



# General Assembly

Distr.: General  
2 January 2004

Original: English

**United Nations Commission  
on International Trade Law**  
Thirty-seventh session  
New York, 14 June-2 July 2004

## **Explanatory note on the United Nations Convention on the Assignment of Receivables in International Trade\***

**Note by the Secretariat**

### Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction .....	1-6	3
II. Scope of application.....	7-20	4
A. Assignment/assignor-assignee-debtor/receivable .....	7-9	4
B. Practices covered .....	10	4
C. Exclusions and other limitations .....	11-13	5
D. Definition of “internationality” .....	14-15	5
E. Connecting factors for the application of the Convention .....	16-18	6
F. Definition of “location” .....	19-20	6
III. General provisions .....	21-23	7
A. Definitions and rules of interpretation.....	21	7
B. Party autonomy .....	22	7
C. Interpretation.....	23	7

\* This note has been prepared by the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) for information purposes. It is not an official commentary on the Convention.



IV.	Effects of assignment .....	24-29	8
A.	Formal and material validity .....	24-25	8
B.	Statutory limitations .....	26	8
C.	Contractual limitations .....	27-28	8
D.	Transfer of rights securing payment of the assigned receivables .....	29	9
V.	Rights, obligations and defences .....	30-53	9
A.	Assignor and assignee .....	30-34	9
1.	Party autonomy and rules of practice .....	30	9
2.	Representations .....	31	9
3.	Notification and payment instructions .....	32-33	10
4.	Rights in proceeds .....	34	10
B.	Debtor .....	35-46	10
1.	Debtor protection .....	35-36	10
2.	Debtor's discharge by payment .....	37-42	11
3.	Debtor's defences and rights of set-off .....	43	12
4.	Waiver of defences .....	44	12
5.	Modification of the original contract .....	45	12
6.	Recovery of payments by the debtor .....	46	13
C.	Third parties .....	47-53	13
1.	Law applicable to priority in receivables .....	47-49	13
2.	Mandatory law and public policy exceptions .....	50	14
3.	Law applicable to priority in proceeds .....	51	14
4.	Substantive law priority rules .....	52	14
5.	Subordination agreements .....	53	15
VI.	Autonomous conflict-of-laws rules .....	54-59	15
A.	Scope and purpose .....	54-55	15
B.	Law applicable to the form of the contract of assignment .....	56	15
C.	Law applicable to the mutual rights and obligations of the assignor and the assignee .....	57	16
D.	Law applicable to the rights and obligations of the assignee and the debtor .....	58	16
E.	Law applicable to priority .....	59	16
VII.	Final provisions .....	60	16

## I. Introduction

1. The United Nations Convention on the Assignment of Receivables in International Trade was adopted and opened for signature by the General Assembly by its resolution 56/81 of 12 December 2001.<sup>1</sup> The Convention was prepared by the United Nations Commission on International Trade Law.<sup>2</sup>
2. The main objective of the Convention is to promote the availability of capital and credit at more affordable rates across national borders, thus facilitating the cross-border movement of goods and services. The Convention achieves this objective by reducing legal uncertainty with respect to a number of issues arising in the context of important receivables financing transactions, including asset-based lending, factoring, invoice discounting, forfaiting and securitization, as well as transactions in which no financing is provided.
3. The Convention establishes principles and adopts rules relating to the assignment of receivables. In particular, it removes statutory prohibitions to the assignment of future receivables and of receivables that are not specifically identified (bulk assignments). It also removes contractual limitations to the assignment of trade receivables, agreed between the parties to the contract from which the assigned receivables arise, and clarifies the effect of an assignment on rights securing payment of the assigned receivables. In addition, the Convention recognizes party autonomy and provides a set of non-mandatory rules applicable in the absence of an agreement between the parties to the assignment. Moreover, it addresses legal barriers to the collection of receivables from foreign debtors by providing a uniform set of rules on debtor-related issues, such as notification of the debtor, discharge of the debtor by payment and defences and rights of set-off of the debtor.
4. Most importantly, the Convention removes the existing uncertainty with respect to the law applicable to conflicts as to who is entitled to receive payment as between an assignee and a competing claimant, such as another assignee, creditors of the assignor or the administrator in the insolvency of the assignor. This is achieved by subjecting priority conflicts to a single law, one that is easy to determine and is most likely to be the place in which the main insolvency proceeding with respect to the assignor will be opened (i.e. the place of the assignor's place of business and, in the case of places of business in more than one State, the law of the State in which the assignor has its central administration). The Convention also addresses the non-recognition of rights in proceeds in many countries by providing a uniform limited priority rule with respect to proceeds, which aims to facilitate practices, such as securitization and undisclosed invoice discounting. In addition, it provides guidance to States wishing to modernize their substantive law priority rules by providing model substantive law priority rules.
5. Furthermore, the Convention enhances uniformity of the law applicable to assignment by including a set of conflict-of-laws rules. These rules are designed to fill gaps left in the Convention on issues governed but not explicitly settled in it. They may apply if the State in which a dispute arises has adopted the Convention.
6. A summary of the main features and provisions of the Convention is given below.

## **II. Scope of application**

### **A. Assignment/assignor-assignee-debtor/receivable**

7. “Assignment” is defined in the Convention as a transfer of property in receivables by agreement (art. 2). The definition covers both the creation of security rights in receivables and the transfer of full property in receivables, whether or not for security purposes. The Convention, however, does not specify what constitutes either an outright or a security transfer, leaving this issue to law applicable outside the Convention. An “assignment” may be a contractual subrogation or a pledge-type transaction. On the other hand, it may not be a transfer by operation of law (e.g. statutory subrogation) or other non-contractual assignment.

8. The “assignor” is the creditor in the original contract giving rise to the assigned receivable. The assignor is either a borrower (or a third party) assigning receivables as security or a seller of receivables. The “assignee” is the new creditor, a lender or a buyer of receivables. The “debtor” is the obligor in the contract from which the assigned receivables arise (“original contract”).

9. The Convention defines a “receivable” as a “contractual right to payment of a monetary sum”. The definition includes parts of and undivided interests in receivables. Receivables from any type of contract are included. While the exact meaning of the term “contractual right” is left to national law, claims from contracts for the supply of goods, construction and services are clearly covered, whether the contracts are commercial or consumer contracts. Also included are loan receivables, intellectual property licence royalties, toll road receipts and monetary damage claims for breach of contract, as well as interest and non-monetary claims convertible to money. The term does not include a right to payment arising other than by contract, such as a tort claim or a tax refund claim.

### **B. Practices covered**

10. In view of the broad definition of the terms “assignment” and “receivable”, the Convention applies to a wide array of transactions. In particular, it covers the assignment of trade receivables (arising from the supply of goods, construction or services between businesses), loan receivables (arising from the extension of credit), consumer receivables (arising from consumer transactions) and sovereign receivables (arising from transactions with a governmental authority or a public entity). As a result, asset-based financing (e.g. revolving credit facilities and purchase-money financing) is covered. Factoring and forfaiting are also covered in all their variants (e.g. invoice discounting, maturity factoring and international factoring). The Convention also covers financing techniques, such as securitization of contractual receivables, as well as project financing on the basis of the future income flow of a project.

### **C. Exclusions and other limitations**

11. The scope of assignments covered is restricted by way of outright or limited exclusions of some types of receivable or assignment. The Convention excludes some assignments because no market exists for them (art. 4, para. 1). For example, assignments to a consumer are excluded; however, assignments of consumer receivables are covered. The Convention also excludes the assignment of those types of receivable which are already sufficiently regulated, or for which some of the provisions of the Convention may not be suitable, such as assignments of receivables arising from securities (whether directly or indirectly held), letters of credit, independent guarantees, bank deposits, derivative and foreign exchange transactions, payment systems and so forth (art. 4, para. 2).

12. Beyond the outright exclusion of certain types of assignment or receivable, the Convention provides two further types of limitation. One type is the “hold harmless” clause, which applies to assignments of receivables in the form of negotiable instruments, consumer receivables and real estate receivables (art. 4, paras. 3-5). The Convention applies to the assignment of such receivables. However, it does not change the legal position of certain parties to such assignments. For example, the priority of a holder in due course under the law governing negotiable instruments is preserved.

13. The Convention places another type of limitation upon the scope of the provision granting effectiveness to assignments notwithstanding anti-assignment and similar clauses (arts. 9 and 10). Articles 9 and 10 apply only to trade receivables, broadly defined to include receivables from the supply or lease of goods or the provision of services other than financial services (arts. 9, para. 3, and 10, para. 4). They do not apply to assignments of other receivables, such as loan or insurance receivables. The result of this limitation to the scope of articles 9 and 10 is that the effectiveness of an anti-assignment clause in an assignment outside the scope of articles 9 and 10 is subject to law outside the Convention (which, under article 29, is the law governing the original contract).

### **D. Definition of “internationality”**

14. As it focuses on international trade, the Convention applies in principle only to assignments of international receivables and to international assignments of receivables (art. 3). An assignment is international if the assignor and the assignee are located in different States. A receivable is international if the assignor and the debtor are located in different States. The international character of an assignment or a receivable is determined by the location of the assignor and the assignee, or the debtor, at the time of the conclusion of the assignment contract (a subsequent change does not affect the application of the Convention).

15. The Convention generally does not apply to domestic assignments of domestic receivables. Two exceptions exist, however. The first relates to subsequent assignments where, for example, A assigns to B, B to C, and so on. In order to ensure consistent results, the Convention applies to such subsequent assignments irrespective of whether the subsequent assignments are international or relate to international receivables, provided that any prior assignment in the chain of

subsequent assignments is governed by the Convention (art. 1, para. 1 (b)). The second exception speaks to conflicts of priority between a domestic and a foreign assignee of domestic receivables (i.e. assignee A in country X and assignee B in country Y; the receivables are owed by a debtor in country Y). To ensure certainty as to the priority rights of assignees, the Convention covers the priority conflict between assignee A and assignee B even though the assignment to B is a domestic assignment of domestic receivables (arts. 5 (m) and 22).

## **E. Connecting factors for the application of the Convention**

16. With the exception of the debtor-related provisions (e.g. arts. 15-21), the Convention applies to international assignments and to assignments of international receivables if the assignor is located in a State that is a party to the Convention (art. 1, para. 1 (a)). The Convention may apply to subsequent assignments that may be wholly domestic even if the assignor is not located in a contracting State as long as a prior assignment is governed by the Convention (art. 1, para. 1 (b)).

17. For the debtor-related provisions to apply, the debtor too should be located in a State party to the Convention or the law governing the assigned receivables should be the law of a State party to the Convention (art. 1, para. 3). This approach protects the debtor from being subject to a text of which it could not be aware. It does not, however, exclude the application of the Convention's rules that have no effect on the debtor, such as the rules dealing with the relationship between the assignor and the assignee or those dealing with priority among competing claimants. Accordingly, even if the debtor-related provisions do not apply to a particular assignment, the balance of the Convention may still apply to the relationship between the assignor and the assignee or the assignee and a competing claimant.

18. The autonomous conflict-of-laws rules of the Convention may apply even if the assignor or the assignee is not located in a contracting State as long as a dispute is brought before a court in a contracting State (art. 1, para. 4).

## **F. Definition of "location"**

19. The meaning of the term "location" has an impact on the application of the Convention (i.e. on the international character of an assignment or a receivable and on the territorial scope of the Convention). It also has an impact on the law governing priority (art. 22). The Convention defines "location" by reference to the place of business of a person, or the person's habitual residence, if there is no place of business. Departing from the traditional "location rule", referring in the case of multiple places of business to the place with the closest relationship to the relevant transaction, the Convention provides that, when an assignor or an assignee has places of business in more than one State, reference shall be made to the place of central administration (in other terms, the principal place of business or the main centre of interests). The reason for this approach is to provide certainty with respect to the application of the Convention as well as to the law governing priority. In contrast, when a debtor has places of business in more than one State, reference is to be made to the place most closely connected to the original contract. This different approach was taken with regard to the location of the debtor so as to ensure that the

debtor is not surprised by the application of legal rules to which the original contract between the debtor and the assignor has no apparent relationship.

20. In the case of transactions made through branch offices, the central administration location rule will result in the application of the Convention rather than the law of the State in which the relevant branch is located, if the assignor has its central administration in a State party to the Convention. In addition, a transaction may become international and fall under the Convention if the assignee has its central administration in a State other than the State in which the assignor is located, even though the assignee acted through a branch located in the same State as the assignor. Moreover, the central administration location rule will result in the application of the law of the assignor's central administration (rather than the place with the closest relationship to the assignment) to priority disputes. Certainty in the application of the Convention and in the determination of the law governing priority justify such a result. This rule will not affect a financing institution as a debtor of the original receivable because, in such a case, the close connection test determines the institution's location.

### **III. General provisions**

#### **A. Definitions and rules of interpretation**

21. Important terms such as "future receivable", "writing", "notification", "location", "priority", "competing claimant" and "financial contract" are defined in article 5.

#### **B. Party autonomy**

22. The Convention recognizes the right of the assignor, the assignee and the debtor to derogate from or vary by agreement provisions of the Convention (art. 6). There are two limitations: firstly, such an agreement cannot affect the rights of third parties; and, secondly, the debtor may not waive certain defences (art. 19, para. 2).

#### **C. Interpretation**

23. The Convention contains a general rule that its interpretation should be with a view to its object and purpose as set forth in the preamble, its international character and the need to promote uniformity in its application and the observance of good faith in international trade. Gaps left with respect to matters covered but not expressly settled in the Convention are to be filled in accordance with its general principles and, in the absence of a relevant principle, in accordance with the law applicable by virtue of the rules of private international law, including those of the Convention if they are applicable (art. 7).

## **IV. Effects of assignment**

### **A. Formal and material validity**

24. Owing to the lack of consensus in the Commission, the Convention does not contain a uniform substantive law rule as to the formal validity of the assignment. However, it does contain conflict-of-laws rules. The form of an assignment as a condition of priority is referred to the law of the assignor's location (arts. 5 (g) and 22). Moreover, a conflict-of-laws rule for formal validity of the contract of assignment as between the parties thereto is contained in the autonomous conflict-of-laws rules of the Convention (art. 27).

25. An assignment made by agreement between the assignor and the assignee is effective if it is otherwise effective as a matter of contract (arts. 2 and 11). No notification is required for the assignment to be effective (art. 14, para. 1). The Convention focuses on statutory and contractual limitations, as well as on the impact of assignment on security and other supporting rights. Other issues related to material validity or effectiveness are addressed in the context of the relationship in which they may arise (assignor-assignee or debtor-assignee or assignee-third party).

### **B. Statutory limitations**

26. In order to facilitate receivables financing, the Convention sets aside statutory and other legal limitations with respect to the assignability of certain types of receivable (e.g. future receivables) or the effectiveness of certain types of assignment (e.g. bulk assignments) that are typical in receivables financing transactions. It is sufficient if receivables are identifiable as receivables to which the assignment relates at the time of assignment or, in the case of future receivables, at the time of conclusion of the original contract. One act is sufficient to assign several receivables, including future receivables (art. 8). Apart from the statutory limitations mentioned, other statutory limitations, such as those relating to personal or sovereign receivables, are not affected by the Convention.

### **C. Contractual limitations**

27. The Convention validates an assignment of trade receivables (broadly defined in art. 9, para. 3) made in violation of an anti-assignment clause without eliminating the liability that the assignor may have for breach of contract under law applicable outside the Convention and without extending that liability to the assignee (art. 9, para. 1). However, if such liability exists, the Convention narrows its scope by providing that mere knowledge of the anti-assignment agreement, on the part of the assignee that is not a party to the agreement, does not constitute sufficient ground for liability of the assignee for the breach of the agreement. In addition, the Convention protects the assignee further by ensuring that the violation of an anti-assignment clause by the assignor is not in itself sufficient ground for the avoidance of the original contract by the debtor (art. 9, para. 2). Furthermore, the Convention does not allow a claim for breach of an anti-assignment clause to be made by the debtor against the assignee by way of set-off so as to defeat the assignee's demand for payment (art. 18, para. 3).



28. With respect to consumers, the approach of the Convention is based on the assumption that this provision does not affect them, since anti-assignment clauses are very rare in consumer contracts. In any case, if there is a conflict between the Convention and applicable consumer-protection law, consumer-protection law will prevail (art. 4, para. 4). With respect to the assignment of sovereign receivables, States may enter a reservation with regard to article 9 (art. 40). This exception is intended to protect a limited number of States that do not have a policy of protecting themselves by statute, but instead rely on contractual limitations.

#### **D. Transfer of rights securing payment of the assigned receivables**

29. An accessory right, whether personal or property, securing payment of the assigned receivable is transferred with the receivable without a new act of transfer. The assignor is obliged to transfer to the assignee an independent security or other supporting right (art. 10, para. 1). With respect to contractual limitations on assignment, such rights are treated in the same way as a receivable (art. 10, paras. 2 and 3). This provision likewise applies to “trade receivables” defined broadly (art. 10, para. 4) and does not affect any obligations of the assignor towards the debtor under the law governing the security or other supporting right (art. 10, para. 5). Similarly, this provision does not affect any form or registration requirement necessary for the transfer of the security right (art. 10, para. 6).

### **V. Rights, obligations and defences**

#### **A. Assignor and assignee**

##### **1. Party autonomy and rules of practice**

30. The Convention recognizes the right of the assignor and the assignee to structure their contract in any way they wish to meet their particular needs, as long as they do not affect the rights of third parties (arts. 6 and 11). The Convention also gives legislative strength to trade usages agreed upon by the assignor and the assignee and trade practices established between such parties. Moreover, the Convention includes certain non-mandatory rules that are applicable to the relationship between the assignor and the assignee. Those rules are meant to provide a list of issues to be addressed in the contract and, at the same time, to fill gaps left in the contract with respect to matters, such as representations of the assignor, notification and payment instructions, as well as rights in proceeds. They are suppletive rules only. The parties may always agree to modify the rules as they operate between them.

##### **2. Representations**

31. With respect to representations, the Convention follows generally accepted principles and attempts to establish a balance between fairness and practicality (art. 12). For example, unless otherwise agreed, the risk of hidden defences on the part of the debtor is placed on the assignor. The Convention follows this approach, in view of the fact that the assignor is the contractual partner of the debtor and thus

is in a better position to know whether there will be problems with the contract's performance that may give the debtor rights of defence.

### **3. Notification and payment instructions**

32. Unless otherwise agreed, the assignor, the assignee or both may send the debtor a notification and a payment instruction. The assignee is given an independent right to notify the debtor and request payment. This independent right is essential where the assignee's relationship with the assignor becomes problematic and the assignor is unlikely to cooperate with the assignee in notifying the debtor. After notification, only the assignee may request payment (art. 13). Notification of the debtor in violation of an agreement between the assignor and the assignee would still permit the debtor to obtain a discharge if it pays in accordance with such a notification, but the claim for breach of contract between the assignor and the assignee is preserved.

33. Payment instructions do not fall within the definition of notification of the assignment (art. 5 (d)). This means that a notification need not provide a change in payment instructions to the debtor, but may be given mainly to freeze the debtor's defences and rights of set-off (art. 18, para. 2).

### **4. Rights in proceeds**

34. The Convention introduces a contractual right to proceeds of receivables and proceeds of proceeds ("whatever is received in respect of an assigned receivable", art. 5 (j)). As between the assignor and the assignee, the assignee may claim proceeds if payment is made to the assignee, to the assignor or to another person over whom the assignee has priority (art. 14). Whether the assignee may retain or claim a proprietary right in such proceeds is generally an issue left to law applicable outside the Convention. However, if the proceeds are themselves receivables, this issue is left to the law of the assignor's location (arts. 5 (j) and 22). In addition, in certain circumstances, the Convention's limited substantive proceeds rule may apply (art. 24).

## **B. Debtor**

### **1. Debtor protection**

35. An assignment does not affect the debtor's legal position without the debtor's consent, unless a provision of the Convention clearly states otherwise. Furthermore, the assignment cannot change the currency or the State in which payment is to be made without the debtor's consent (arts. 6 and 15).

36. Beyond generally codifying the principle of debtor protection, the Convention contains a number of specific expressions of this principle. These provisions deal with the debtor's discharge by payment, defences, rights of set-off, waivers of such defences or rights of set-off, modification of the original contract and recovery of payments by the debtor.

## 2. Debtor's discharge by payment

37. The debtor may be discharged by paying in accordance with the original contract, unless the debtor receives notification of the assignment. After receiving such notification, the debtor is discharged by paying in accordance with the written payment instructions and, in the absence of such instructions, by paying the assignee (art. 17, paras. 1 and 2). The notification of the assignment thereby determines the method by which the debtor shall be discharged. The notification must be written in a language that is reasonably expected to be understood by the debtor and must reasonably identify the assigned receivables and the assignee (art. 16).

38. Whether the debtor knew or ought to have known of a previous assignment of which it did not receive a notification is irrelevant. The Convention adopts this approach so as to ensure an acceptable level of certainty as to debtor discharge, which is an important element in pricing a transaction by the assignee. This approach encourages neither bad faith nor fraud. It is always difficult to prove what the debtor knew or ought to have known and, in any case, the Convention does not override national law provisions on fraud.

39. The Convention also provides a series of rules concerning multiple notifications or payment instructions. When the debtor receives several payment instructions that relate to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received (art. 17, para. 3). Where several notifications relate to more than one assignment of the same receivables by the same assignor, the debtor is discharged by paying in accordance with the first notification received (art. 17, para. 4). In the case of several notifications relating to subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments (art. 17, para. 5).

40. When the debtor receives several notifications relating to parts of, or undivided interests in, one or more receivables, it has a choice. The debtor may obtain a discharge by paying either in accordance with the notifications received or in accordance with the Convention as if no notification had been received (art. 17, para. 6). By giving the debtor, in effect, the right to determine whether or not the notification of a partial assignment is effective with respect to debtor discharge, the Convention avoids overburdening the debtor with the obligation of dividing its payment. This approach does not invalidate partial assignments. Rather, it merely suggests that assignors or assignees need to structure payments taking into account that the debtors need not agree to partial payments (e.g. according to the provisions of art. 24, para. 2). The assignor and the assignee may also divide payments with the debtor's consent obtained at the time of the conclusion of the original contract or the assignment or at a subsequent point of time.

41. One of the key debtor-protection provisions allows the debtor to request adequate proof of the assignment when the assignee gives notification without the cooperation or apparent authorization of the assignor (art. 17, para. 7). This right is intended to safeguard the debtor from the risk of having to pay an unknown third party. "Adequate proof" includes any writing with the assignor's signature indicating that the assignment occurred, such as the assignment contract or an authorization for the assignee to notify. If the assignee does not provide such proof

within a reasonable period of time, the debtor may obtain a discharge by paying the assignor.

42. The Convention does not affect any rights the debtor may have under law outside the Convention to discharge its obligation by payment to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund (art. 17, para. 8). For example, if the debtor is discharged under law outside the Convention by complying with a notification that does not meet the Convention's requirements, the Convention recognizes this result. Similarly, payment to a public deposit fund under law outside the Convention is recognized in the Convention as a valid discharge where payment to such a fund is recognized under law outside the Convention.

### **3. Debtor defences and rights of set-off**

43. With respect to the debtor's defences and rights of set-off, the Convention codifies generally accepted rules. The debtor may raise against the assignee any defences or rights of set-off that the debtor could have raised in a claim against the assignor. Rights of set-off arising from the original contract or a related transaction may be raised against the assignee even if they become available to the debtor after notification (art. 18, para. 1). However, rights of set-off that do not arise from the original contract or a related transaction, and become available to the debtor after notification, may not be raised against the assignee (art. 18, para. 2). The Convention leaves the meaning of "become available" (i.e. whether the right has to be quantified, has matured or has become payable) to be determined by the applicable law outside the Convention (for rights of set-off arising from the original contract, that law is, under article 29, the law governing the original contract).

### **4. Waiver of defences**

44. The debtor may waive its defences and rights of set-off by agreement with the assignor. To warn the debtor of the important consequences of the waiver, the Convention requires a writing signed by the debtor for a waiver or its modification (art. 19, para. 1). In order to protect the debtor from undue pressure by the assignor, the Convention also prohibits waiver of defences or rights of set-off arising from fraudulent acts of the assignee or based on the debtor's incapacity (art. 19, para. 2).

### **5. Modification of the original contract**

45. Often, the original contract needs to be modified to meet the changing needs of the parties. The agreement itself determines the *inter partes* effects of such modifications. The Convention addresses the third-party effects, such as whether the debtor can pay to the assignee the receivable as modified to be discharged, and whether the assignee can claim payment of the receivable as modified. The basic rule provides that, up until notification of the debtor, any contract modification is effective as against the assignee and the assignee acquires the receivable as modified (art. 20, para. 1). After notification, without the assignee's consent, such a modification is ineffective as against the assignee of a receivable earned by performance but is effective against the assignee of an unearned receivable if the modification was provided for in the original contract or a reasonable assignee would have consented to the modification (art. 20, para. 2). The Convention does

not affect any liability of the assignor towards the assignee under applicable law for breach of an agreement not to modify the original contract (art. 20, para. 3).

#### **6. Recovery of payments by the debtor**

46. The debtor may recover only from the assignor payments made to the assignor or the assignee (art. 21). This, in effect, means that the debtor bears the risk of insolvency of its contractual partner, which would be the case even in the absence of an assignment.

### **C. Third parties**

#### **1. Law applicable to priority in receivables**

47. One of the most important parts of the Convention deals with the impact of assignment on third parties, such as competing assignees, other creditors of the assignor and the administrator in the insolvency of the assignor. This issue is addressed in the Convention as an issue of priority among competing claimants, that is, of who is entitled to receive payment or other performance first. As the assignor's assets may not be sufficient to satisfy all creditors, this issue is of considerable importance.

48. As there was no consensus in the Commission on a substantive law priority rule, the Convention addresses this issue through conflict-of-laws rules (arts. 22-24). The value of these rules lies in the fact that, deviating from traditional approaches, they centralize all priority conflicts to the law of the assignor's location. Because "location" means the place of central administration, if the assignor has a place of business in more than one State, the Convention thereby refers priority conflicts to the law of a single, and easily determinable, jurisdiction. In addition, the main insolvency proceeding with regard to the assignor will most often be opened in this jurisdiction, a result that makes conflicts between secured transactions and insolvency laws easier to address.

49. In order to cover all possible priority conflicts, the term "competing claimant" is defined so as to include other assignees, even if both the assignment and the receivable are domestic and thus otherwise outside the Convention's scope, other creditors of the assignor, including creditors with rights in other property extended by law to the assigned receivable, such as creditors with a proprietary right in the receivable created by court decision or a retention of title in goods extended by law to the receivables from the sale of the goods, and the administrator in the insolvency of the assignor (art. 5 (m)). The definition of the term "priority" covers not only the preference in payment or other satisfaction but also related matters, such as the determination of whether that right is a personal or a property right, whether or not it is a security right and whether any required steps to render the right effective against a competing claimant have been satisfied (art. 5 (g)). Priority does not generally cover the effectiveness of an assignment as between the assignor and the assignee or the debtor (arts. 5 (g), 8 and 22, "with the exception of matters that are settled elsewhere in this Convention").

## **2. Mandatory law and public policy exceptions**

50. A mandatory law priority rule of the forum State may result in setting aside the applicable priority rule of the assignor's law if the latter's application is "manifestly contrary to the public policy of the forum State" (art. 23, para. 1). Mandatory law rules of the forum State or another State may not prevent in and of themselves the application of a priority provision of the assignor's law (art. 23, para. 2). However, in the case of insolvency proceedings in a State other than the State of the assignor's location, the forum State may apply its own mandatory priority rule giving priority to certain types of preferential creditor, such as tax or wage claimants (art. 23, para. 3). Moreover, the Convention is not intended to interfere with substantive and procedural insolvency rules of the forum State that do not affect priority as such (e.g. avoidance actions, stays on collection of receivables assigned and the like).

## **3. Law applicable to priority in proceeds**

51. The Convention does not contain a general rule on the law applicable to priority in proceeds. The reason lies in the differences between legal systems with respect to the nature and the treatment of rights in proceeds. However, the Convention contains two limited proceeds rules. Under the first one, if the assignee has priority over other claimants with respect to receivables and proceeds are paid directly to the assignee, the assignee may retain the proceeds (art. 24, para. 1). The second rule is intended to facilitate practices such as securitization and undisclosed invoice discounting. In such practices, payments are channelled to a special account held by the assignor, separately from its other assets, on behalf of the assignee. The Convention provides that, if the assignee has priority over other claimants with respect to the receivables and the proceeds are kept by the assignor on behalf of the assignee and are reasonably identifiable from the other assets of the assignor, the assignee has the same priority with respect to proceeds (art. 24, para. 2). The Convention does not address, however, a priority conflict between an assignee claiming an interest in proceeds held in a deposit or securities account and the depository bank or the securities broker or other intermediary with a security or set-off right in the account (art. 24, para. 3).

## **4. Substantive law priority rules**

52. In order to obtain the benefit of the Convention's priority rules, parties have the opportunity to structure their transactions in a way that refers priority questions to the appropriate law (e.g. by creating special entities in appropriate locations). The question remains as to what should happen if this is impossible, or is only possible at a considerable cost, and the applicable law has insufficient priority rules. In order to address this question, the Convention offers model substantive priority provisions (annex). States have a choice between three substantive priority systems if they wish to change their existing rules. One is based on filing of a notice about the assignment, another is based on notification of the debtor and the third is based on the time of assignment. States that wish to adjust their legislation may, by declaration, select one of these priority regimes, or simply enact new priority rules or revise their existing priority rule by way of domestic legislation. The assumption is that, in an environment of free competition between legal regimes, the regime with the most economic benefits will prevail.

## **5. Subordination agreements**

53. Parties involved in a priority conflict may negotiate and relinquish priority in favour of a subordinate claimant where commercial considerations so warrant. In order to afford maximum flexibility and to reflect prevailing business practices, the Convention makes it clear that a valid subordination need not take the form of a direct subordination agreement between the assignee with priority and the beneficiary of the subordination agreement (art. 25). It can also be effected unilaterally, for instance, by means of an undertaking of the first ranking assignee to the assignor, empowering the assignor to make a second assignment ranking first in priority.

# **VI. Autonomous conflict-of-laws rules**

## **A. Scope and purpose**

54. The Convention contains a set of conflict-of-laws rules that may apply independently of any territorial link with a State party to the Convention. In cases where the assignor, or the debtor, is located in a State party to the Convention, or the law governing the original contract is the law of a State party to the Convention, the independent conflict-of-laws rules may apply to fill gaps in the Convention, unless an answer may be derived from the principles underlying the Convention. If the assignor, or the debtor, is not located in a State party to the Convention, or the law governing the receivable is not the law of a State party, the independent conflict-of-laws rules may apply to transactions to which the other provisions of the Convention would not apply (art. 26). Such transactions need to be international, as defined in the Convention, and should not be excluded from the scope of the Convention.

55. The autonomous conflict-of-laws rules of the Convention in chapter V are subject to a reservation. States that enter a reservation with respect to chapter V are not bound by it (art. 39). Such a reservation was allowed to ensure that States that wished to adopt the Convention would not be prevented from doing so merely because the autonomous conflict-of-laws rules were inconsistent with their own conflict-of-laws rules.

## **B. Law applicable to the form of the contract of assignment**

56. In the case of a contract of assignment concluded between persons located in the same State, formal validity of the contract of assignment is subject to the law of the State, which governs the contract, or of the State in which the contract is concluded. When a contract of assignment is concluded between persons located in different States, it is valid if it satisfies the formal requirements of either the law that governs the contract or the law of one of those States (art. 27).

**C. Law applicable to the mutual rights and obligations of the assignor and the assignee**

57. The mutual rights and obligations of the assignor and the assignee are subject to the law of their choice. The parties' freedom of choice is subject to the public policy of the forum and the mandatory rules of the forum or a closely connected third country. In the absence of a choice by the parties, the law of the State with which the contract of assignment is most closely connected governs. The "close connection" test was adopted in this case despite the uncertainty it might cause as it is unlikely to have much impact in view of the fact that in the vast majority of cases parties choose the applicable law (art. 28).

**D. Law applicable to the rights and obligations of the assignee and the debtor**

58. The relationship between the assignee and the debtor, the conditions under which the assignment can be invoked as against the debtor and contractual limitations on assignment are subject to the law governing the original contract. The fact that most of these issues are covered by the substantive law rules of the Convention limits the impact of this provision. However, certain issues were deliberately not covered in the substantive law rules of the Convention, such as the question as to when a right of set-off is available to the debtor under article 18. Article 29 governs that particular issue, at least with respect to transaction set-off (i.e. set-off arising from the original contract or another contract that was part of the same transaction). Another question falling within the scope of article 29 is the effect of anti-assignment clauses on assignments of receivables to which article 9 or 10 does not apply either because they relate to assignments of non-trade receivables or because the debtor is not located in a State party to the Convention. Statutory limitations, however, are not covered by article 29. While some statutory limitations aim to protect the debtor, many are intended to protect the assignor. In the absence of a way to draw a clear distinction between the various types of statutory limitation, it would be inappropriate to subject them to the law governing the original contract. In any case, with a few exceptions, the Convention does not affect statutory limitations.

**E. Law applicable to priority**

59. The Convention refers issues of priority to the law of the assignor's location. The value of this rule is that it may apply to transactions to which article 22, which it repeats, does not apply because of the absence of a territorial connection between an assignment and a State party to the Convention.

**VII. Final provisions**

60. The Convention will enter into force upon ratification by five States (art. 45). States may exclude further practices by declaration, but may not exclude practices relating to "trade receivables" broadly defined in articles 9, paragraph 3, and 10,



paragraph 4 (art. 41). The Convention will not apply to such practices if the assignor is located in a State that has made such a declaration. The Convention prevails over the Unidroit Convention on International Factoring (the Ottawa Convention). However, this does not affect the application of the Ottawa Convention to the rights and obligations of a debtor if the Convention does not apply to that debtor (art. 38).

#### Notes

<sup>1</sup> At its twenty-sixth to twenty-eighth sessions (1993-1995), the Commission considered three reports of the Secretary-General, namely, A/CN.9/378/Add.3 (*UNCITRAL Yearbook, Volume XXIV: 1993* (United Nations publication, Sales No. E.94.V.16)), A/CN.9/397 (*UNCITRAL Yearbook, Volume XXV: 1994* (United Nations publication, Sales No. E.95.V.20)) and A/CN.9/412 (*UNCITRAL Yearbook, Volume XXVI: 1995* (United Nations publication, Sales No. E.96.V.8)). The deliberations of the Commission on those reports are reflected in its reports on its twenty-sixth to twenty-eighth sessions (*Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17)*, paras. 297-301 (*UNCITRAL Yearbook, Volume XXIV: 1993*) (op. cit.); *ibid.*, *Forty-ninth Session, Supplement No. 17 (A/49/17)*, paras. 208-214 (*UNCITRAL Yearbook, Volume XXV: 1994*) (op. cit.) and *ibid.*, *Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 374-381 (*UNCITRAL Yearbook, Volume XXVI: 1995*) (op. cit.)). At its twenty-eighth session (1995), the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing. The draft convention was prepared by the Working Group at its twenty-fourth to thirty-first sessions (one more session of another Working Group, which was renamed for that session, its twenty-third session, was also held). For the reports of those sessions, see documents A/CN.9/420 (*UNCITRAL Yearbook, Volume XXVII: 1996* (United Nations publication, Sales No. E.89.V.7)), A/CN.9/432 and A/CN.9/434 (*UNCITRAL Yearbook, Volume XXVIII: 1997* (United Nations publication, Sales No. E.99.V.6)), A/CN.9/445 and A/CN.9/447 (*UNCITRAL Yearbook, Volume XXIX: 1998* (United Nations publication, Sales No. E.99.V.12)), A/CN.9/455 and A/CN.9/456 (*UNCITRAL Yearbook, Volume XXX: 1999* (United Nations publication, Sales No. E.00.V.9)), A/CN.9/466 (*UNCITRAL Yearbook, Volume XXXI: 2000* (United Nations publication, Sales No. E.02.V.3)) and A/CN.9/486 (*UNCITRAL Yearbook, Volume XXXII: 2001* (United Nations publication, Sales No. E.04.V.4)). For the papers prepared by the Secretariat and considered by the Working Group at those sessions, see A/CN.9/WG.II/WP.87 and A/CN.9/WG.II/WP.89 (*UNCITRAL Yearbook, Volume XXVIII: 1997*) (op. cit.), A/CN.9/WG.II/WP.93 and A/CN.9/WG.II/WP.96 (*UNCITRAL Yearbook, Volume XXIX: 1998*), A/CN.9/WG.II/WP.98 and A/CN.9/WG.II/WP.102 (*UNCITRAL Yearbook, Volume XXX: 1999*) (op. cit.) and A/CN.9/WG.II/WP.104 (*UNCITRAL Yearbook, Volume XXXI: 2000*) (op. cit.)).

<sup>2</sup> For information on UNCITRAL and its work, see the web site of the Commission ([www.uncitral.org](http://www.uncitral.org)). The deliberations of UNCITRAL on the draft convention are reflected in the reports on the work of its thirty-third (2000) and thirty-fourth (2001) sessions (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 17 (A/55/17)*, paras. 12-192 (*UNCITRAL Yearbook, Volume XXXI A: 2000*) (op. cit.), and *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 17* and corrigendum (A/56/17 and Corr.3), paras. 13-200 (*UNCITRAL Yearbook, Volume XXXII: 2001*) (op. cit.)). Annex I of the report of UNCITRAL on the work of its thirty-third session (A/56/17 and Corr.3) contains the draft convention as submitted by the Commission to the General Assembly. At its thirty-third and thirty-fourth sessions, the Commission had before it versions of an analytical commentary on the draft convention, prepared by the Secretariat (A/CN.9/470 (*UNCITRAL Yearbook, Volume XXXI: 2000*) (op. cit.) and A/CN.9/489 and Add.1 (*UNCITRAL Yearbook, Volume XXXII: 2001*) (op. cit.)).