set-off from unrelated contracts were not available to the debtor, on the grounds that the assignee should not be held responsible for any rights of set-off that the debtor might accumulate on the basis of transactions with the assignor.

62. Paragraph 3 provided that the debtor could not raise against the assignee by way of defence or set-off the breach of a contractual limitation by the assignor, since that would defeat the purpose of article 11. At its last session, the Working Group had considered the issue of whether the essence of the rule contained in article 30 could be included in article 20. Inclusion of the rule would mean that, for issues not covered by article 20, the law applicable would be the law

governing the receivable or the law governing the original contract. The Working Group had received that proposal at a late stage in its proceedings and had pointed out that the inclusion of article 30 in article 20 might raise concerns for those countries that wanted to see chapter V in its entirety subject to an opt-out. Moreover, if article 30 was included in article 20, it would be necessary to incorporate the public policy and mandatory law exceptions into article 20, just as those exceptions had been incorporated into articles 24 and 25. Comments by Governments and international organizations on that issue were contained in document A/CN.9/490 and Add.1-4.

63. **Mr. Stofflet** (France) said that his delegation could accept article 20 as it stood, but would object to the inclusion of the substance of article 30 in article 20.

64. **Mr. Smith** (United States of America) said that, in paragraph 3, there should be a reference to article 12 as well as to article 11.

The meeting rose at 1.20 p.m.