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SUMMARY RECORD OF THE 692nd MEETING

Held at Headquarters, New York,
on Thursday, 22 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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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; A/CN.9/XXXIII/CRP.8)

Chapter V

1. The CHAIRMAN said that, as previously agreed, the Commission would interrupt its consideration of article 11 so that the observer for the Hague Conference on Private International Law, who would be unable to participate in the remainder of the current session, could raise a series of issues concerning chapter V of the draft Convention (arts. 28 to 32).

2. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that, although the assignment of receivables was on the agenda of the Hague Conference, it had elected to consider the topic only in the context of a joint working group in which some members of the Commission had participated. Although some of the private international law rules established in the draft Convention did not correspond exactly to the joint working group's suggestions, they were nevertheless quite satisfactory.

3. However, chapter V raised a number of issues. If, as planned, articles 28 to 32 became a "mini-convention" available to States whose domestic legislation did not include the necessary provisions of private international law, there might be problems in cases where the conflict-of-law rules embodied in the draft Convention differed slightly from those established in the Rome Convention and other regional instruments. The Commission should endeavour to identify specific situations where such difficulties were likely to arise.

4. With regard to the scope of application of chapter V, she noted that article 1 (3) and the words "With the exception of matters that are settled in this Convention" in articles 28 (1) and 29, all of which were currently placed in brackets, would have to be reconsidered if the "mini-convention" approach were adopted. It was important to ensure that States parties could not use articles 28 and 29 as an excuse for avoiding application of the substantive law provisions contained in the rest of the draft Convention. The best solution might be to make a single such statement at the beginning of chapter V.

5. Article 28 (2) stated that, in the absence of proof to the contrary, the contract of assignment was presumed to be most closely connected with the State in which the assignor had its place of business. A similar statement might be included in article 6 in order to resolve the problem of establishing location for transactions involving branch offices of financial service providers.

6. Article 28 (3) was clearly modelled on article 3, paragraph 3, of the Rome Convention. Such a provision was appropriate to the latter instrument, which did not define the term "internationality" and could therefore be taken to apply to all contractual obligations, including domestic ones. Since the draft Convention contained such a definition and, except in one case, applied only to international assignments, article 28 (3) might cause more problems than it solved.

7. Furthermore, if the Commission elected to establish chapter V as a "mini-convention", an explicit exclusion of renvoi must be added to article 28 and the comments on the ambit of the draft Convention (A/CN.9/470, para. 191) must be reflected in the actual text of article 28 (1).

8. She did not fully understand the role of article 30, which had been placed in brackets; even if the Commission took the "mini-convention" approach to chapter V, article 30 should be drafted along the same lines as article 24 for the sake of consistency. In any case, she found it redundant to include both article 30 (2) and article 32 in the draft Convention.

9. Mr. FERRARI (Italy) agreed with the comments made by the observer for the Hague Conference concerning the private international law rules not covered in chapter V. Although he was not in favour of establishing articles 28 to 32 as a "mini-convention", he agreed that such an approach would require the redrafting of other articles.

10. He thought that the exclusion of renvoi had been dealt with in article 6 (j), although it was true that under the "mini-convention" approach that article would not apply to private international law rules. However, under article 1 (3) in its current form, those rules would remain in force regardless of the applicability of the draft Convention, in which case the concerns raised by the observer for the Hague Conference would need to be addressed.

11. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that articles 30, 31 and 32 had been placed in brackets pending the finalization of articles 24 to 27. Articles 30 (2) and 32 were indeed very similar; the Working Group had decided to model the substance of article 30 on article 24 for reasons related to the scope of the draft Convention. The Commission would have to resolve that problem at a later date.

Article 11

12. The CHAIRMAN invited the Commission to resume its consideration of article 11 and, in particular, the Secretariat proposal contained in paragraph 104 of the analytical commentary to the draft Convention (A/CN.9/470).

13. Mr. MEDIN (Observer for Sweden) suggested that the Commission should first decide whether to delete article 11. Anti-assignment clauses were effective under Swedish domestic law; the country's industries were strongly in favour of retaining that article, which they considered to be the instrument's most important provision.

14. If article 11 was retained, it would be appropriate to state therein that the debtor could not declare the original contract avoided on the sole ground that the assignor had violated an anti-assignment clause.

15. Mr. MORÁN BOVIO (Spain) said that he would prefer to retain article 11, which made it clear that an assignor who violated an anti-assignment clause was responsible to the debtor and that the draft Convention did not affect national restrictions on such clauses. He also supported the Secretariat proposal; in

case of uncertainty concerning the interpretation of article 11 (2), the proposed amendment would make the assignee's position secure.

16. The CHAIRMAN said that, since the Working Group had already approved article 11, it would be retained unless there was strong support for its deletion.

17. Mr. DOYLE (Observer for Ireland) said that inevitably there were provisions in the draft Convention that certain delegations might find strange or unacceptable. He fully sympathized with those delegations which found article 11 alien to their national systems, as the same objection had been raised in Ireland. However, for States to ask for a provision to be removed for that reason was an indulgence which the Commission could not afford. The Secretariat proposal in paragraph 104 was a valuable clarification of article 11. The debtor's remedies should be preserved, but should not include avoiding the original contract, or article 11 would be meaningless.

18. Mr. BURMAN (United States of America) noted that the Commission's aim was to adopt a modern approach to encourage the extension of credit to areas of the world where it was urgently needed. Certain core provisions of modern finance law had to be included; if a provision of the text was inconsistent with a domestic law, a country always had the option not to implement the instrument. The alternative of watering down critical provisions that were vital to the draft Convention was unacceptable. His delegation would explain to lawmakers why the Convention differed from domestic law and some elements of that law would need to be changed. If at each meeting a delegation could object to a provision inconsistent with its national law, the Convention would not be ready until 2005 instead of 2001.

19. On the basis of the discussion, his delegation agreed with the solution proposed in paragraph 104 of document A/CN.9/470.

20. Mrs. STRAGANZ (Austria) clarified that her delegation did not wish to delete or question article 11, which was a key provision of the draft Convention. It was unlikely that it would be misinterpreted, as businessmen were likely to go to courts where the issues involved were understood. Her Government did still have concerns, and she had therefore expressed them, but her delegation accepted the proposal in document A/CN.9/XXXIII/CRP.8, as well as the proposal in paragraph 104 of the commentary.

21. Mr. CARSELLA (Observer for the Commercial Finance Association) said that members of the Association who financed those types of receivable were concerned that they might have to review individually vast numbers of receivables in order to determine which ones could be financed. Such an onerous task would result in the banks refusing to offer financing, which would defeat the purpose of facilitating low-cost financing to businesses around the world.

22. Mr. MARADIAGA (Honduras) said that the arguments for retaining article 11 had been convincing. However, the principle of good faith was very important in contractual law, in the context of negotiations and also in the execution of contracts. He wondered what would happen if the third party referred to in article 11 (2), was deliberately trying to cause harm.

23. Mr. FRANKEN (Germany) was in favour of retaining article 11 and also believed that the Secretariat proposal in paragraph 104 should be included to cover contracts concluded for a long period of time. When an anti-assignment clause had been breached, the debtor should perhaps have the right, in addition to a claim for compensatory damages, to terminate such a contract. If the Commission did not agree with that course of action, his delegation would in any case accept the proposal in paragraph 104.

24. Ms. McMILLAN (United Kingdom) understood that paragraph 104 offered two alternatives: limiting the relief available to the debtor against the assignor for breach of an anti-assignment clause to a claim for compensatory damages, or stating that the debtor might not declare the original contract avoided on the sole ground that the assignor had violated an anti-assignment clause.

25. Article 11 did not require amendment; however, if there was a consensus in favour of change, she would prefer the second alternative. The first one seemed interventionist, as it was unclear whether compensatory damages would be what the debtor would wish.

26. Mr. STOUFFLET (France) supported the current wording of article 11; it seemed unnecessary to be more specific about the risk of avoidance of the contract at the request of the debtor. There should be no such risk, because paragraph (1) provided absolute protection to the assignee against all the possible consequences of a breach of an anti-assignment clause. Any addition was superfluous, and could have unexpected and undesirable effects. A contract was often a complex matter with numerous obligations, of which only the monetary obligations were transferred to the assignee. In relations between the assignor and the debtor, it might be desirable under domestic law to allow the contract to be cancelled. That could be a way for the debtor to obtain the cancellation of contractual obligations other than the monetary obligations that had been transferred. Sometimes, several contracts were interlinked and failure to perform an obligation arising from one contract could have the effect of annulling a whole series of contracts. The Commission should also consider cases where the assignment was not total, as in the case of successive contracts for a lease, where there was an obligation to pay rent due each month or year. It was quite possible that the assignment related only to part of the monetary obligations under the contract. Why prevent termination at the request of the debtor? The first paragraph of article 11 was sufficient to prevent there being any consequence for the assignee; the issue would be the relationship between the assignor and the debtor, and the law regulating their obligations.

27. Mr. MEENA (India) said that the first paragraph of article 11 had an overriding effect on contractual arrangements. Paragraph (2) did not intend to lift the limitation on assignment so that the assignor was not liable for a breach of agreement between the assignor and the debtor. It attempted to protect any assignee or related person which was not a party to the agreement between the assignor and the debtor, by ruling out liability on the sole ground that such a person had knowledge of the agreement.

28. His delegation accepted article 11 as well as the Secretariat proposal in paragraph 104.

29. Mr. HERRMANN (Secretary of the Commission) wished to clarify the Secretariat proposal in paragraph 104. The draft Convention did not need to address the issues of good faith or malicious intent, because there were already general principles of law to deal with those issues. Article 11 (2) referred to possible consequences, despite the assignment being effective, and seemed to require the additional clarification that breach of an anti-assignment clause was not a basis for avoiding the contract. The intent was to exclude only the right to terminate the contract and not positively to regulate what the consequences would be, as the United Kingdom representative had pointed out. The exclusion of the right to avoid a contract on the sole ground of violation of an anti-assignment clause would take care of the example of a partial assignment. If there was a right to avoid the contract because of connections with other contracts, the exclusion would not operate.

30. Mr. Al-NASSER (Observer for Saudi Arabia) also supported article 11, but had some concerns about the first paragraph. He proposed adding the words "unless there is an anti-assignment clause under the law of the country concerned".

31. Mr. ATWOOD (Australia) supported the Secretariat proposal in paragraph 104, which would clarify the interaction between paragraphs (1) and (2) of article 11. His delegation preferred the second of the two alternatives in paragraph 104, namely to restrict the debtor's right to avoid the contract.

32. The CHAIRMAN recalled the Secretariat clarification that the proposal in paragraph 104 did not place any limitation on remedies available to the debtor for breach of an anti-assignment clause by the assignor. The aim was to ensure that the contract was not terminated purely because of the breach of such a clause. If that policy direction was accepted, the drafting group could decide on the wording.

33. Mr. IKEDA (Japan) said that his delegation was in favour of adopting article 11 as currently worded.

34. Mr. FRANKEN (Germany) also approved the present wording of article 11. However, in a contract concluded for a longer period of time, there seemed to be no reason why the debtor should not terminate a contract because of the breach of an anti-assignment clause. It would certainly have that right under German law. The purpose of article 11 was to protect the assignee, by making the assignment valid despite any anti-assignment clause. However, there was no intention of protecting the assignor. That was a matter of policy rather than drafting.

35. The CHAIRMAN confirmed that it was a policy matter that still had to be settled. However, there seemed to be a consensus to retain the provision to negate anti-assignment clauses.

36. Mr. TELL (France) said that the Secretariat clarification had only increased his delegation's concern. The Secretariat had said that a contract could not be avoided on the ground of breach of an anti-assignment clause. Paragraph 104 also made that clear. He shared the view expressed by the representative of Germany. Such interference with domestic law would make

ratification very difficult. His delegation was prepared to accept article 11, which would require modifying national legislation to ensure that anti assignment clauses would not have any effect on the assignee as far as cancellation was concerned. However, to specify that the debtor had no possibility of avoiding a contract when an anti-assignment clause had been violated was going too far.

37. The CHAIRMAN suggested that, since there appeared to be broad support for retaining article 11, the Commission should focus on the need to include in the text wording that explicitly excluded the right of the debtor to terminate its contract with the assignor because of a breach by the latter of an anti-assignment clause.

38. Mr. COHEN (United States of America) reiterated his delegation's support for the incorporation in article 11 of wording along the lines proposed by the Secretariat in paragraph 104 of the analytical commentary to the draft Convention (A/CN.9/470). The point made therein was a very important one. The purpose of article 11 was to protect the assignee against the assertion of a non-assignment clause. If, however, the debtor could avoid the contract on the sole ground that the assignor had violated such a clause, the outcome for the assignee would be the same as if a non-assignment clause were given effect. In both cases, the assignee would have purchased a receivable of no practical value. Unless assignees were afforded the protection that article 11 was intended to provide, they would have to examine the documentation of each individual original contract in a bulk assignment and the resulting expense would be passed on to debtors.

39. Mr. DOYLE (Observer for Ireland) said that, if article 11 was to work, it must negate any anti-assignment clause. It was true that the Secretariat proposal would constitute major interference in contract law, but that could not be avoided. It was difficult to square the opposition of certain speakers to the wording proposed in paragraph 104 with their assertion that they wished to protect the rights of the assignee vis-à-vis the debtor. Maintenance of the debtor's right to terminate a contract on the sole ground of violation of an anti-assignment clause would vitiate article 11.

40. Ms. GAVRILESCU (Romania) said that her delegation wished to associate itself with the views expressed by the representative of France. The Working Group had debated the provisions of article 11 at length. The language used in the draft Convention had enjoyed consensus and should therefore be retained as it stood. She saw no need for the wording proposed by the Secretariat.

41. Ms. SABO (Observer for Canada) endorsed the comments of the United States representative and supported the incorporation in article 11 of the wording proposed by the Secretariat in paragraph 104.

42. Mr. HERRMANN (Secretary of the Commission) urged those members of the Commission who wished to retain article 11 as it stood to indicate clearly their interpretation of paragraph (1). It was very important to clarify the extent to which rights accorded to debtors under national laws were excluded.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

43. Ms. McMILLAN (United Kingdom) said that delegations appeared to be very far apart in their interpretation of article 11. It seemed that the representatives of France and Germany saw that article as allowing the debtor to avoid a contract in the event of a violation by the assignor of an anti-assignment clause. Such an interpretation ran counter to the purpose of article 11: if the debtor could terminate the contract by relying on an anti-assignment clause, its willingness to discharge the debt would be diminished. It was clear from the Commission's discussions that article 11 was open to various readings and that its adoption as it stood would lead to complicated litigation between debtors, assignors and assignees.

44. Mr. FRANKEN (Germany) said that under many national laws debtors had the right to terminate long-term contracts to which they were party in the event of a material breach of the contract. That right should not be taken away. He proposed the incorporation in paragraph (1) of a clause to the effect that the debtor might not declare the original contract avoided on the sole ground that the assignor had assigned the receivables arising from it in violation of an anti-assignment clause, unless the assignment constituted a material breach of the contract. He emphasized that such a provision would apply only in the case of future receivables and not in the case of receivables that had already crystallized.

45. Mr. BRINK (EUROPAFACTORING) said that his delegation concurred with the observer for Ireland and the representatives of the United Kingdom and the United States in their interpretation of article 11. It seemed that other delegations wished to restrict the application of the article to an extent that would undermine the purposes of the draft Convention and limit, rather than promote, the assignment of receivables. He was not convinced that those delegations had understood the thrust of the Secretariat proposal: while excluding the right of the debtor to terminate the contract on the sole ground that the assignor had violated an anti-assignment clause, it would not affect its right to do so for any other reason. The Commission must keep in mind that any provision of the draft Convention that undermined the value of the receivable would be detrimental to the assignee.

46. Mr. STOUFFLET (France) said that his delegation had no desire to tamper with the principles underlying the law of contracts. Clearly, the rights of the assignee must be inviolable. However, there was no need, in order to achieve that end, to prohibit avoidance of the original contract as a sanction for violation of an anti-assignment clause. Maintaining the right of the debtor to avoid the contract would in no way undermine article 11.

47. Mr. COHEN (United States of America) said that the differences of opinion concerning the provision proposed in paragraph 104 were more apparent than real, since they centred on differences in the kind of transaction that each delegation envisaged and different understandings of the words "sole ground". In fact, however, there was full agreement that, where an assignor had fulfilled all its obligations and it only remained for the debtor to pay, the latter was not entitled to terminate the engagement. If, on the other hand, an assignor assigned all its rights under a contract to a third party, who failed to fulfil the contract, the debtor had every right to avoid the contract. United States law drew a distinction between assignments of the right merely to be paid, where

there was no delegation of performance to the assignee and no harm done to the debtor, and those which materially changed the debtor's duty, increased its risk or impaired its ability to obtain performance. The policy had surely been agreed and the drafting group could be requested to find the right wording. The proposal adumbrated by the German delegation and given formal expression by the Chairman was not wholly satisfactory: if the key element in the original contract was that it was not to be assigned, subsequent assignment might be claimed to be a material breach of the contract. That was surely not the aim of the proposal, which rather sought to deal with instances in which the debtor was caused material harm because the assignment delegated duties to the assignee or otherwise impaired the debtor's right to get what it was entitled to.

48. Mr. MORÁN BOVIO (Spain) said that the debate illustrated the relevance of the provision proposed in paragraph 104, which went to the very heart of the draft Convention. By addressing the relationship between the assignor and the assignee, the Commission was impinging on domestic law either as codified or as expressed in a contract, since it excluded any possible interference in that relationship in cases where the contract contained an anti-assignment clause. It was therefore important that the draft Convention should contain a provision that non-compliance with an anti-assignment clause would not allow a debtor to declare a contract terminated. Such a provision would undoubtedly impinge on domestic law; but it might be necessary to go still further and stipulate that the debtor would have no monetary rights other than those arising out of the contractual relationship. The suggestion by the representative of Germany that assignments under long-term contracts, involving receivables yet to arise, might not be covered by article 11, was damaging to the agreement reached on that article, since the effect of the article would be undermined by any implication that some kinds of contract fell outside its scope. Nothing should be done to discourage assignors from assigning receivables, even ones that had not yet arisen, in long-term contracts. The draft Convention already made it clear that assignment did not alter any of a debtor's rights and, indeed, could actually improve a debtor's position. The example given by the United States representative was irrelevant, in that it related to the performance of the original contract. Article 2 concerned receivables arising from the original contract, which was quite another matter, even if it contained an anti-assignment clause.

49. Mr. DOYLE (Observer for Ireland) said that earlier discussions of the same point had not raised such difficulties. He understood the reservations of the French delegation, although it was hard to see how the assignee's rights against the debtor could be protected if the original contract no longer existed. The subject of the draft Convention was simply the assignment of the right of payment - hence the expression "sole ground" - and not any other contractual obligations. As for the German suggestion, he too wondered why a distinction should be made between future receivables and receivables that had already crystallized. Moreover, the interpretation of the expression "material breach" gave rise to great difficulties. Its use might therefore cause more problems than it solved. He would still prefer a text based on that proposed in paragraph 104.

50. Ms. GAVRILESCU (Romania) stressed that before any decision could be reached the Commission would need to see the written text of any proposal.

51. Mr. SALINGER (Observer for Factors Chain International) agreed with previous speakers that paragraph 104 concerned a core provision of the draft Convention. He had believed that, rather than dealing with the delegation or transfer of responsibility under a contract, the draft Convention concerned only the assignment of receivables. The objection to prohibiting the termination of a contract owing to the breach of an anti-assignment clause stemming from the fact that the performance of the assignee rather than that of the assignor was at fault was therefore irrelevant. As for the question of a material breach, the claim could be made that the breach was material if the contract referred to it as such. If, however, the draft Convention contained a provision that a contract could not be terminated except in respect of future receivables, the effect might also be to cancel out existing receivables, because under article 20 some contracts might allow for counterclaims by the debtor which could be set off against existing receivables. The assignee would therefore be left with nothing. If the Commission was interested in assisting the financing of trade receivables and obviating the need for financers to examine every contract, it would be well advised to include in the draft Convention the provision proposed in paragraph 104.

The meeting rose at 1 p.m.