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Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments

Addendum

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I. Introduction

1. The first set of comments on the draft Convention on Assignment was issued in document A/CN.9/490. This note reproduces the second set of comments received by the Secretariat. Further comments will be issued as addenda to this note and in the order they are received.

II. Compilation of comments

1. Colombia

[Original: Spanish]

Article 19, para 7: The words "reasonable period of time" may be understood by each party in a different way and as referring to varying time periods, which could lead to unnecessary controversies. We, therefore, suggest that, in the interest of clarity, a precise period of time should be stated.

Article 24: The new proposal on the law applicable to priority conflicts with respect to proceeds clears up some uncertainties. However, its formulation may imply that there are situations that are not covered. We, therefore, suggest that consideration be given to including a rule of general application. In this context, bearing in mind that negotiable securities are transferred by endorsement and not by way of an assignment, we must stress the importance of their exclusion from the scope of the Convention.

Regulatory powers of central banks: To the extent general economic circumstances make it necessary, central banks should be authorized to intervene in assignments under the Convention without this entailing a violation of the Convention. Central banks and States in general have the authority to control the inflow and outflow of capital. The importance of such powers for general economic policy in any State cannot be overstated

Under article 24, the law of the assignor's location governs priority questions. It seems that it covers also capital controls. This may create a conflict with capital controls of the country from which the receivables originate. A central bank may refrain from selling foreign exchange in a particular economic situation and, in this case, it is important not only that the bank can retain this power but also that debtors are safeguarded against any effect that this measure may have on the terms in which the debt is established.

2. France

[Original: French]

Pending issues

Article 4, paragraph 1 (b): France has always supported the exclusion of transfers of receivables effected by the delivery (instruments payable to bearer) or endorsement (instruments payable to order) of negotiable instruments. Such receivables are subject to a very specific legal regime characterized, in particular, by the application of the principle that defences outside the instrument cannot be invoked against the new bearer. Moreover, the Geneva Conventions of 1930 (on bills of exchange and promissory notes) and 1931 (on cheques) give a legal status to these instruments, which would be difficult to combine with the Convention being prepared by the Commission. What justifies the exclusion is not the nature of the instrument representing the receivable (bill of exchange, promissory note, cheque, etc.), but the technique of transfer, namely endorsement or delivery.

However, some negotiable securities, such as negotiable certificates of indebtedness or bonds (in French, *titres de créances négociables* or "*TCN*s") do not belong to the category of negotiable instruments. It would, therefore, be desirable to replace the reference to "effets de commerce" in the French version of article 4, paragraph 1 (b), with a reference to "instruments négociables".

An increasing number of negotiable instruments are paperless and are transferred by way of an entry into an account. These forms of transfer are often recognized as having an abstract character similar to endorsement, and their exclusion from the scope of application of the Convention would seem to be justified in the interest of uniformity with the rules governing negotiable instruments. If there is agreement on such exclusions, they should be expressly provided for in the text of the Convention. It goes without saying that, if a receivable is transferred not by a negotiation technique (endorsement or delivery, as applicable) but in the form of an assignment, there is no reason to exclude the application of the Convention.

Articles 4, para. 4, and 41: Permitting States to exclude further practices by way of declaration would seriously jeopardize the unifying function of the Convention. However, if the question of the protection of consumer debtors cannot be satisfactorily regulated in article 17, it would seem essential to maintain the right of States to exclude by declaration the assignment of certain types

of receivables (see comment on article 17 below). Furthermore, taking into account the remaining uncertainty as to on the application of certain provisions of the Convention to certain practices, it would seem desirable to retain the right of declaration provided for in article 41, so as to enhance the acceptability of the Convention.

Reference to "goods" in articles 11, para. 3 (a), and 12, para. 4 (a): The choice of the French expression "*biens meubles corporels*" to translate the English term "goods" (see A/55/17, para. 185), so as to cover only tangible, and not intangible, movable property, inevitably means adopting an unduly restrictive approach as to the scope of articles 11 and 12. Such a solution would entail excluding assignments of receivables that result from operations relating to intangible property such as the goodwill, the trade name or other name of an enterprise, or the right to a lease and the like). It is hard to see what would justify special rules for receivables resulting from operations with intangible property, particularly as the treatment of receivables connected with financial transactions is already the subject of broad exclusions. Furthermore, this approach would run counter to the policy underlying articles 11 and 12, since assignees would need to examine documents to ensure that receivables are assignable. In order to avoid that result, the word "goods" should be understood as covering both tangible and intangible movable property.

Consumer protection issues: As indicated above and in the comments last year (A/CN.9/472), France would insist that article 17 should include a provision ensuring that consumers are not deprived of the protection afforded to them by the law of the State in which they are located. This comment is also valid for article 6, entitled "Party autonomy". A consumer-related problem may arise also in article 19, paragraphs 5 to 7. When the debtor is a consumer, the debtor should always be allowed to be discharged by paying the initial creditor.

Article 17, in particular, seems incompatible with domestic provisions of public policy which protect the consumer in the area of consumer credit and from which the assignee may not derogate even with the consent of the consumer. It is essential that article 17 makes it clear that the Convention does not allow a consumer debtor to vary or derogate from a contract if such variation or derogation is not permitted by the law applicable to consumer protection (see document A/55/17, para. 171-172). If this proposal is not adopted, some States, including France, may have to simply exclude assignments of consumer receivables from the scope of the Convention, which would deprive it of much of its usefulness.

Article 24, paragraph 1 (b) and (c): The question of the right of an assignee in proceeds is one of the issues that gave rise to the longest and most complicated discussions in the Working Group. Briefly, the question is whether the assignee has a right in financial instruments or other assets given in payment of the assigned receivable and, if so, whether that right is a personal or a property right. In view of the wide differences among the various legal systems, the Working Group did not find it possible to agree on a substantive law rule with respect to proceeds. The notion of "proceeds" is foreign to many legal systems and introduces chganges that may discourage States from adopting the Convention. In addition, it seems impossible to define it in a way that would remove any uncertainty as to the consequences of the application of article 24, paragraph 1 (b) and (c). It would, therefore, be desirable to exclude the idea of "proceeds" from the Convention and to delete article 24, paragraph 1 (b) and (c).

New provision on form in chapter V: On the question of the law applicable to the formal validity of an assignment, article 8 differs from the Rome Convention on the Law Applicable to Contractual Obligations (see article 9) particularly in creating a rebuttable presumption in favour of the law of the location of the assignor as the law most closely connected with the contract of assignment, without requiring an explicit choice of applicable law. In view of the differences between the criteria adopted in the Rome Convention and in the UNCITRAL draft, any provision on this subject must be dealt with directly in chapter V, whose optional character would permit future signatory States to avoid a conflict of private international law rules that could impair the aim of foreseeablility desired by the parties and by third parties.

The possible inclusion in article 20 of a provision along the lines of article 30: France has no objection to allowing States that so wish to adopt chapter V only in part. However, the proposal to include in article 20 a rule along the lines of article 30 causes France serious concerns. This proposal, which would mean introducing a provision of an optional nature into the body of the Convention, is not acceptable, because the suggested text would overlap (and might even conflict) with the provisions of the Rome Convention on the Law Applicable to Contractual Obligations.

Potential conflicts with other conventions: France notes with concern that the relationship between the Convention and the Convention and Protocols being prepared by UNIDROIT jointly with other organizations has not been settled yet. In view of the fundamental differences between the two texts, it is urgent to address their relationship so as to avoid conflicts. France favours a limited or partial exclusion of the application of the Convention where the UNIDROIT Convention actually applies. For the reasons explained before the Commission or the Working Group, France considers that it would not be desirable to exclude receivables relating to mobile equipment, in general, from the scope of the UNCITRAL text. However, paragraph 1 of article 38 concerning conflicts with other international agreements is not well adapted to the UNIDROIT Convention, because it declares that Convention to be applicable even when it is not. A more precise provision taking into account the foregoing should therefore be added to article 38.

The annex: Priority rules based on the time of the contract (section III of the annex) are viewed with favour in France. It would be useful to supplement articles 6 and 7 of the annex in order to regulate the question of proving the date of an assignment. Three complementary solutions could be considered. The date of the assignment may be proved by any method; if the date is disputed, it is the responsibility of the party claiming priority to prove it; if the assignor is subjected to an insolvency proceeding, the assignee must show that the proceeding was opened subsequently to the assignment under which the assignee claims a right. As to the mechanism for the establishment of the registry and the appointment of the supervising authority and registrar, France is not ready to adopt the registration system and, therefore, sees no need to take a position on the technical modalities for such a registration system.

Procedure for the final adoption of the Convention*:* For practical reasons, preference should be given to adoption by the General Assembly.

Additional issues

Definition of location: Referring to its comments on the definition of "location" last year (A/CN.9/472), France stresses that those comments remain valid. Article 24, paragraph 1 (b) (iii), which opts for the law of the location of the bank in the case of bank deposits, continues to cause uncertainty. In the case of sectors organized by branch offices, it would not be appropriate to have the questions of priority relating to operations that an enterprise carries out through a branch in one country governed by the law of another country where the enterprise has its head office or central administration. This applies in particular to the banking sector in which the conditions under which bank branches are authorized to operate and the particular constraints that they face concerning both their mode of refinancing and their prudential rules, require their being placed under a regime linked to the law of their location. France considers, therefore, that it would be desirable to state that article 24 refers not to the law of the location of the head office (or central administration) but to the law of the location of the branch concerned.

Non-contractual receivables: Article 2 (a) leaves outside the scope of application of the Convention receivables of a non-contractual nature, such as rights to payment under requests for reimbursement of taxes, the assignment of which forms part of important financing practices at the present time. France has always considered, and pointed out in its comments last year, that a broader definition of the concept of "receivables" would make it possible to reduce differences in the interpretation of the expression "contractual rights" in different legal systems. For these

reasons, it would be desirable to include this type of receivable in the scope of application of the Convention through the introduction of an optional system for States, in the form of a declaration. Such an approach would avoid the need to reconsider, at this stage in the negotiations, a number of provisions already drawn up to govern assignments of contractual receivables exclusively.

Article 1, para. 4: Article 1, paragraph 4 does not make clear which State has to make a declaration for the annex to apply. As a result, several parallel systems may coexist under the Convention for establishing priorities among competing assignees. For example, if a conflict arises before the courts of State A between an assignment with priority according to the law of State A (which has opted for the priority rules based on the time of registration, sections I and II of the annex) and another assignment with priority according to the law of State B (in which the assignor is located and which has opted for the priority rules based on the time of the contract of assignment, section III of the annex), it is not clear which law would apply, that of State A (section I) or that of State B (section II).

It seems obvious that it should be the law of the location of the assignor that determines what system of priority is applicable in a Contracting State in conformity with article 1 (a), which governs the scope of the Convention's application. However, the text of the Convention is not sufficiently clear about this. Article 42, concerning the application of the annex, confines itself to indicating that "a State may ... declare that it will be bound either by sections I and II or by section III of the annex to this Convention". Paragraph 2 of article 42 stipulates that, for the purposes of article 24, the law of a contracting State that has made a declaration pursuant to the provisions mentioned earlier is the set of rules set forth in either section I of the annex or section III. Under article 1, paragraph 4, the annex applies in a Contracting State that has made a declaration under article 42. It is, therefore, proposed that article 1, paragraph 4, should be amended as follows: "The annex to this Convention applies to the assignments referred to in a declaration made under article 42 by the Contracting State in which the assignor is located."

Relationship between the draft Convention and Regulation (EC) No. 1346/2000 of the Council of the European Union of 29 May 2000 on Insolvency Proceedings

At its last session, the Working Group noted that there is no conflict between the Convention and the Regulation of the European Union on Insolvency Proceedings (see A/CN.9/486, para. 107). However, this does not seem to be sufficient to establish compatibility between the draft Convention and the European Union Regulation. Article 24 of the Convention refers conflicts between an assignee and an insolvency administrator to the law of the location of the assignor. Articles 5 and 2 (g) of the European Union Regulation refer the matter to the law of the centre of the main interests of the debtor affected by the assignment. There is thus an incompatibility, or at least an apparent one, between the two instruments. It would be desirable for this point to be clarified.

It might also be desirable to make clear to what extent the Convention could affect the situation of holders of rights in a secondary insolvency proceeding rather than in a main insolvency proceeding, since the European Union Regulation, in principle, provides for the same effects for the two types of proceeding. It would also probably be clearer to state that the insolvency proceedings referred to in article 25 of the Convention are proceedings opened against the assignor, unless it is felt that article 5 of the Convention is sufficient.

Article 38, para. 2: Article 38, paragraph 2, still refers to the "time of the conclusion of the original contract". This formulation may be unfortunate in that a contract for the assignment of receivables may be signed on one date while the actual assignment of receivables may take place later. This is often what happens in practice.