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RECEIVABLES FINANCING

Revised articles of draft Convention
on Assignment in Receivables Financing

Note by the Secretariat

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INTRODUCTION

1. At the current session, the Working Group on International Contract Practices continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the preparation of a uniform law on assignment in receivables financing. 1/ This is the fifth session devoted to the preparation of that uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth session (New York, 14-25 July 1980) had decided to defer for a later stage. 2/

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. 3/

4. At its twenty-fourth session (Vienna, 13-24 November 1995), the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower cost credit (A/CN.9/420, para. 16).

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

2/ Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28.

3/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

5. At its twenty-fifth to twenty-seventh sessions (New York, 8-19 July 1996, Vienna, 11-22 November 1996 and Vienna, 20-31 October 1997), ^{4/} the Working Group continued its work by considering different versions of the draft uniform rules contained in notes prepared by the Secretariat (A/CN.9/WG.II/WP.87, A/CN.9/WG.II/WP.89 and A/CN.9/WG.II/WP.93). At those sessions, the Working Group adopted the working assumptions that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include conflict-of-laws provisions (A/CN.9/434, para. 262), dealing in particular with questions of priority (A/CN.9/445, paras. 27 and 31).

6. This note sets forth a revised version of the draft Convention, reflecting the deliberations and decisions of the Working Group thus far. Additions and modifications to the text are indicated by underlining. With the exception of draft article 17, the underlined text in draft articles 13-22 is not new text but it appears underlined, since it has not been discussed at the previous session of the Working Group.

* * *

DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

Prior discussion: A/CN.9/445, paras. 120-122 (27th session, 1997)
A/CN.9/434, para. 14 (26th session, 1996)

Remarks

In order to ensure consistency between the title and the content of the draft Convention, the Working Group may wish to consider the title once it has completed its consideration of the draft Convention as a whole.

* * *

PREAMBLE

The Contracting States,

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

[Considering that problems created by the uncertainties as to the legal regime applicable to assignments in international trade constitute an obstacle to transactions in which value, credit or related services is given or promised against value in the form of receivables, including factoring, forfaiting, securitization, project financing and refinancing transactions.]

^{4/} The twenty-seventh session, which was originally scheduled to take place in New York from 23 June to 3 July 1997, had to be rescheduled as a result of the decision of the General Assembly to hold its nineteenth special session on Agenda 21 in New York from 23 to 27 June 1997.

Being of the opinion that the adoption of uniform rules governing assignments in receivables financing would facilitate the development of international trade and would promote the availability of credit at more affordable rates,

Have agreed as follows:

Prior discussion: A/CN.9/445, paras. 123-124 (27th session, 1997)
A/CN.9/434, paras. 15-16 (26th session, 1996)

Remarks

Should the Working Group prefer to retain the second paragraph of the preamble, which has been prepared by the Secretariat for the consideration of the Working Group, it may wish to delete draft article 5(d) (definition of receivables financing).

* * *

CHAPTER I. SCOPE OF APPLICATION

Article 1 [1]^{5/}. Scope of application

(1) This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the assignment, the assignor is located in a Contracting State.

(2) [The provisions of articles [...] do not apply] [This Convention does not affect the rights and obligations of the debtor] unless the debtor is located in a Contracting State [or the rules of private international law lead to the application of the law of a Contracting State to the relationship between the assignor and the debtor].

[(3) The provisions of articles 29 to 33 apply [to assignments of international receivables and to international assignments of receivables as defined in this chapter] independently of paragraphs (1) and (2) of this article.]

(4) Chapter VII applies in a Contracting State which has made a declaration under article 43. [If a Contracting State makes such a declaration, the provisions of articles 23(1) and 24(1), (2) do not apply in this State.]

Prior discussion: A/CN.9/445, paras. 26-27, 31 and 125-145 (27th session, 1997)
A/CN.9/434, paras. 17-25 (26th session, 1996)
A/CN.9/432, paras. 14-18 and 29-32 (25th session, 1996)
A/CN.9/420, paras. 19-25 and 30-31 (24th session, 1995)

^{5/} The numbers in square brackets refer to the articles of the previous version of the draft Convention (A/CN.9/WG.II/WP.93).

Remarks

1. At its previous session, the Working Group decided that, in order to achieve certainty as to the application of the draft Convention and as to the law applicable to priority, the term "place of business" or other similar term should be clearly defined (A/CN.9/445, paras. 164-167). In order to avoid creating interpretation problems with regard to other UNCITRAL texts in which the term "place of business" is referred to, use of that term is being avoided. Reference is made instead to the location of the assignor and the debtor, which is defined in draft article 5. The definition is intended to ensure certainty by identifying as the location of the assignor or the debtor a single place and one that can be determined easily, i.e. the place of registration or, in the case of an individual or a person without a registered office, its habitual residence. Under article 16(3) of the UNCITRAL Model Law on Cross-Border Insolvency (hereinafter referred to as "the Cross-Border Insolvency Model Law") and article 3(1) of the Convention on Insolvency Proceedings prepared by the European Union (hereinafter referred to as "the European Insolvency Convention") the registered office or, in the case of an individual, its habitual residence, is presumed to be the centre of its main interests, "in the absence of proof to the contrary".
2. An alternative formulation for paragraph (1) might be: "This Convention applies to international assignments". In order to cover all assignments presently covered in paragraph (1) internationality would have to be defined along the following lines: "An assignment is international if, at the time of the assignment, any two of the following parties are located in different States: assignor, assignee, debtor" (see articles 1 and 4 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, New York, 1995; hereinafter referred to as the "Guarantee and Standby Convention").
3. Under such an approach, both international assignments and assignments of international receivables would be covered. The internationality, however, would be determined at the time of the assignment (under the present formulation of draft article 3, the internationality of a receivable is determined at the time it arises; as a result, in case of an assignment of future receivables, parties may not be able to determine at the time of the assignment whether the draft Convention would apply).
4. At its previous session, the Working Group decided that the reference to the application of the draft Convention by virtue of private international law should be deleted, since it introduced an unacceptable degree of uncertainty in a text that dealt not only with contractual obligations but also with proprietary rights (A/CN.9/445, para. 139). However, the uncertainty referred to cannot be removed by deleting the reference to private international law, since the rules of private international law also apply outside the draft Convention. In addition, as a result of the Working Group's decision, if by virtue of private international law rules the law of a Contracting State would be applicable, the domestic law of that Contracting State may be applied and not the draft Convention. It is submitted that the uncertainty arising from the application of non-uniform private international law rules and the problem just identified could be satisfactorily addressed by a set of uniform private international law rules along the lines of draft articles 29 to 33.
5. In paragraph (2), the Working Group may wish to specify the relevant provisions. Paragraph (3) appears in square brackets pending a final decision by the Working Group on the question whether the conflict-of-laws provisions of the draft Convention should be retained and, if so,

whether they should apply if the forum is in a Contracting State, irrespective of whether the assignor or the debtor is located in a Contracting State. Paragraph (4) reflects the tentative decision of the Working Group that the substantive law priority provisions of the draft Convention should apply only to States that wish to be bound by them (A/CN.9/445, paras. 26-27). Under the second sentence of paragraph (4), if a State opts into chapter VII, it chooses to apply the substantive law priority provisions contained in chapter VII and not draft articles 23 and 24, which are conflict-of-laws provisions. The Working Group may wish to consider following a different approach by combining the substantive law priority provisions with the conflict-of-laws priority provisions. Under such an approach, the substantive law priority provisions chosen by a Contracting State would apply if the assignor is located in that State (draft article 1(1)). No inconsistency would arise with draft articles 23 and 24, since those articles provide that priority is governed by the law (i.e. the substantive law) of the State in which the assignor is located, which would be the same State.

* * *

Article 2 [2]. Assignment of receivables

(1) For the purposes of this Convention, "assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of its right to payment of a monetary sum ("receivable") owed by the debtor, provided that the transfer is made against value, credit or related services given or promised by the assignee to the assignor or a person specified by the assignor. "Assignment" includes the transfer of receivables and the creation of rights in receivables as security for indebtedness or other obligation.

[(2) "Receivable" includes any right of the assignor to payment of a monetary sum arising under:

[(a) a contract between the assignor and the debtor, whether the contract is for the sale or lease of goods, the provision of services or credit, the licensing of technology, intellectual property or information, or otherwise;

(b) a settlement agreement or a decision of a judicial or other authority;

(c) any policy of insurance or reinsurance;

(d) a deposit agreement between the assignor and a financial institution;

(e) an agreement between the assignor and a financial institution for the management of securities, commodities or other assets;

(f) an agreement for the sale or other transfer, or lending, of securities, instruments or precious metals;

(g) other contracts, the amount of payment under which is indexed or otherwise relates to interest rates, to prices of securities, commodities or other assets, or to the occurrence of other events or circumstances that are independent of the actions of the parties to the contract.]

[(3) "Receivable" also includes any right of the assignor arising under the original contract, if any, including a right arising from a clause for the retention of title or the creation of a right in goods as security for indebtedness or other obligation.]

Prior discussion: A/CN.9/445, paras. 146-153 and 170-179 (27th session, 1997)
A/CN.9/434, paras. 62-70 and 72-77 (26th session, 1996)
A/CN.9/432, paras. 40-49 and 53-69 (25th session, 1996)
A/CN.9/420, paras. 33-43 and 53-69 (24th session, 1995)

Remarks

1. The words "provided that the transfer is made" have been inserted in paragraph (1) in order to clarify that the consideration must be given in return for the transfer of a property right in the receivables to be covered by the draft Convention and does not relate to the contract of assignment, for the validity of which no consideration is required under the "abstraction principle" prevailing in some countries. The words "or a person specified by the assignor" have been inserted in order to ensure that a person may assign its receivables so that another person may obtain or be promised "value, credit or related services".
2. Paragraph (2) appears within square brackets, since the Working Group has made no decision yet as to whether the practices mentioned should be covered. They are included in paragraph (2) with a view to facilitating consultations with representatives of the practices mentioned (A/CN.9/445, para. 178). Subparagraph (b) is intended to cover settled or liquidated tort claims, as well as tax claims. Rights arising under guarantees and stand-by letters of credit are not mentioned in paragraph (2), since their assignment is covered by other international texts, including the Guarantee and Standby Convention. The Working Group may wish to consider whether explicit reference to the assignment of such rights should be made in draft article 4 dealing with exclusions..
3. Paragraph (3), which appears within square brackets, reflects a suggestion made at the previous session of the Working Group (A/CN.9/445, paras. 189, 216 and 234). As a result of paragraph (3), goods returned from the debtor to, or reclaimed by, the assignor would belong to the assignee (see article 7 of the UNIDROIT Convention on International Factoring, Ottawa, 1988; hereinafter referred to as "the Ottawa Convention").

* * *

Article 3 [3]. Internationality

A receivable is international if, at the time it arises, the assignor and the debtor are located in different States. An assignment is international if, at the time it is made, the assignor and the assignee are located in different States.

Prior discussion: A/CN.9/445, paras. 154-163 (27th session, 1997)
A/CN.9/434, paras. 26-33 (26th session, 1996)
A/CN.9/420, paras. 26-29 (24th session, 1995)

* * *

Article 4 [4]. Exclusions

This Convention does not apply to assignments made:

- (a) for personal, family or household purposes;
- (b) to the extent made by endorsement or delivery of a negotiable instrument;
- (c) as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

Prior discussion: A/CN.9/445, paras. 168-169 (27th session, 1997)
A/CN.9/434, paras. 42-61 (26th session, 1996)
A/CN.9/432, paras. 17 and 62-66 (25th session, 1996)

Remarks

The words added in subparagraph (b) are intended to ensure that, if a receivable is transferred both by way of assignment and by endorsement or delivery of a negotiable instrument, the draft Convention would apply to the assignment but not to the transfer by endorsement or delivery of an instrument.

* * *

CHAPTER II. GENERAL PROVISIONS

Article 5 [5]. Definitions and rules of interpretation

For the purposes of this Convention:

- (a) "Original contract" means the contract, if any, between the assignor and the debtor from which the assigned receivable arises [or by which the assigned receivable is confirmed, determined or modified];
- (b) A receivable is deemed to arise at the time when the original contract is concluded [or, in the absence of an original contract, at the time when it is confirmed or determined in a decision of a judicial or other authority];
- (c) "Future receivable" means a receivable that arises after the conclusion of the contract of assignment;
- [(d) "Receivables financing" means any transaction in which value, credit or related services are provided for value in the form of receivables. "Receivables financing" includes factoring, forfaiting, securitization, project financing and refinancing;]

(e) "Writing" means any form of communication that is accessible so as to be usable for subsequent reference and provides identification of the sender and indication of the sender's approval of the information contained in the communication by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication;

(f) "Notification of the assignment" means a communication informing the debtor that an assignment has taken place;

(g) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized to administer the reorganization or liquidation of the assignor's assets;

(h) "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court for the purpose of reorganization or liquidation;

(i) "Priority" means the right of a party in preference to another party;

(j) A person is located in the State in which it has its registered office, or, if it has no registered office or in the case of an individual, its habitual residence;

[(k) "Time of the assignment" means the time specified in the contract of assignment or other writing, which may not be earlier than the time at which the contract of assignment is actually concluded.]

Prior discussion: A/CN.9/445, paras. 164-167, 180-190 (27th session, 1997)

A/CN.9/434, paras. 70-72, 75-76, 78-85, 166-194 and 244 (26th session, 1996)

A/CN.9/432, paras. 40-72 (25th session, 1996)

A/CN.9/420, para. 44 (24th session, 1995)

Remarks

1. The underlined wording in subparagraph (a) is intended to cover settlement agreements by which tort, tax or other non-contractual receivables may be confirmed or determined and agreements modifying the original contract. The underlined wording in subparagraph (b) is aimed at covering tort, tax or other non-contractual receivables. Under subparagraph (b), a tort receivable arises: if it is confirmed in a settlement agreement (i.e. is converted into a contractual receivable), at the time that agreement is concluded; and if it is confirmed in a decision of a judicial or administrative authority, at the time that decision is issued. Other tort receivables are not covered by the draft Convention because of the uncertainty with which they are associated.

2. As a result of a decision made by the Working Group at its previous session, new wording has been inserted in subparagraph (e) in order to better reflect the notion of "authentication" (A/CN.9/445, para. 186). It has been drawn from article 7 of the UNCITRAL Model Law on Electronic Commerce (hereinafter referred to as "the Electronic Commerce Model Law").

3. Subparagraph (h) has been moved to draft article 5 from draft article 24 of the previous version of the draft Convention, since the term "insolvency proceeding" is used in the current draft in

several articles (the definitions of "opening of insolvency proceeding" and "attachment", contained in draft article 24(8) of the previous version of the draft Convention, have been deleted, since they do not appear in the final text of the Cross-Border Insolvency Model Law, from which they had been drawn, and their definition may be better left to other applicable law).

4. Subparagraph (j) reflects the decision made at the previous session of the Working Group that the draft Convention should provide a clear definition of the term "place of business" or other similar term (A/CN.9/445, para. 164). In order to avoid creating interpretation problems with regard to the meaning of the term "place of business", which is used in other texts prepared by UNCITRAL, reference is made to the term "location". Subparagraph (j) is intended to provide a single place of reference and one that can be determined easily. The place of registration, i.e. incorporation, of a legal person or the habitual residence of a physical person is bound to be a single place (a subsidiary of a major corporation registered in a country other than the country of the head-office is going to be a separate legal entity and financiers would be able to determine this fact easily). On the other hand, such a "registered office" approach may inadvertently result in assignments being governed by a law with which they have no relationship and in the dealings of assignors, i.e. borrowers, being often governed by the law of the country in which assignors have their head-office. It may be argued, however, that both of those results would be acceptable to assignors, as long as the suggested approach provides the certainty and predictability required for assignors to obtain lower-cost credit. Assignors may structure their transactions with assignees in accordance with the law of the country in which assignors have a registered office, which may be the country of the head-office or a subsidiary through which a transaction is closed.

5. By contrast to draft article 11, which deals with the time of the transfer of the receivable as a result of the assignment contract, subparagraph (k) deals with the time of the conclusion of the assignment contract, a term used in draft articles 1, 3, 9, 11, 23, 24, 31, 34, 39 and 40. It has been prepared by the Secretariat in order to address suggestions made at the previous session of the Working Group (A/CN.9/445, para. 225). The first suggestion was that, in order to enhance certainty, the term "time of the assignment" should be clearly defined. The second suggestion was that parties should not be allowed to manipulate the rule by agreeing to backdate their assignment contract.

* * *

Article 6 [6]. Party autonomy

(1) As between the assignor and the assignee, articles [...] may be excluded or varied by agreement.

(2) As between the assignor and the debtor, articles [...] may be excluded or varied by agreement.

[(3) Nothing in this Convention invalidates an assignment which is effective as between the assignor and the assignee under rules other than the provisions of this Convention].

Prior discussion: A/CN.9/445, paras. 191-194 (27th session, 1997)

A/CN.9/434, paras. 35-41 (26th session, 1996)

A/CN.9/432, paras. 33-38 (25th session, 1996)

Remarks

The Working Group may wish to specify the draft articles which could be excluded or varied by agreement of the parties. In paragraph (3) the underlined language is intended to clarify that paragraph (3) does not address the issue of the effects of an assignment on the debtor and other third parties. In its present formulation, paragraph (3) would run contrary to draft article 9, if variant A were to be preferred.

* * *

Article 7 [7]. Debtor's protection

- (1) Except as otherwise provided in this Convention, an assignment does not have any effect on the rights and obligations of the debtor.
- (2) Nothing in this Convention affects the debtor's right to pay in the currency and in the country specified in the payment terms contained in the original contract [or in the decision of a judicial or other authority giving rise to the assigned receivable].

Prior discussion: A/CN.9/445, paras. 195-198 (27th session, 1997)
A/CN.9/434, paras. 86-94 (26th session, 1996)
A/CN.9/432, paras. 87-92 and 244 (25th session, 1996)
A/CN.9/420, para. 101 (24th session, 1995)

Remarks

Draft article 7 is intended to ensure that the draft Convention provides a debtor-protection framework that meets the minimum threshold required in any jurisdiction. It is supplemented by draft articles 12, 13 and 18 to 22. Where necessary, i.e. in draft articles 20 and 22, the debtor-protection provisions in the draft Convention are made subject to consumer-protection law (for possible exceptions to draft article 12 in case the debtor is a consumer or a State, see remarks to draft article 12). Paragraph (2) is intended to ensure that an assignment under the draft Convention cannot change the currency and the country in which payment is to be made. However, it is left to other law to determine what constitutes payment and whether payment has to be made in the specific place where the assignor or the assignee or the debtor is located, as long as they are located within the country specified in the original contract.

* * *

Article 8 [8]. Principles of interpretation

- (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
- (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of

such principles, in conformity with the law applicable by virtue of the rules of private international law.

Prior discussion: A/CN.9/445, paras. 199-200 (27th session, 1997)
A/CN.9/434, paras. 100-101 (26th session, 1996)
A/CN.9/432, paras. 76-81 (25th session, 1996)
A/CN.9/420, para. 190 (24th session, 1995)

* * *

CHAPTER III. FORM AND EFFECT OF ASSIGNMENT

Article 9 [10]. Form of assignment

(1) Variant A

An assignment in a form other than in writing is not effective, unless it is effected pursuant to a contract between the assignor and the assignee which is in writing.

Variant B

An assignment is not effective, unless it is evidenced by a writing which describes the receivables to which it relates or, in the absence of a writing, it complies with the rules concerning form of the assignment of the State in which the assignor is located at the time of the assignment.

Variant C

The form of the assignment and the effect of any non-compliance with such form is governed by the law of the State in which the assignor is located at the time of the assignment.

(2) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new writing being required for each receivable when it arises.

Prior discussion: A/CN.9/445, paras. 204-210 (27th session, 1997)
A/CN.9/434, paras. 102-106 (26th session, 1996)
A/CN.9/432, paras. 82-86 (25th session, 1996)
A/CN.9/420, paras. 75-79 (24th session, 1995)

Remarks

Variant A has attracted so far the support of the majority in the Working Group (A/CN.9/434, para. 104 and A/CN.9/445, paras. 205-206). Variants B and C have been prepared at the previous session of the Working Group by an ad hoc drafting group in order to address the concerns expressed by a few delegations with regard to written form (A/CN.9/445, paras. 207-209).

* * *

Article 10 [11]. Effect of assignment

(1) Subject to articles 22 and 23,

- (a) an assignment of receivables that are specified individually is effective to assign the receivables to which it relates;
- (b) an assignment of receivables that are not specified individually is effective to assign the receivables that can be identified, at the time agreed upon by the assignor and the assignee and, in the absence of such agreement, at the time when the receivables arise, as receivables to which the assignment relates.

(2) An assignment may relate to existing or future, one or more, receivables, and to parts of or undivided interests in receivables.

Prior discussion: A/CN.9/445, paras. 211-220 (27th session, 1997)
A/CN.9/434, paras. 66-67, 113, 126 (26th session, 1996)
A/CN.9/432, paras. 101-108 (25th session, 1996)
A/CN.9/420, paras. 45-56 (24th session, 1995)

Remarks

The chapeau of paragraph (1) is intended to ensure that the rule set forth therein does not prejudice the rights of third parties. In subparagraphs (a) and (b), the words "to assign" have been inserted (which, under draft article 2(1), includes both the transfer of and the creation of security rights in receivables) in order to avoid giving the impression that only transfers of receivables are covered (A/CN.9/445, para. 213).

* * *

Article 11 [12]. Time of transfer of receivables

(1) Subject to articles 23 and 24,

- (a) a receivable arising up to the time of the assignment is transferred at the time of the assignment; and
- (b) a future receivable is deemed to be transferred at the time agreed upon between the assignor and the assignee[. which may be no earlier than the time of the assignment]. In the absence of such agreement, a future receivable is deemed to be transferred at the time of the assignment [or, in the case of a receivable arising from a decision of a judicial or other authority, at the time when it [arises] [becomes payable]].

(2) If a State makes a declaration under article 43, paragraph (1) is subject to the priority rule referred to in the declaration [instead of articles 23 and 24].

Prior discussion: A/CN.9/445, paras. 221-226 (27th session, 1997)
A/CN.9/434, paras. 108 and 115-122 (26th session, 1996)
A/CN.9/432, paras. 109-112 (25th session, 1996)
A/CN.9/420, paras. 57-60 (24th session, 1995)

Remarks

The chapeau of paragraph (1), as well as paragraph (2), is intended to ensure that the rule on the time of transfer of a receivable contained in paragraph (1) does not interfere with the priority rules set forth in the draft Convention, which may be draft articles 23 and 24 or the substitute priority rules contained in chapter VII. The words appearing within square brackets in the first sentence of paragraph (1)(a) are aimed at ensuring that the parties to the assignment do not agree on a time of transfer that is earlier than the time of the assignment. The Working Group may wish to consider whether the reference to draft articles 23 and 24 adds to the clarity of paragraph (2) and should be retained. This reference appears within square brackets pending determination of the relationship between draft articles 23 and 24 and the alternative priority rules (see draft article 1(4) and para. 5 of the remarks to draft article 1).

* * *

Article 12 [13]. Contractual limitations to assignment

- (1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor limiting in any way the assignor's right to assign its receivables.
- (2) Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of an agreement limiting in any way the assignor's right to assign its receivables, but the assignee is not liable to the debtor for such a breach.

Prior discussion: A/CN.9/445, paras. 227-231 (27th session, 1997)
A/CN.9/434, paras. 128-133 and 135-136 (26th session, 1996)
A/CN.9/432, paras. 113-126 (25th session, 1996)
A/CN.9/420, paras. 61-68 (24th session, 1995)

Remarks

1. The Working Group may wish to consider the revised title of draft article 12. In addition, the Working Group may wish to consider the questions whether: the borrower in a syndicated bank loan may preclude the lenders from assigning the loan to a competitor of the borrower (which would not be a true assignment but a part of a take-over scheme); the assignor may preclude the assignee from assigning the receivables further (a no-assignment clause in the assignment); the assignee may preclude a subsequent assignee from assigning the receivables further (a no-assignment clause in a refinancing contract). Draft article 12 may be considered together with draft article 26 dealing with contractual limitations to assignment in the context of subsequent assignments, in order to clarify whether, e.g., a contractual limitation between the initial assignor and the debtor precludes not only

the initial but any subsequent assignment or creates any liability for the assignee or any subsequent assignee for assigning the receivables further.

2. At a previous session of the Working Group, the suggestion was made that in the case of an anti-assignment clause contained in a contract, in which the debtor is a consumer or a governmental entity, the consumer or the governmental entity should be allowed to discharge its obligation by paying in accordance with the payment terms of the original arrangement between the assignor and the debtor (i.e. the assignee could not change the payment terms; A/CN.9/445, para. 229).

3. To the extent that it relates to consumer transactions, such an approach would reflect current practice in which consumer receivables are assigned in bulk, while consumers are not notified. In those practices, consumers keep paying to the same bank account or post office box or other box, and it is for the assignor and the assignee to negotiate about the control of that bank account or post office box or other box. As to the application of that rule in case the debtor is a State, it may be considered that, for public policy reasons, a deviation from the general rule of draft article 12 might be appropriate.

4. On the other hand, it may be argued that the practice mentioned above involving consumers is already sufficiently accommodated in the text of the draft Convention and does not need to be the subject of special treatment. Under draft article 18(1), in the absence of notification, the debtor may discharge its obligation by paying the assignor. In addition, consumer debtors would not need any additional protection, since normally they do not have the power to negotiate anti-assignment clauses with their creditors, and those sophisticated consumers who do have such power may take care of their interests on their own. In addition, both consumer debtors and governmental entities may be protected by law outside the draft Convention, since the draft Convention covers contractual limitations to assignment and not statutory limitations that may exist, e.g., under consumer protection or government contracting legislation.

* * *

Article 13 [14]. Transfer of security rights

(1) Unless otherwise provided by law or by agreement between the assignor and the assignee, any personal or property rights securing payment of the assigned receivables are transferred to the assignee without a new act of transfer.

(2) Paragraph (1) of this article applies even if there is an agreement between the assignor and the debtor, or the person granting a right securing payment of the assigned receivables, limiting in any way the assignor's right to assign a receivable or a right securing payment of the receivable.

(3) The transfer of a possessory property right under paragraph (1) of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

(4) Paragraph (1) of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivables.

Prior discussion: A/CN.9/445, paras. 232-235 (27th session, 1997)
A/CN.9/434, paras. 138-147 (26th session, 1996)
A/CN.9/432, paras. 127-130 (25th session, 1996)
A/CN.9/420, paras. 69-74 (24th session, 1995)

Remarks

1. Paragraphs (2) and (3) have been prepared by the Secretariat in order to address concerns expressed at a previous session of the Working Group (A/CN.9/434, paras. 143-145). They are intended to reflect the decision of the Working Group that: the transfer of security rights should be effective despite agreements between the assignor and the debtor restricting their transferability; and that the transfer of those security rights should not prejudice the rights of the guarantor of an independent guarantee, the issuer of a stand-by letter of credit, or a person granting a possessory right (A/CN.9/434, para. 146).
2. Paragraph (2) does not refer to independent guarantees and stand-by letters of credit, since the rule in paragraph (1) cannot apply to such instruments for the reason that they are not "security rights" and are normally not transferred automatically. Should the Working Group decide to extend the application of the rule in paragraph (1) to independent guarantees and stand-by letters of credit, a reference should be added in paragraph (1), e.g., to "supporting rights", while in paragraph (2) it should be ensured that such a transfer of "supporting rights" does not prejudice the rights of a guarantor/issuer (the term "independent undertaking" could be used and defined, probably along the lines of article 3 of the Guarantee and Standby Convention).
3. The Working Group may wish to consider whether the words "unless otherwise provided by law" contained in paragraph (1) make paragraph (4) redundant.

* * *

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 14 [15]. Rights and obligations of the assignor and the assignee

- (1) Subject to the provisions of this Convention, the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.
- (2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.
- (3) In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage of which they knew or ought to

have known and which in international trade is widely known to, and regularly observed by, parties to the particular receivables financing practice.

Prior discussion: A/CN.9/434, paras. 148-151 (26th session, 1996)
A/CN.9/432, paras. 131-144 (25th session, 1996)
A/CN.9/420, paras. 73, 81 and 95 (24th session, 1995)

Remarks

The Working Group may wish to merge paragraph (1) into draft article 10(1) and to delete paragraphs (2) and (3). Paragraph (2) may not be necessary, since parties may, in any case, agree to be bound by usages and are normally bound by practices established between themselves. Paragraph (3) may introduce uncertainty since there does not seem to be a distinct body of usages on receivables financing practices.

* * *

Article 15 [16]. Representations of the assignor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents that:

(a) [notwithstanding an agreement between the assignor and the assignee limiting in any way the assignor's rights to assign its receivables,] the assignor has, at the time of assignment, the right to assign the receivable;

(b) the assignor has not previously assigned [, nor will later assign,] the receivable to another assignee; and

(c) the debtor does not have, at the time of assignment, any defences or rights of set-off arising under the original contract or any other agreement with the assignor, other than those specified in the assignment.

(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay.

Prior discussion: A/CN.9/434, paras. 152-161 (26th session, 1996)
A/CN.9/432, paras. 145-158 (25th session, 1996)
A/CN.9/420, paras. 80-88 (24th session, 1995)

Remarks

1. The Working Group may wish to consider whether the bracketed language in paragraph (1)(a) is necessary, since this result is implied in draft article 12, according to which an assignment made despite an anti-assignment clause is effective. In the context of its discussion on paragraph (1)(b), the Working Group may wish to consider the question whether a representation of the assignor that it will not assign the same receivables again should be retained in a default rule such as draft article

15. Normally, such "negative pledge" types of representations are a matter of negotiation and are undertaken only in the context of specific transactions.

2. Paragraph (1)(c) is intended to limit the representation as to the absence of defences of the debtor to situations involving contractual receivables, since such a representation would not be appropriate in the case of non-contractual receivables. The Working Group may wish to consider whether the representation as to the absence of defences of the debtor should also refer to defences arising after the time of the assignment.

* * *

Article 16 [17]. Notification of the debtor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and request that payment be made to the assignee.

(2) Notification of the assignment or request for payment made by the assignor or the assignee in breach of an agreement under paragraph (1) is effective. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

(3) Notification shall be in writing and shall reasonably identify the receivables and the person to whom or for whose account or the address to which the debtor is required to make payment.

(4) Notification of the assignment may relate to receivables arising after notification. [Such notification is effective for a period of five years after the date it is received by the debtor, unless:

(a) otherwise agreed between the assignee and the debtor; or

(b) the notification is renewed in writing during the period of its effectiveness [for a period of five years unless otherwise agreed between the assignee and the debtor.]

Prior discussion: A/CN.9/434, paras. 162-165 (26th session, 1996)

A/CN.9/432, paras. 159-164 (25th session, 1996)

A/CN.9/420, paras. 89-97 (24th session, 1995)

Remarks

1. With the exception of the bracketed language in paragraph (4), draft article 16 is intended to reflect the agreement already reached by the Working Group on the issues addressed in this provision.

2. Under draft article 16 in combination with draft article 18, if notification is given by the assignee, the debtor is entitled to request the assignee to furnish within a reasonable period of time

adequate proof (until adequate proof is furnished, the debtor does not need to pay the assignee and does not owe any interest for the delay in payment). In the absence of such adequate proof, the debtor may discharge its obligation by paying the assignor (draft article 18(4)). If the debtor knows that the assignee who notified is not entitled to payment or if the debtor receives notification under other law, the debtor may discharge its obligation by paying to the person entitled to payment or to a judicial or other authority or to a public deposit fund (draft article 18(5)). Draft article 18(5) is intended to provide the debtor with a right, not an obligation. The debtor does not need to know or to determine the validity of the assignment, but it may discharge its obligation as prescribed in draft article 18(5) if it does have positive knowledge.

3. The bracketed language in paragraph (4) is intended to protect the assignor by limiting the types of future receivables in respect of which notification may be given. While financiers may wish to obtain a right in all future receivables, they usually advance credit only on the basis of future receivables that may arise within a limited period of time. On the other hand, introducing such a time limit would place on the assignee and the debtor the burden of having to keep track of the time of effectiveness of notifications, and might increase uncertainty and the cost of credit. With regard to the debtor, a time limit could create injustice, since, unless the debtor knows that the payment instructions contained in the notification are only effective for five years, it runs the risk of paying without being discharged.

* * *

Article 17. Right of the assignee to payment

- (1) The assignee is entitled to payment of the assigned receivable. Unless otherwise agreed between the assignor and the assignee, if payment is made to the assignee, the assignee is entitled to retain whatever it receives.
- (2) Unless otherwise agreed between the assignor and the assignee, if payment is made to the assignor, the assignee has a right in whatever is received by that assignor.
- (3) If payment is made to another person, including another assignee, a creditor of the assignor or the insolvency administrator, the assignee has a right in whatever is received by that person.

Prior discussion: A/CN.9/445, paras. 215-220

Remarks

1. Draft article 17 is intended to codify a rule which is common in most legal systems, namely that the assignee has the right to claim and to retain payment of the assigned receivables (which payment may take various forms, including a funds transfer, a cheque or goods). Under paragraph (1), the assignee may claim and retain payment (the assignee may claim payment even before notification, since the assignment is effective under draft article 10, but, under draft article 18(1), the debtor may choose to pay the assignor). Under paragraphs (2) and (3), the assignee may claim any payment of the assigned receivable made to other persons (the Working Group may wish to specify what constitutes payment of the assigned receivable). However, draft article 17 does not attempt to

specify whether that right is a personal or a property right (in rem or ad personam), since this is a matter on which legal systems differ widely (A/CN.9/445, paras. 215-220).

2. The right to whatever is received upon payment is described, in some legal systems, as a "proceeds" issue. Use of that term is avoided, since it has a specific meaning and finds a specific treatment in certain legal systems, while it is unknown or is treated differently in other legal systems. Should the Working Group decide to attempt to unify the law in those respects, it could consider an approach, under which: the assignment would transfer, or create a security right in, not only the receivable, but also the proceeds of the receivable; priority as to the receivable would constitute priority as to its proceeds; and proceeds of receivables would include assets commingled with other assets, provided that they could be identified or traced as proceeds of receivables. As a matter of drafting, this result could be reached by extending the definition of "receivable" contained in draft article 2 so as to cover proceeds of receivables (e.g., in draft article 2(3) a subparagraph could be inserted that would read along the following lines: "any monetary sum or other property received upon any disposition, collection or distribution on account of an assigned receivable"; the reference to the specific types of payment covered is intended to avoid any uncertainty that may arise as a result of the differences existing among legal systems as to what constitutes payment; "other property" is intended to indicate non-cash proceeds; "any disposition" is intended to indicate, e.g., the sale of or creation of a security right in receivables; collections and distributions refer to cash or dividends collected or distributed on account of securities).

3. Alternatively, this result could be achieved by defining "proceeds" in draft article 5 along the following lines: "'Proceeds of receivables' means any monetary sum or other property received upon any disposition, collection or distribution on account of an assigned receivable"; and by introducing in draft article 11 language along the following lines: "Unless otherwise agreed between the assignor and the assignee, the assignment transfers or creates a security right in any proceeds of the assigned receivables, provided that they may be identified or traced as proceeds of the receivables"; and in draft articles 23 and 24 language along the following lines: "Priority as to receivables constitutes priority as to any proceeds, provided that they may be identified or traced as proceeds of the receivables". Should the Working Group choose to follow this approach, more detailed rules may be needed, in particular for priority as to proceeds in case of insolvency of the assignor.

* * *

Section II. Debtor

Article 18 [18]. Debtor's discharge by payment

(1) Until the debtor receives notification of the assignment, it is entitled to discharge its obligation by paying the assignor.

(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (5) of this article, it is discharged only by paying in accordance with the payment instructions set forth in the notification.

(3) In case the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying in accordance with the payment instructions set forth in the first notification received by the debtor.

(4) [In case the debtor receives notification of the assignment from the assignee,] the debtor is entitled to request the assignee to furnish within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, [the writing evidencing assignment or] any [other] writing emanating from the assignor and indicating that the assignment has taken place.

(5) This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

Prior discussion: A/CN.9/434, paras. 176-191 (26th session, 1996)

A/CN.9/432, paras. 165-172 and 195-204 (25th session, 1996)

A/CN.9/420, paras. 98-115 and 124-131 (24th session, 1995)

Remarks

1. Draft article 18 is intended to set forth the ways in which the debtor may discharge its obligation by payment. It is not meant to establish an obligation of the debtor to pay, which is left to the contract or other legal relationship between the assignor and the debtor and to the law governing that relationship (see A/CN.9/432, paras. 173 and 181). The rule is that, up to notification, the debtor may discharge its obligation by paying the assignor (it may pay the assignee, but, in such a case, the debtor exposes itself to the risk of having to pay twice); after notification, discharge is obtained by payment to the assignee, in case of notification under the draft Convention. Paragraphs (3) to (5) deal with special cases in which the debtor may be discharged other than by paying the assignee (multiple notifications, notification by the assignee, notification under other law).

2. Under paragraph (2), the debtor's obligation to pay the assignee or as instructed by the assignee is triggered by the receipt of the notification by the debtor. The assignee bears the burden of ensuring that the notification is received by the debtor and, if something goes wrong (e.g., the assignor undertakes to notify the debtor but fails to do so), the risk of loss may be allocated by agreement between the assignor and the assignee.

* * *

Article 19 [19]. Defences and rights of set-off of the debtor

(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences arising from the original contract [or from a decision of a judicial or other authority giving rise to the assigned receivable] of which the debtor could avail itself if such claim were made by the assignor.

(2) The debtor may raise against the assignee any right of set-off arising from contracts between the assignor and the debtor other than the original contract [or from a decision of a judicial or other

authority other than that giving rise to the assigned receivable], provided that they were available to the debtor at the time notification of the assignment was received by the debtor.

(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 12 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

Prior discussion: A/CN.9/434, paras. 194-204 (26th session, 1996)

A/CN.9/432, paras. 205-209 (25th session, 1996)

A/CN.9/420, paras. 132-151 (24th session, 1995)

Remarks

The Working Group may wish to address the question whether the debtor may raise against the assignee rights of set-off, the basis for which was created before notification, although they may have not been "available" to the debtor at that time (e.g., a reciprocal and similar claim which becomes payable only after notification).

* * *

Article 20 [20]. Agreement not to raise defences or rights of set-off

(1) Without prejudice to [the law governing consumer protection] [public policy requirements] in the State in which the debtor is located, the debtor may agree with the assignor in writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 19. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

(2) The debtor may not agree not to raise:

(a) defences arising from fraudulent acts on the part of the assignee or the assignor;

(b) the right to contest the validity of the original contract.

(3) Such an agreement may only be modified by written agreement. [After notification, such a modification is effective as against the assignee subject to article 21(2).]

Prior discussion: A/CN.9/434, paras. 205-212 (26th session, 1996)

A/CN.9/432, paras. 218-238 (25th session, 1996)

A/CN.9/420, paras. 136-144 (24th session, 1995)

Remarks

Paragraph (2) was inspired by article 30(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"; see A/CN.9/434, para. 211). The second sentence of paragraph (3) is aimed at

protecting the assignee from a modification of an agreement not to raise defences or rights of set-off, which may be agreed upon between the assignor and the debtor without the knowledge of the assignee. The words within square brackets are intended to ensure that, after notification, the modification of such an agreement is not effective towards the assignee unless the conditions set forth in draft article 21(2) have been met.

* * *

Article 21 [21]. Modification of the original contract [or of the receivable]

(1) An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's right to payment is effective as against the assignee and the assignee acquires corresponding rights.

(2) After notification of the assignment, an agreement under paragraph (1) of this article is effective as against the assignee and the assignee acquires corresponding rights,

Variant A

if it is made in good faith and in accordance with reasonable commercial standards or, in case of a modification relating to a receivable fully earned by performance, it is consented to by the assignee.

Variant B

if the modification is provided for in the assignment or is later consented to by the assignee.

[(3) Paragraphs (1) and (2) of this article do not affect any right of the assignee against the assignor for breach of an agreement between the assignor and the assignee that the assignor will not modify the original contract without the assignee's consent.]

[(4) In case a receivable is confirmed or determined in a decision of a judicial or other authority, it may be modified only through a decision of that authority.]

Prior discussion: A/CN.9/434, paras. 198-204 (26th session, 1996)
A/CN.9/432, paras. 210-217 (25th session, 1996)

Remarks

1. The purpose of draft article 21 is twofold: first, to protect the debtor by allowing the debtor to pay under the modified contract; and second, to protect the assignee from such modifications and to ensure that the assignee acquires rights under the modified contract.
2. Paragraphs (1) through (3) cover contractual modifications relating to contractual or non-contractual receivables (e.g., a modification of the time of payment or the amount owed, a modification of an agreement not to raise defences, a modification of a settlement agreement relating to tort or tax receivables).

3. Under paragraph (2), a choice needs to be made. Reference to good faith may create some uncertainty, but avoids putting on the parties the burden of having to obtain the consent of the assignee to every little modification of an unperformed contract, a procedure that might be burdensome for the assignee as well. Paragraph (4) has been inserted in order to address the modification of a non-contractual receivable determined or confirmed in a judicial or administrative decision (e.g., a tort or a tax receivable).

* * *

Article 22 [22]. Recovery of advances

Without prejudice to [the law governing consumer protection] [public policy requirements] in the country in which the debtor is located and the debtor's rights under article 19, failure of the assignor to perform the original contract [or the decision of a judicial or other authority giving rise to the assigned receivable] does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

Prior discussion: A/CN.9/434, paras. 213-215 (26th session, 1996)

A/CN.9/432, paras. 239-244 (25th session, 1996)

A/CN.9/420, paras. 145-148 (24th session, 1995)

Remarks

In line with the principle that the debtor's position should not be worsened as a result of the assignment, draft article 22 provides that the debtor's position should not be improved either by granting the debtor the right to recover from the assignee any advance payments made to the assignor or the assignee. Such a right of the debtor to recover from the assignee becomes critical in case the assignor becomes insolvent, otherwise the debtor can recover from the assignor based on their contractual relationship. At the same time, draft article 22 expressly preserves any right that the debtor may have, under domestic consumer-protection or other similar legislation, to recover from the assignee. In addition, draft article 22 protects the right of the debtor to refuse payment based on draft article 19.

* * *

Section III. Third parties

Article 23 [23]. Competing rights of several assignees

(1) Priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located.

(2) Notwithstanding paragraph (1), conflicts of priority may be settled by agreement between competing assignees.

Prior discussion: A/CN.9/445, paras. 18-29 (27th session, 1997)
A/CN.9/434, paras. 238-254 (26th session, 1996)
A/CN.9/432, para. 247-252 (25th session, 1996)

* * *

Article 24 [24]. Competing rights of assignee and insolvency administrator
or creditors of the assignor

- (1) Priority as between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.
- (2) Priority as between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located.
- (3) Nothing in this article requires a court to take any action which is manifestly contrary to the public policy of the State in which the court is located.
- (4) In case an insolvency proceeding is commenced in a State other than the State in which the assignor is located,

Variant A

except as provided in this article, this Convention does not affect the rights of the insolvency administrator or the rights of the assignor's creditors.

Variant B

this Convention does not affect:

- (a) any right of creditors of the assignor to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer;
- (b) any right of the insolvency administrator,
 - (i) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer,
 - (ii) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding,
 - (iii) to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract, or

- (iv) to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee;
- (c) [if the assigned receivables constitute security for indebtedness or other obligations,] any insolvency rules or procedures generally governing the insolvency of the assignor:
 - (i) permitting the insolvency administrator to encumber the assigned receivables;
 - (ii) providing for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding,
 - (iii) permitting substitution of the assigned receivables for new receivables of at least equal value,
 - (iv) providing for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured, or
 - (v) other rules and procedures of similar effect and of general application in the insolvency of the assignor [specifically described by a Contracting State in a declaration made under article 43].
- (5) An assignee asserting rights under this article has no fewer rights than an assignee asserting rights under other law.

Prior discussion: A/CN.9/445, paras. 30-44 and 57 (27th session, 1997)
A/CN.9/434, paras. 255-258 and 216-237 (26th session, 1996)
A/CN.9/432, para. 253-258 and 260 (25th session, 1996)

Remarks

1. Paragraphs (1) and (2) reflect a decision tentatively reached by the Working Group at its previous session (A/CN.9/445, paras. 39-40). Paragraphs (3) and (4) are intended to address the potential conflict between the draft Convention and the applicable insolvency law. As a result of crafting the scope provisions and the priority provisions on the basis of the registered office of the assignor, the possibility for such a conflict arising has been significantly reduced. If the insolvency proceeding is commenced in the State in which the assignor has its registered office or habitual residence in the case of an individual or a person without a registered office (i.e. a main insolvency proceeding under article 2(b) of the Cross-Border Insolvency Model Law), no conflict would arise because the law applicable to priority would be from the same jurisdiction as the law governing insolvency.
2. A conflict can only arise if an insolvency proceeding is commenced in another State, i.e. a non-main insolvency proceeding under article 2(c) of the Cross-Border Insolvency Model Law, which is a Contracting State. If that other State is not a Contracting State, the draft Convention would not apply. This result should not create any problems, since the secondary insolvency proceeding

commenced in that State would generally not have any automatic extra-territorial effects and the assignor would be solvent in the State in which it has its registered office or habitual residence in the case of an individual or a person without a registered office).

3. The purpose of paragraph (3) is twofold: on the one hand, to ensure that the public policy of the State, in which a non-main insolvency proceeding is commenced, is preserved; and on the other hand, to avoid a blanket exclusion of the application of the law applicable under draft article 24 on the pretext of the slightest alleged deviation from public policy considerations. Paragraph (4) is intended to go a step further and to ensure that the draft Convention does not override certain rights of the insolvency administrator that are based on mandatory provisions of the State in which a non-main insolvency proceeding is commenced (which may not reflect public policy considerations).

4. In paragraph (4), a choice needs to be made between a general and a more detailed formulation of the principle. Variant A is based on the assumption that, once the validity of an assignment has been established by the draft Convention, nothing inhibits the insolvency administrator to challenge the assignment on any grounds other than its basic validity. Variant B expressly sets forth the matters that are either left generally to the law of the State in which a non-main insolvency proceeding has been commenced (e.g., the rights of the insolvency administrator with regard to post-insolvency future and unearned receivables, and its rights to assign or encumber the assigned receivables in certain circumstances), or are left to that law only under certain conditions (e.g., if "equal value" is given to the assignee, or if a security assignment is involved). By listing the rights of an insolvency administrator that are not affected by the draft Convention, variant B may enhance certainty and predictability to the extent that an assignment may not be challenged on grounds other than those listed. On the other hand, to the extent that the list may not be exhaustive, such an approach may result in excluding rights of insolvency administrators currently existing under national insolvency law.

* * *

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25 [25(1) and (2)]. Scope

This Convention applies to:

(a) assignments of receivables by the initial or any other assignee to subsequent assignees ("subsequent assignments") that are governed by this Convention under article 1, notwithstanding that the initial or any other previous assignment is not governed by this Convention; and

(b) any subsequent assignment, provided that the initial assignment is governed by this Convention

as if the subsequent assignee were the initial assignee.

Prior discussion: A/CN.9/445, paras. 47-48 (27th session, 1997)
A/CN.9/432, paras. 265-266 (25th session, 1996)
A/CN.9/420, para. 166-173 (24th session, 1996)

Remarks

Subparagraph (a) is intended to clarify that subsequent assignments that meet the criteria set forth in draft article 1 are governed by the draft Convention, even if the initial assignment falls outside the scope of application of the draft Convention (e.g., a subsequent assignment in a securitization transaction may be covered even if the initial assignment is a domestic assignment of domestic receivables). Subparagraph (b), which appears within square brackets, has been inserted pursuant to a suggestion made at the previous session of the Working Group (A/CN.9/445, paras. 161-163). It is aimed at ensuring that the law governing the initial assignment governs any subsequent assignment (continuatio juris). As a result, a domestic receivable may be brought under the draft Convention, if assigned internationally. The final words of subparagraph (b) are aimed at ensuring that the subsequent assignee has the same legal position that an assignee has under the draft Convention (see article 11(1)(a) of the Ottawa Convention).

* * *

Article 26 [25(3)]. Agreements limiting subsequent assignments

(1) A receivable assigned by the initial or any subsequent assignee to a subsequent assignee is transferred notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the initial or any subsequent assignor's right to assign its receivables.

(2) Nothing in this article affects any obligation or liability for breach of such an agreement, but a person who was not party to such an agreement is not liable for its breach.

Prior discussion: A/CN.9/445, para. 49 (27th session, 1997)
A/CN.9/432, para. 267 (25th session, 1996)
A/CN.9/420, para. 174-178 (24th session, 1996)

Remarks

In paragraph (1), a reference has been added to an anti-assignment agreement between "the initial or any subsequent assignor and the debtor or any subsequent assignee" in order to ensure that an anti-assignment clause contained in the original contract or in the assignment or in a subsequent assignment does not invalidate any subsequent assignment. Under paragraph (2), if any assignee is liable towards the debtor or any assignor under other applicable law outside the draft Convention for further assigning the receivable despite an anti-assignment clause contained in the original contract, in the assignment, or in any subsequent assignment, that liability is not extended to any subsequent assignee.

* * *

Article 27 [25(4)]. Debtor's discharge by payment

Notwithstanding that the invalidity of an assignment renders all subsequent assignments invalid, the debtor is entitled to discharge its obligation by paying in accordance with the payment instructions set forth in the first notification received by the debtor.

Prior discussion: A/CN.9/445, para. 51 (27th session, 1997)
A/CN.9/432, para. 268 (25th session, 1996)
A/CN.9/420, para. 179 (24th session, 1996)

Remarks

Draft article 27 is intended to protect the debtor from having to determine the validity of all assignments in a chain of assignments, in order to obtain a valid discharge of its obligation. Under draft article 18(2), the debtor may discharge its obligation in this way even if the initial assignment is invalid. If in doubt as to the validity of an assignment, the debtor may, under draft article 18(4), pay the assignor and be discharged.

* * *

Article 28. Notification of the debtor

Notification of a subsequent assignment constitutes notification of [any] [the immediately] preceding assignment.

Prior discussion: A/CN.9/445, para. 46 (27th session, 1997)

* * *

CHAPTER VI. CONFLICT OF LAWS

Article 29 [26]. Law applicable to the contract of assignment

(1) [With the exception of matters which are settled in this Convention,] the contract of assignment is governed by the law chosen by the assignor and the assignee. [The parties' choice of law must be express or [evident from the parties' conduct and from the clauses of the assignment contract, considered as a whole] [demonstrated with reasonable certainty by the terms of the contract and the circumstances of the case]].

[(2) Without prejudice to the validity of the contract of assignment or to the rights of third parties, the assignor and the assignee may agree to subject the contract of assignment to a law other than that which previously governed it as a result of an earlier choice under this article or other provisions of this Convention.]

(3) In the absence of a choice of law by the assignor and the assignee, the contract of assignment is governed by the law of the State with which the contract of assignment is most closely connected. In

the absence of proof to the contrary, the assignment contract is presumed to be most closely connected with the State in which the assignor is located.

Prior discussion: A/CN.9/445, paras. 56-64 (27th session, 1997)
A/CN.9/420, paras. 185-195 (24th session, 1995)

Remarks

The wording inserted in the first sentence of paragraph (1) and in paragraph (3) reflects the decisions made by the Working Group at its previous session (A/CN.9/445, paras. 57-64). According to the understanding of the Working Group so far, draft article 29 subjects both the contractual rights and obligations of the assignor and the assignee and the transfer of the receivables as between the assignor and the assignee to the same law. The language that appears in paragraph (1) within square brackets is based on articles 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; hereinafter referred to as "the Inter-American Convention") and 3(1) of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980; hereinafter referred to as "the Rome Convention"). Paragraph (2) is drawn from article 3(2) of the Rome Convention.

* * *

Article 30 [27]. Law applicable to the rights and obligations of the assignee and the debtor

(1) [With the exception of matters which are settled in this Convention,] the assignability of a receivable, the right of the assignee to request payment, the debtor's obligation to pay as instructed in the notification of the assignment, the discharge of the debtor and the debtor's defences are governed by the law governing the receivable to which the assignment relates.

[(2) The law governing the receivable is the law governing the contract [or decision or other act] from which the receivable arises.

(3) The law governing the contract from which the receivable arises is the law of the State with which the contract is most closely connected. A severable part of the contract which has a closer connection with another State may be governed by the law of that other State.

(4) In the absence of proof to the contrary, the contract is presumed to be most closely connected with the State in which the assignor is located.]

Prior discussion: A/CN.9/445, paras. 65-69 (27th session, 1997)
A/CN.9/420, paras. 197-201 (24th session, 1995)

Remarks

Paragraphs (2) to (4), which appear within square brackets for the consideration of the Working Group, are intended to specify the law governing the receivable. They have been inspired by article

4 of the Rome Convention and article 9 of the Inter-American Convention.

* * *

[Article 31 [28]. Law applicable to conflicts of priority

- (1) The priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located at the time of the assignment.
- (2) The priority between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located at the time of the assignment.
- (3) The priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located at the time of the assignment.

Prior discussion: A/CN.9/445, paras. 70-74 (27th session, 1997)
A/CN.9/420, para. 154 (24th session, 1995)

Remarks

Pending determination by the Working Group of the issue of the purpose of the conflict-of-laws provisions, draft article 31 appears within square brackets. If the Working Group decides that the purpose of the conflict-of-laws provisions should be to fill the substantive-law gaps left in the draft Convention (draft article 8(2)), draft article 31 could be deleted, since the rules of the draft Convention dealing with priority are conflict-of-laws provisions and filling substantive-law gaps should be left to the applicable law. If, however, the Working Group decides to provide an additional layer of harmonization of law in the field of assignment by preparing a so called "mini-Convention" on conflict-of-laws issues on assignment, draft article 31 should be retained. A related purpose of the conflict-of-laws rules, i.e. the facilitation of the application of the draft Convention, is referred to in the remarks to article 1. The Working Group may wish to consider whether a reference to the time at which the location of the assignor will determine the law applicable is necessary.

* * *

Article 32. Mandatory rules

- (1) Nothing in this chapter restricts the application of the rules of the law of the forum in a situation where they cannot be derogated from by contract ("mandatory rules") irrespective of the law otherwise applicable.
- (2) With regard to matters settled in this chapter, the forum may decide to apply the mandatory rules of the law of another State with which the contract of assignment has a close connection, if and in so far as, under the law of that other State, those rules must be applied whatever the law applicable.

* * *

Article 33. Public policy

With regard to matters settled in this chapter, the application of the law specified by this Convention may be refused only if such application is manifestly contrary to the public policy of the forum.

Prior discussion: A/CN.9/445, para. 57 (27th session, 1997)

Remarks

Draft articles 32 and 33 reflect a suggestion made at the previous session of the Working Group (A/CN.9/445, para. 57). They have been inspired respectively by articles 7 and 16 of the Rome Convention and articles 11 and 18 of the Inter-American Convention. The purpose of draft article 32 is to ensure that: the forum may apply its mandatory rules, even if the law of the forum is not the applicable law; and that the forum may apply mandatory rules of another State's law if that State has a close connection with the contract of assignment, irrespective of whether the law of that State is applicable. Draft article 33 is aimed at preserving the public policy of the forum.

* * *

CHAPTER VII. ALTERNATIVE PRIORITY RULES

Section I. Priority rules based on registration

Article 34 [23(3)]. Priority among several assignees

As between assignees of the same receivables from the same assignor, priority is determined by the order in which certain information about the assignment is registered under this Convention, regardless of the time of transfer of the receivables. If no assignment is registered, priority is determined on the basis of the time of the assignment.

Prior discussion: A/CN.9/445, para. 28 (27th session, 1997)

A/CN.9/434, paras. 238-254 (26th session, 1996)

A/CN.9/432, para. 247-252 (25th session, 1996)

* * *

Article 35 [24(4)]. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to articles 23(3) and (4) and 44,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

- (a) the receivables [were assigned] [arose] [were earned by performance], and information about the assignment was registered under this Convention, before the commencement of the insolvency proceeding or attachment; or

(b) the assignee has priority on grounds other than the provisions of this Convention.

Prior discussion: A/CN.9/445, para. 31 (27th session, 1997)
A/CN.9/434, paras. 255-258 and 216-237 (26th session, 1996)
A/CN.9/432, para. 253-258 and 260 (25th session, 1996)

Remarks

The opening words of draft article 35, as well as of draft article 40, are intended to ensure that the rights of the insolvency administrator referred to in draft articles 24(3) and (4) and 44 are preserved.

* * *

Section II. Registration

Article 36 [1 and 2 annex]. Establishment of a registration system

A registration system will be established for the registration of data about assignments under this Convention and the regulations to be promulgated by the registrar and the supervising authority. The regulations will prescribe the exact manner in which the registration system will operate, as well as the procedure for resolving disputes relating to registration.

Prior discussion: A/CN.9/445, paras. 94-103 (27th session, 1997)

Remarks

As chapter VII is optional, it generally provides for the establishment of a registration system. With regard to the way in which a registration system may be established, Contracting States have a number of options, including: to establish their own national registration system; or to cooperate in establishing an international registration system. In either case, States may wish to establish a supervising authority, which, in the former case, will provide assistance to States in linking their own registries to other national registries and, in the latter case, will provide for the operation and maintenance of the registration system. The details of this system will have to be described in the regulations (e.g., whether registration and searching will have to be made at the national level or whether, while registration may be made both at the national and international level, all data will be available at the international registry, the duties of the registry and the dispute resolution procedures). The promulgation of the regulations is left to the supervising authority, which will probably have to be a governmental or intergovernmental entity, and to the operator of the system (the registrar), which may be a private contractor.

* * *

Article 37 [3, 4 and 5 of annex]. Registration

(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the name and address of the assignor and the assignee and a brief description of the assigned receivables.

(2) A single registration may cover:

(a) the assignment by the assignor to the assignee of more than one receivable;

(b) an assignment not yet made;

(c) the assignment of receivables not existing at the time of registration.

(3) Registration, or its amendment, is effective from the time that the data referred to in paragraph (1) are available to searchers. Registration, or its amendment, is effective for the period of time specified by the registering party. In the absence of such a specification, a registration is effective for a period of [five] years. Regulations will specify the manner in which registration may be renewed, amended or discharged.

(4) Any defect, irregularity, omission or error with regard to the name of the assignor that results in data registered not being found upon a search based on the name of the assignor renders the registration ineffective.

Prior discussion: A/CN.9/445, paras. 104-111 and 115-117 (27th session, 1997)

* * *

Article 38 [6 of annex]. Registry searches

(1) Any person may search the records of the registry according to the name of the assignor and obtain a search result in writing.

(2) A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:

(a) the date and time of registration; and

(b) the order of registration.

Prior discussion: A/CN.9/445, paras. 118-119 (27th session, 1997)

* * *

Section III. Priority rules based on the time of the contract of assignment

Article 39 [23(1)]. Priority among several assignees

- (1) If a receivable is assigned several times, the right thereto is acquired by the assignee whose contract of assignment is of the earliest date.
- (2) The earliest assignee may not assert priority if it acted in bad faith at the time of the conclusion of the contract of assignment.
- (3) If a receivable is transferred by operation of law, the beneficiary of that transfer has priority over an assignee asserting a contract of assignment of an earlier date.
- (4) In the event of a dispute, it is for the assignee asserting a contract of assignment of an earlier date to furnish proof of such an earlier date.

Prior discussion: A/CN.9/445, para. 28 (27th session, 1997)
A/CN.9/434, paras. 238-254 (26th session, 1996)
A/CN.9/432, para. 247-252 (25th session, 1996)

Remarks

1. Reflecting a suggestion made at the previous session of the Working Group (A/CN.9/445, para. 84), chapter VII provides an alternative method of determining priority based on the time of the contract of assignment.
2. Should the Working Group decide to refer to alternative methods, it may wish to consider whether yet another alternative method based on the time of notification should be included, in order to avoid giving the impression that a time-of-assignment rule is the second-best alternative to a registration-based rule (A/CN.9/445, para. 86). On the other hand, the Working Group may wish to limit the alternatives offered in the optional part of the draft Convention to one or to decide to delete the optional part altogether, since offering too many alternatives may cause confusion. In its efforts to reach agreement, the Working Group may wish to take into account that all three alternative rules are applied interchangeably in both civil and common law jurisdictions (e.g., while a time-of-assignment rule is considered to be a civil law rule, it exists in common law jurisdictions and is known as "the American rule"; and while a registration- or notification-based rule is considered to be a common law rule, it exists in civil law jurisdictions).

* * *

Article 40 [24(3)]. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to articles 23(3) and (4) and 44,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:

(a) the receivables were assigned before the commencement of the insolvency proceeding or attachment; or

(b) the assignee has priority on grounds other than the provisions of this Convention.

Prior discussion: A/CN.9/445, para. 31 (27th session, 1997)

A/CN.9/434, paras. 255-258 and 216-237 (26th session, 1996)

A/CN.9/432, para. 253-258 and 260 (25th session, 1996)

* * *

CHAPTER VIII. FINAL PROVISIONS

Remarks

With the exception of draft articles 42 to 44, the final provisions are drawn from the Guarantee and Standby Convention.

* * *

Article 41. Depositary

The Secretary-General of the United Nations is the depositary of this Convention.

* * *

Article 42 [9 and 29]. Conflicts with international agreements

(1) Except as provided in paragraph (2) of this article, this Convention prevails over any international convention [or other multilateral or bilateral agreement] which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.

(2) If a State declares, at [the time of signature, ratification, acceptance, approval or accession] [any time], that the Convention will not prevail over international conventions [or other multilateral or bilateral agreements] listed in the declaration, to which it has or will enter and which contain provisions concerning the matters governed by this Convention, this Convention does not prevail.

Prior discussion: A/CN.9/445, paras. 201-203 (27th session, 1997)

A/CN.9/434, paras. 96-99 (26th session, 1996)

A/CN.9/432, paras. 73-75 (25th session, 1996)

A/CN.9/420, para. 23 (24th session, 1995)

* * *

Article 43. Application of chapter VII

A Contracting State may declare at [the time of signature, ratification, acceptance, approval, or accession] [any time] that it will be bound either by sections I and II or by section III of chapter VII.

* * *

Article 44. Insolvency rules or procedures not affected by this Convention

A Contracting State may describe at [the time of signature, ratification, acceptance, approval, or accession] [any time] other rules or procedures governing the insolvency of the assignor which this Convention does not affect.

* * *

Article 45. Signature, ratification, acceptance, approval, accession

- (1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until
- (2) This Convention is subject to ratification, acceptance or approval by the signatory States.
- (3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.
- (4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

* * *

Article 46. Application to territorial units

- (1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.
- (2) These declarations are to state expressly the territorial units to which the Convention extends.
- (3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which the Convention does not extend, this location is considered not to be in a Contracting State.
- (4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to

all territorial units of that State.

* * *

Article 47 [31]. Effect of declaration

- (1) Declarations made under articles 42 to 44 and 46 at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- (2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
- (3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.
- (4) Any State which makes a declaration under articles 42 to 44 and 46 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

* * *

Article 48 [32]. Reservations

No reservations may be made to this Convention.

* * *

Article 49. Entry into force

- (1) This Convention enters into force on the first day of the month following the expiration of one year from the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession.
- (2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.
- (3) This Convention applies only to assignments made on or after the date when the Convention enters into force in respect of the Contracting State referred to in paragraph (1) of article 1.

* * *

Article 50. Denunciation

(1) A Contracting State may denounce this Convention at any time by means of a notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

* * *