

THE DRAFT UNCITRAL CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING: A BRIEF OVERVIEW

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1. INTRODUCTION

The United Nations Commission on International Trade Law (“UNCITRAL”) began its project to draft uniform rules for the assignment of receivables in 1995 and contemplates completion of the project in early 2000. The purpose of these rules, which will be embodied in a multinational Convention, is to facilitate cross-border commercial finance and the assignment of international receivables. If the Convention is adopted, it will impact cross-border asset-based lending, factoring, securitization, and project finance.

The following is a brief summary of the current provisions of the draft UNCITRAL Convention on Assignment in Receivables Financing, including a status report of some remaining issues. The reader is cautioned, however, to seek clarification of the general descriptions in this summary by referring to the provisions of the Draft Convention itself, including any subsequent version.¹

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¹ References herein to the Draft Convention are to the *Draft Convention on Assignment in Receivables Financing*, United Nations Commission on International Trade Law, Working Group on International Trade Law, 31st Sess., U.N. Doc. A/CN.9/WG.II/WP.104 (July 16, 1999) [hereinafter *Draft Convention*]. There will likely be changes to the Draft Convention made at the next working group meeting scheduled for October 11-22, 1999, in Vienna, Austria. A copy of the current Draft Convention may be obtained from the Office of the Legal Advisor, U.S. Department of State, 2430 E Street, N.W., Ste. 355, South Building (SA-44), Washington, D.C. 20037-2800, Telephone: (202) 776-8421, Facsimile: (202) 776-8482, E-mail: pildb@his.com.

2. SCOPE

2.1. Cross-Border

The Draft Convention covers the assignment of receivables where the assignor is located in one country and the debtor² is located in another country.³ The Draft Convention also covers assignments of receivables where the assignor is located in one country and the assignee is located in another country.⁴ The rules for determining the location of a party are still being developed by the working group. One approach being discussed in the working group is for a party to be located, for purposes of the Convention, where it maintains its chief executive office or, in the case of an individual, at the residence of the chief executive officer.⁵ The working group may develop special rules to determine the location of debtors⁶ or banks acting through foreign branch offices.⁷

2.2. Convention Countries

The Draft Convention applies when the assignor is located in a country adopting the Draft Convention.⁸ An assignee need not be located in a country adopting the Draft Convention. But the rights and obligations of a debtor may not be affected by the

² The Draft Convention defines the party that owes the receivable as the "debtor." See *Draft Convention, supra* note 1, art. 2(a), at 10.

³ See *id.* arts. 1(1)(a) and 3, at 8-9.

⁴ See *id.*

⁵ See *id.* art. 5(j), (k), at 17, and remarks 4-10 to art. 5, at 18-20.

⁶ The desire to fix one location for a party reflects a concern that only one jurisdiction's laws should determine priority among competing assignees of the same receivables, the priority over lien creditors, a bankruptcy trustee, or other insolvency administrator of the assignor. But this concern relates in great measure to determining the location of the assignor. There may be a possibility of permitting more flexibility in determining the location of a debtor, especially where the debtor operates through a number of branch offices, only one of which is involved in the creation of the receivable.

⁷ While other business organizations typically operate outside of their home countries through separate subsidiaries, banks often operate through branches. Typically, a foreign branch of a bank will be subject to regulation in the foreign jurisdiction as a branch and will be treated much like a separate legal entity. A rule that a branch of a bank is located in the jurisdiction of the branch would facilitate securitizations by the branch under the laws in which the branch is located. Cf. U.C.C. § 9-307(i) (1998).

⁸ See *Draft Convention, supra* note 1, art. 1(1)(a), at 8.

Draft Convention unless the debtor is located in a country adopting the Draft Convention or the contract under which the receivable arises is governed by the law of a country adopting the Draft Convention.⁹

2.3. *Assignment to Cover Secured Transactions and True Sales*

The Draft Convention uses the term “assignment” to include both an extension of credit secured by a receivable and a “true sale” of the receivable.¹⁰

2.4. *Receivable to Include All Rights to Payment*

A “receivable” under the Draft Convention is any contractual right to receive payment in money.¹¹ Accordingly, the term “receivable” includes contractual receivables arising from the sale or lease of personal or real property, the provision of services, the extension of credit, claims under policies insurance and reinsurance, and the licensing of intellectual property or information. A “receivable” may be either a commercial or a consumer receivable. A “receivable” does not include noncontractual rights to payment in money from, for example, tort claims, tax claims, or claims arising by operation of law, unless the claim is reduced to and evidenced by a settlement agreement or other contract.¹²

2.5. *Exclusions*

Exclusions in the current draft of the Convention deal with negotiable instrument transactions,¹³ assignments by consumers for consumer purposes,¹⁴ and receivables arising out of the sale of a business or change in legal status (e.g., by way of merger) of the assignor.¹⁵ Other general or limited exclusions are being considered by the working group.¹⁶

⁹ See *id.* art. 1(2), at 9.

¹⁰ See *id.* art. 2(a), at 10.

¹¹ See *id.*

¹² See *id.* remarks to art. 2, at 10-11.

¹³ See *id.* art. 4(1)(b), at 11.

¹⁴ See *id.* art. 4(1)(a), at 11.

¹⁵ See *id.* art. 4(1)(c), at 12.

¹⁶ The working group will consider at its October 11-22, 1999 meeting whether certain transactions should be excluded from the Convention or whether, as an alternative, some of the Convention rules should be modified for those transactions. The transactions to be considered include assignments

2.6. *Variation by Agreement*

The Draft Convention permits the parties to a contract, by which a receivable is created or assigned, to vary the terms of the Draft Convention by agreement. The agreement between these parties, as a matter of contract between them, may not, however, vary the rights of any third party under the Draft Convention without the third party's consent.¹⁷

3. FORMATION

3.1. *Writing*

The Draft Convention does not require that an assignment be in writing or contain other formalities such as signatures of witnesses or notarial seals. Those requirements are left to national law under the Draft Convention.¹⁸

3.2. *Bulk Assignments*

The Draft Convention validates assignments of receivables in bulk, *i.e.*, the Draft Convention does not require that each receivable be identified individually. General descriptions of receivables in an assignment are effective so long as the receivables are described in such a way as to be identifiable to the assignment.¹⁹

of receivables arising out of a bank deposit account where the debtor is a depository bank, a securities or commodity account where the debtor is a securities or commodity intermediary, or a derivative or repurchase agreement where the debtor is a derivative or repurchase agreement counterparty. Some in the working group believe that the Convention could accommodate these transactions so long as the rights and obligations of the debtor in any of these transactions are not affected by the Convention without the debtor's consent. The Draft Convention also suggests in art. 4(2) that the working group should consider whether an individual country should be permitted to exclude particular transactions from the Convention by declaration at the time of the country's adoption of the Convention. *See id.* art. 4(2), at 12.

¹⁷ *See id.* art. 6, at 20.

¹⁸ *See id.* remark 1 introducing Chapter III, at 21.

¹⁹ *See id.* art. 8(1), at 21.

3.3. *Future Assignments*

The Draft Convention permits, as a matter of contract between assignor and assignee, future receivables to be assigned by a present assignment.²⁰

3.4. *Anti-Assignment Clauses*

The Draft Convention permits a receivable to be assigned, notwithstanding that the agreement between the assignor and the debtor restricts assignment by the assignor.²¹ The debtor retains, against the assignor, any right that the debtor has for breach of the assignment restriction.²²

3.5. *Supporting Obligations*

The Draft Convention provides that an assignment of a receivable is also an assignment of any guaranty or collateral supporting or securing the payment of the receivable.²³

3.6. *Governmental Debtors*

If a restriction on assignment of a receivable is contained in a contract with a governmental debtor, whether that restriction is contained in the primary contract under which the receivable arises or in a supporting obligation (such as a guaranty), the assignment is still effective as between the assignor and the assignee.²⁴ However, the governmental debtor, unless acting in a commercial capacity, need not recognize or otherwise deal with the assignee.²⁵

3.7. *Proceeds*

The current draft of the Convention suggests that further discussion among the working group is needed to resolve the right of the assignee to the actual proceeds of the assigned receivables if the proceeds are not paid directly to the assignee.²⁶ The current

²⁰ See *id.* art. 8(2), at 22.

²¹ See *id.* art. 10(1), at 22.

²² See *id.* art. 10(2), at 22.

²³ See *id.* art. 11, at 23.

²⁴ See *id.* art. 12, at 23-24.

²⁵ See *id.*

²⁶ See *generally id.* arts. 26-28 and the remarks thereto, at 35-40.

draft offers, as a suggestion to the working group, a limited cash proceeds rule, which would apply even in those jurisdictions that do not recognize the concept of proceeds.²⁷ It also offers a choice of law rule for determining rights to actual proceeds in other situations.²⁸

4. RIGHTS OF DEBTORS

4.1. *Notice and Payment Instructions*

The Draft Convention provides for the assignor and the assignee to agree as to when a debtor should be notified of the assignment and when to make payments to the assignee.²⁹ The parties are encouraged to provide the notification and instructions in the language of the contract out of which the receivables arise.³⁰ The notification and instructions may not require payment in a currency or State different from that required in the contract with the debtor.³¹

4.2. *Debtor Discharge*

When notified of the assignment and instructed to make payment to the assignee, and assuming that the debtor receives any requested reasonable evidence of the assignment if notice of the assignment is given by the assignee, the debtor is discharged by paying the assignee.³² However, the debtor retains the right to obtain a discharge under other law by paying the person entitled to payment or by following any local procedures for depositing disputed funds into court.³³

4.3. *Recoupment and Set-Off*

The Draft Convention generally preserves a debtor's rights of recoupment and set-off on an assigned receivable.³⁴ A debtor may

²⁷ See *id.* art. 26, at 37.

²⁸ See *id.* art. 26, at 35-36.

²⁹ See *id.* art. 15, at 26.

³⁰ See *id.* art. 18(1), at 28.

³¹ See *id.* art. 17(2), at 27-28.

³² See *id.* arts. 19(2), (6), at 28.

³³ See *id.* art. 19(7), at 29.

³⁴ See *id.* art. 20(1), at 31.

not, however, set-off against a receivable a claim against the assignor arising under an unrelated contract after the debtor's receipt of notice of the assignment of the receivable to the assignee.³⁵

4.4. *Agreements Not to Assert Claims or Defenses*

The Draft Convention validates an agreement by a commercial debtor not to assert claims or defenses against an assignee of a receivable.³⁶

4.5. *Contract Modification*

The Draft Convention provides rules for determining when a modification of a contract from which a receivable arises is binding upon an assignee. Generally, an assignor and a debtor may not modify the terms of a fully earned receivable where the debtor has already been notified of the assignment of the receivable.³⁷

4.6. *Assignee Liability*

The Draft Convention protects an assignee from contractual liability to a debtor if the assignee accepts an assignment of a receivable which contains a restriction on assignment.³⁸ The Draft Convention also protects an assignee from liability for any claims made by a commercial debtor to recover from the assignee any payments previously made to the assignor or the assignee for the receivables assigned.³⁹

5. PERFECTION, PRIORITY, AND OTHER THIRD PARTY RIGHTS

5.1. *Perfection*

An assignment under the Draft Convention is perfected against a lien creditor, a trustee in bankruptcy, or other insol-

³⁵ See *id.* art. 20(2), at 31.

³⁶ See *id.* art. 21, at 31-32.

³⁷ See *id.* art. 22, at 32.

³⁸ See *id.* art. 10(2), at 22.

³⁹ See *id.* art. 23, at 32.

veny administrator if the assignment is perfected under the laws of the jurisdiction in which the assignor is located.⁴⁰

5.2. *Priority*

In the case of competing assignees, priority is determined under the laws of the jurisdiction in which the assignor is located.⁴¹

5.3. *Bankruptcy*

The Convention is not intended to affect local bankruptcy or insolvency rules or procedures, such as those dealing with stays of enforcement actions, preferences, fraudulent transfers, rights to use cash collateral, rights of a bankruptcy trustee or other insolvency administrator to charge unperformed receivables for the expenses incurred by the bankruptcy or insolvency estate in their performance.⁴² The Draft Convention preserves the right of a local bankruptcy court not to apply the Draft Convention's perfection and priority choice of law rules if those rules would cause the court to apply a law of another country and result in a clear violation of the public policy of the forum country.⁴³ The working group is considering whether to include a provision encouraging each country adopting the Convention to state, in its instrument of adoption or in a subsequent Convention filing, the provisions of the country's own laws which would permit superior claims or interests to be charged against the assigned receivables in a bankruptcy of the assignor in that country.⁴⁴

⁴⁰ See *id.* arts. 24-25, at 33-35. See *supra* Section 2 (discussing the status of the working group's discussions for determining the location of a party under the Convention).

⁴¹ See *Draft Convention, supra* note 1, arts. 24-25, at 33-35.

⁴² An assignee who has priority in a receivable has a right to the receivable in preference to another party. See *id.* art. 5(j), at 17. If the forum for resolving priority is the forum of the jurisdiction in which the assignor is located, all aspects of the assignee's priority are determined by the law of that jurisdiction. Assuming that the assignee has priority under the laws of that jurisdiction, the assignee has priority under the Convention absent a manifestly contrary public policy of the forum country. See *id.* art. 25(3), at 34. If the forum for resolving priority is a forum of another jurisdiction, the rights of competing creditors of the assignor and of the assignor's insolvency administrator are preserved on all matters other than priority, subject to privileged or preferential claims under the law of the forum jurisdiction. See *id.* art. 25(4)-(5), at 34.

⁴³ See *id.* art. 25(3), at 34.

⁴⁴ See *id.* art. 25(5), at 34.

6. OTHER PROVISIONS

6.1. *Subsequent Assignments*

The Draft Convention applies to an assignment covered by the Draft Convention even if an earlier assignment of the same receivable is not covered by the Draft Convention.⁴⁵ The Draft Convention also applies to a later assignment of a receivable that was covered in the Draft Convention in an earlier assignment.⁴⁶

6.2. *Choice of Law Rules*

The working group is considering whether the Convention should contain choice of law rules that would apply independently of other provisions of the Convention. For example, the Convention might supply a choice of law rule relating to an assigned receivable where the assignor or the debtor is not located in a country adopting the Convention.⁴⁷

6.3. *Uniform Perfection and Priority Rules*

The working group is attempting to develop alternative substantive rules for perfection and priority that countries adopting the Convention may elect to apply on a uniform basis with other countries adopting the same elective Convention rules. One alternative is for a substantive perfection and priority rule based on first in time of actual assignment. The other alternative is for a substantive perfection and priority rule based on a first-in-time in completing a public notice filing of the assignment.⁴⁸

6.4. *Notice Filing*

The working group is also considering a set of uniform notice filing rules and procedures that may lead to the creation of an international registry for notice filings on assigned receivables. These rules would apply to those countries that adopt the Con-

⁴⁵ See *id.* art. 1(1)(c), at 9. In the case of a subsequent assignment by an assignee, the assignee is itself an assignor under the Draft Convention. See *id.* art. 2(b), at 10.

⁴⁶ See *id.* art. 1(1)(b), at 8.

⁴⁷ See *id.* art. 1(3), at 9 and ch. V, at 37-42.

⁴⁸ See *id.* art. 1(4), at 9 and the Annex to the Draft Convention, at 46-50.

vention and the substantive perfection and priority rule based on notice filing.⁴⁹

7. CONCLUSION

The Convention is taking shape to provide uniform rules for assignments of receivables in cross-border transactions. There is further work to be done, including: formulating rules for determining the location of parties, whether and how the Convention should apply to certain financial services transactions, determining whether and how the Convention will recognize the concept of proceeds of receivables, and establishing priority for a receivables assignee without disrupting local bankruptcy rules and procedures. In addition, further discussions by the working group will be necessary if the Convention is to include choice of law rules apart from the otherwise applicable provisions of the Convention and uniform substantive priority rules, including those based upon notice filing. Still, hopefully the Convention will be completed at the beginning of the next millenium, in time to offer to the global business and financial communities a uniform framework for cross-border receivable assignment transactions.

⁴⁹ *See id.*