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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS THIRTIETH SESSION
(New York, 1 - 12 March 1999)

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I. INTRODUCTION

1. At the present session, the Working Group on International Contract Practices continued its work on the preparation of a uniform law on assignment in receivables financing, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2–26 May 1995).[1/] That was the seventh 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 from 17 to 21 May 1992 in conjunction with the twenty-fifth session. 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 (1980) had decided to defer to 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 (where the assignor, the assignee and the debtor were not 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, 8–19 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/ Ibid., Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26–28.

3/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297–301; ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208–214; and ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374–381.

5. At its twenty-ninth session (1996), the Commission had before it the report of the twenty-fourth session of the Working Group (A/CN.9/420). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously.[4/]

6. At its twenty-fifth and twenty-sixth sessions (New York, 8–19 July and Vienna, 11–22 November 1996), the Working Group continued its work by considering different versions of the draft uniform rules contained in two notes prepared by the Secretariat (A/CN.9/WG.II/WP.87 and A/CN.9/WG.II/WP.89). 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 private international law provisions (A/CN.9/434, para. 262).

7. At its thirtieth session (1997), the Commission had before it the reports of the twenty-fifth and twenty-sixth sessions of the Working Group (A/CN.9/432 and A/CN.9/434). The Commission noted that the Working Group had reached agreement on a number of issues and that the main outstanding issues included the effects of the assignment on third parties, such as the creditors of the assignor and the administrator in the insolvency of the assignor.[5/] In addition, the Commission noted that the draft Convention had aroused the interest of the receivables financing community and Governments, since it had the potential of increasing the availability of credit at more affordable rates.[6/]

8. At its twenty-seventh and twenty-eighth sessions (Vienna, 20–31 October 1997, and New York, 2–13 March 1998), the Working Group considered two notes prepared by the Secretariat (A/CN.9/WG.II/WP.93 and A/CN.9/WG.II/WP.96). At its twenty-eighth session, the Working Group adopted the substance of draft articles 14 to 16 (assignor and assignee) and 18 to 22 (debtor and other third parties) and requested the Secretariat to revise draft article 17 (A/CN.9/447, paras. 161–164 and 68 respectively).

9. At its thirty-first session (1998), the Commission had before it the report of the twenty-seventh and twenty-eighth sessions of the Working Group (A/CN.9/445 and A/CN.9/447). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously so as to complete its work in 1999 and submit the draft Convention for adoption by the Commission at its thirty-third session (2000).[7/]

10. At its twenty-ninth session (Vienna, 5–16 October 1998), the Working Group considered two notes prepared by the Secretariat (A/CN.9/WG.II/WP.96 and A/CN.9/WG.II/WP.98), as well as a note containing the report of a group of experts prepared by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.II/WP.99). At that session, the Working Group adopted the substance of the preamble and draft articles 1(1) and (2) (scope), 5 (g) to (j) (definitions), 18(5*bis*) (debtor's discharge by payment), 23 to 33 (priority and private international law issues) and 41 to 50 (final provisions; A/CN.9/455, para. 17).

4/ Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), para. 234.

5/ Ibid., Fifty-second Session, Supplement No. 17 (A/52/17), para. 254.

6/ Ibid., para. 256.

7/ Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), para. 230.

11. The Working Group, which was composed of all States members of the Commission, held the present session in New York from 1 to 12 March 1999. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Botswana, Burkina Faso, Cameroon, China, Colombia, Egypt, Fiji, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland and United States of America.

12. The session was attended by observers from the following States: Belarus, Bolivia, Canada, Croatia, Czech Republic, Ecuador, Gabon, Indonesia, Iraq, Ireland, Kuwait, Lesotho, Netherlands, Pakistan, Poland, Republic of Korea, Saudi Arabia, Senegal, Sweden, Switzerland, Turkey and Venezuela.

13. The session was attended by observers from the following international organizations: Association of the Bar of the City of New York (ABCNY), Cairo Regional Centre for International Commercial Arbitration, Commercial Finance Association (CFA), European Federation of National Factoring Associations (EUROPAFACTORING), Factors Chain International (FCI), Fédération bancaire de l'Union européenne, International Bar Association (IBA), International Institute for the Unification of Private Law (Unidroit) and Union internationale des Avocats (UIA).

14. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Aly Gamaledin Awad (Egypt).

15. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.II/WP.101), a note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing" (A/CN.9/WG.II/WP.96), another note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing: remarks and suggestions" (A/CN.9/WG.II/WP.98), a proposal by the United States of America entitled "Discharge of the debtor by payment: proposed revision of articles 5, 16 and 18" (A/CN.9/WG.II/WP.100) and another note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing: remarks and suggestions" (A/CN.9/WG.II/WP.102).

16. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of draft Convention on Assignment in Receivables Financing.

4. Other business.

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

17. The Working Group considered the title, the preamble and draft articles 1 to 24, as set forth in documents A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98, A/CN.9/WG.II/WP.100 and A/CN.9/WG.II/WP.102.

18. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapters III to V. The Working Group adopted the title, the preamble and draft articles 1 to 24 and, with the exception of draft articles 23 and 24, referred them to a drafting group established by the Secretariat to align the various language versions.

III. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

A. Title

19. The Working Group decided to defer discussion of the title of the draft Convention until it had completed its review of chapter I and draft article 5 (see paras. 60-65).

B. Preamble

20. The text of the preamble as considered by the Working Group was as follows:

"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 content and choice of legal regime applicable to assignments in international trade constitute an obstacle to financing transactions,

"*Desiring* to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to receivables financing, while protecting existing financing practices and facilitating the development of new practices,

"*Also desiring* to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,

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

"*Have agreed* as follows:"

21. It was noted that, in order to reflect in the preamble the main objectives of the draft Convention in a more balanced way, the principle of debtor-protection had been moved from draft article 7 to the preamble (and to draft article 17 *ter*; see paras. 81 and 168-176). Subject to that change, the Working Group adopted the preamble and referred it to the drafting group (in the context of its consideration of draft article 5 (d), the Working Group reopened discussion on the preamble; see paras. 60-65).

C. Discussion of draft articles

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

22. The text of article 1 as considered by the Working Group was as follows:

"(1) This Convention applies to:

(a) 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;

(b) assignments of receivables by the initial or any other assignee to subsequent assignees ("subsequent assignments") provided that any prior assignment is governed by this Convention; and

(c) subsequent assignments that are governed by this Convention under subparagraph (a) of this paragraph, notwithstanding that any prior assignment is not governed by this Convention.

"(2) This Convention applies to subsequent assignments as if the subsequent assignee who exercises its right to assign were the initial assignor and as if the subsequent assignee to whom the assignment is made were the initial assignee.

"(3) This Convention does not affect the rights and obligations of the debtor unless the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State.

"[(4) 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 (3) of this article] [independently of the provisions of this chapter]. However, the provisions of articles 29 to 31 do not apply if a State makes a declaration under article 42 *bis*.]

"(5) Chapter VII applies in a Contracting State which has made a declaration under article 43.

"[(6) [In the case of an assignment of more than one receivable by more than one assignor, this Convention applies if any assignor is located in a Contracting State.] In the case of an assignment of more than one receivable owed by more than one debtor, this Convention does not affect the

rights and obligations of any debtor unless that debtor is located in a Contracting State or the law governing the receivable owed by that debtor is the law of a Contracting State.

"(7) This Convention applies to additional practices listed in a declaration made by a State under draft article 42 *ter*.]"

Paragraphs (1) to (3)

23. It was noted that, at its previous session, the Working Group had already adopted the substance of paragraphs (1) to (3) (A/CN.9/455, paras. 169 and 172). It was also noted that draft article 25, dealing with the scope of application of the draft Convention with regard to subsequent assignments, had been incorporated into draft article 1 slightly modified (to the effect that the subsequent assignee who further assigned the receivables previously assigned was treated as the initial assignor, while the subsequent assignee who received the receivables previously assigned was treated as the initial assignee).

24. While there was general support for the substance of paragraphs (1) to (3), several suggestions were made with regard to the placement in the text of paragraph (2). One suggestion was that it should be included in draft article 5, since it contained a rule of interpretation. Another suggestion was that it should be retained in chapter I (either in draft article 1 or in draft article 2), since it related to the scope of the draft Convention. The Working Group adopted paragraphs (1) to (3) and referred the question of their specific formulation and of the placement of paragraph (2) to the drafting group (in the context of its consideration of draft article 5 (l), the Working Group reconsidered the reference to the "time of assignment", contained in paragraph (1); see paras. 76-78).

Paragraph (4)

25. It was noted that paragraph (4) dealt with the question of the scope or the purpose of the private international law rules of the draft Convention (chapter VI). In addition, it was noted that, if the first set of bracketed language were to be deleted, the private international law rules of the draft Convention would apply irrespective of whether the assignor or the debtor would be located in a Contracting State, or whether the law governing the receivable would be the law of a Contracting State. Moreover, it was noted that, if the bracketed language were to be deleted and the second set of bracketed language were to be retained, the private international law provisions of the draft Convention would apply independently of the other scope provisions contained in chapter I, in particular of the definition of internationality contained in draft article 3. It was also noted that the Working Group would need to consider a number of questions, including the questions whether: paragraph (4) should be moved to chapter VI; States should be allowed to adopt only chapter VI; and whether additional language should be inserted in the draft Convention to ensure that a Contracting State would apply the substantive law provisions before resorting to the application of the private international law provisions of the draft Convention.

26. While it was noted that, at its previous session, the Working Group had decided to make the application of chapter VI subject to an opt-out clause (A/CN.9/455, para. 72), the view was expressed that chapter VI should be deleted or, at least, its application should be made subject to an opt-in clause. While some support was expressed in favour of that view, the prevailing view was that chapter VI should be retained in the draft Convention, subject to an opt-out by States, and that the matter should be revisited when the Working Group had an opportunity to consider the substance of chapter VI.

Paragraph (5)

27. It was noted that chapter VII had been moved to the annex to the draft Convention. General support was expressed in favour of making the application of the annex subject to an opt-in by States. Subject to replacing the reference to chapter VII with a reference to the annex, the Working Group adopted paragraph (5).

Paragraph (6)

28. It was pointed out that the concept of multiple parties arose in a number of provisions (i.e. draft articles 1 (6), 3 (2) and (3), 5 (k)). In view of the fact that the concept related to specific practices, the Working Group decided to defer consideration of those provisions until it had completed its review of the draft Convention, in order to allow for consultations with regard to the practices involving multiple parties (see paras. 45 and 223-227).

Paragraph (7)

29. The Working Group decided to defer discussion of paragraph (7) until it had an opportunity to consider draft article 2 (see para. 43).

Territorial scope of application and internationality ("location")

30. Before concluding its deliberations on draft article 1, the Working Group considered the meaning of the term "location" for the purposes of determining the territorial scope of application of the draft Convention and the internationality of an assignment or a receivable. It was noted that draft article 5 (k), which had been prepared by the Secretariat in order to reflect the discussions of the Working Group at its previous session (A/CN.9/455, paras. 163-169), defined "location" for the purposes of draft articles 1 and 3 by reference to the place of business with the closest connection to the relevant contract, introducing a rebuttable presumption that that place was the place where a legal person had its central administration. It was also noted that, in view of draft article 5 (j) which defined "location" for the purpose of draft articles 23 and 24 by reference to the place of incorporation, the Working Group would need to consider the question whether a single definition for the purposes of the draft Convention as a whole would be preferable.

31. Diverging views were expressed. One view was that "location" of a legal person should be defined by reference to its place of incorporation. In support of that view, it was stated that a place-of-incorporation approach would result in reference being made to a single and easily determinable jurisdiction. Such an approach, it was said, would provide certainty as to the application of the draft Convention, thus potentially having a beneficial impact on the availability and the cost of credit. In addition, it was observed that, if "location" of a legal person were to be defined by reference to the closest relationship of a transaction with a particular place business, it would be very difficult, in particular for third parties, to determine in each case where the relevant place of business might be. It was stated that such an approach would have a negative impact on the availability and the cost of credit.

32. Moreover, it was pointed out, in order to avoid producing inconsistent results, the Working Group would have to define the term "location" for the purposes of the draft Convention in the same way as it had defined it for the purposes of draft articles 23 and 24 (i.e. by reference to the place of incorporation). It was also stated that in a variety of service-related transactions, in which services were provided by various branch offices of a corporation, it would be difficult and unnecessary to refer to the place of business of the branch offices that were involved in the transaction. In such a case, it would be

easier and more sensible from a practical point of view to refer to the place of incorporation of the company. It was further pointed out that reference to the place of business with the closest relationship to the assignment might lead to inconsistent results (e.g., various assignments of the same receivables by the assignor might be subject to different legal regimes, simply because they might be most closely connected with different jurisdictions).

33. Another view was that "location" should be defined by reference to that place of business which was most closely connected with the relevant contract. In favour of that view, it was pointed out that a place-of-business approach would provide sufficient certainty, since it was a well-known term, used in a number of uniform laws and sufficiently explained in existing case law. In addition, it was stated that such an approach would provide flexibility in that it would result in focusing in each case on the relevant place of business, i.e., the place of business which would be most closely connected with the relevant transaction (the assignment for the assignor and the assignee, and the original contract for the debtor).

34. While a place-of-incorporation approach had been found to be acceptable in the context of draft articles 23 and 24, it was stated that such an approach would not be appropriate for the purpose of the scope provisions, since the place of incorporation could be a fictitious place and referring to it in that context could inadvertently result in the application of the draft Convention to purely domestic transactions. In that connection, it was observed that, while a place-of-incorporation approach could be followed in order to protect the rights of third parties, it would not be workable with regard to the debtor, since it could inadvertently result in exposing the corporate debtor/branch to the law of a fictitious jurisdiction, thus compromising debtor-protection, one of the main objectives of the draft Convention. In addition, it was pointed out that an approach based on the place of incorporation could also lead to a situation in which the draft Convention would not apply to a clearly international transaction. Moreover, it was said that use of the term "place of incorporation" might fail to promote its stated goal of achieving certainty, since that term was not universally understood in the same way and, unlike the place of business which normally appeared on the letterhead of a corporation, was not readily available to third parties. It was further mentioned that such an approach might inadvertently result in the non-application of the draft Convention to cases in which a corporation had its actual place of business in one or more places, while it was incorporated in a tax haven, which would typically not be a Contracting State. A reference to the place of incorporation, i.e., the nationality of a corporation, was further said to be inconsistent with the normal approach of focusing on the residence, not on the nationality, of persons for the purpose of determining their location.

35. In order to bridge the gap between the above-mentioned diverging views, a number of suggestions were made, including the suggestions to refer to the chief executive office, to the place of organization, to the place of registration (at least with regard to the assignor and the assignee, but not necessarily the debtor, so as to address the problem mentioned in para. 33), to the place of business with a rebuttable presumption in favour of the place of central administration or of incorporation, or to the place in which a receivable was created (e.g., in the case of goods, the place from which the goods were shipped or the invoice was sent). With regard to the latter suggestion, it was stated that, while the territorial scope of the draft Convention could be determined on the basis of the place where the receivable had arisen, internationality could be defined by reference to place of registration, place of business, place of chief executive office or of habitual residence, in the case of individuals.

36. While some interest was expressed in those suggestions, the Working Group was unable to reach agreement on the definition of the term "location". With regard to the chief executive office, place of organization or place of registration, it was observed that a reference to any of those places would result

in inappropriately subjecting the transactions of branches of a corporation to the law of the head office. In addition, it was stated that use of the terms "place of organization" and "place of registration" would inadvertently result in uncertainty as to the application of the draft Convention, as those terms were not universally understood in the same way. As to the combination of the place of business with the place of central administration or of incorporation, it was stated that it failed to introduce a sufficient degree of certainty as to the application of the draft Convention and, in particular, as to the rights of third parties.

37. After discussion, the Working Group decided to retain both subparagraphs (j) and (k) within square brackets on the understanding that the matter would need to be revisited at the next session of the Working Group, in the context of all the provisions of the draft Convention in which reference to the location of a person was made (i.e. draft articles 1, 3, 9, 17 *bis*, 19 (2), 20 (1), 22–24, 29–33 and 46 (3)).

Article 2. Assignment of receivables

38. The text of draft article 2 as considered by the Working Group was as follows:

> "For the purposes of this Convention, 'assignment' means the transfer by agreement from one person ('assignor') to another person ('assignee') of the assignor's contractual right to payment of a monetary sum ('receivable') from a third person ('the debtor'), including the creation of rights in receivables as security for indebtedness or other obligation."

39. It was noted that the draft Convention mainly focused on assignment as a transfer of property rights in receivables and that it was not intended to apply to agreements to assign, except where it expressly provided otherwise (e.g., draft articles 14–17). In addition, it was noted that, in view of the fact that the draft Convention dealt only in exceptional cases with the financing contract or the agreement to assign, the reference to "value, credit or services being given or promised" in return for the receivables assigned, which was contained in an earlier version of the definition of "assignment" (A/CN.9/WG.II/WP.96, draft article 2), could be deleted. Moreover, it was noted that, in view of the fact that often all rights arising under a contract were assigned, covering in the draft Convention only the assignment of rights to payment could result in different parts of the same transaction being subjected to different legal regimes. It was also noted that that problem would not arise in the case of assignments of contracts (which involved an assignment of contractual rights and a delegation of obligations), since such contracts were involved in exceptional transactions that could be left outside the scope of the draft Convention.

40. There was general support in the Working Group for the substance of draft article 2. It was widely felt that the draft Convention should cover outright assignments and assignments by way of security, as well as related transactions involving the transfer of receivables or the creation of security rights in receivables (e.g., contractual subrogation and pledge of receivables). It was stated that such an approach was appropriate in particular in view of the fact that, in certain legal systems, significant receivables financing transactions, such as factoring, involved a contractual subrogation or pledge rather than the assignment of receivables. In that connection, it was recalled that an explicit reference to such transactions, contained in an earlier version of draft article 2 (A/CN.9/WG.II/WP.93), had been deleted on the understanding that listing such related practices might inadvertently result in excluding some of them (A/CN.9/445, para. 151). In order to avoid creating any doubt with regard to that matter, it was agreed that the commentary could usefully clarify it. It was also agreed that the commentary could also elaborate on the fact that the draft Convention, rather than creating a new type of assignment, was aimed

at providing uniform rules on assignment and assignment-related practices currently existing under national law.

41. As to the specific formulation of draft article 2, the suggestion was made that the word "including" should be replaced by the word "or", since in some legal systems the creation of a security right in receivables did not constitute a transfer. In that connection, it was recalled that the reference to the creation of security rights in receivables had been included in draft article 2 in order to reflect the Working Group's agreement that the mere creation of a security interest that did not involve a transfer should be covered by the draft Convention (A/CN.9/445, para. 152).

42. With regard to receivables arising by law (e.g., tort or tax receivables), while some support was expressed in favour of the view that the draft Convention should apply to their assignment, it was agreed that that was not necessary, since no significant financing practice existed with regard to such receivables.

43. After discussion, the Working Group adopted the substance of draft article 2 and referred it to the drafting group. In view of its decision to cover only the assignment of contractual receivables, the Working Group decided to delete paragraph (7) of draft article 1, which was intended to accommodate those States that would wish to apply the draft Convention to the assignment of receivables arising by operation of law (see para. 29).

Article 3. Internationality

44. The text of draft article 3 as considered by the Working Group was as follows:

> "[(1)] 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.
>
> "[(2) [In the case of an assignment of more than one receivable by more than one assignor, the assignment is international if any assignor and the assignee are located in different States. In the case of an assignment of more than one receivable to more than one assignee, the assignment is international if the assignor and any assignee are located in different States.
>
> "(3) In the case of more than one receivable owed to more than one creditor, the receivable is international if any assignor and the debtor are located in different States.] In the case of an assignment of more than one receivable owed by more than one debtor, only that receivable is international in which the assignor and the debtor are located in different States.]"

45. The Working Group found the substance of paragraph (1) to be generally acceptable and referred it to the drafting group. With respect to paragraphs (2) and (3), the Working Group deferred its final decision until it had completed its review of the draft Convention, in order to allow for consultations with regard to the financing practices involving multiple parties (see paras. 28 and 223-227).

Article 4. Exclusions

46. The text of draft article 4 as considered by the Working Group was as follows:

"[(1)] This Convention does not apply to assignments made:

(a) for personal, family or household purposes;

(b) to the extent made by endorsement and delivery or only by 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.

"[(2) This Convention does not apply to assignments listed by a State in a declaration made under draft article 42*quater*.]"

Paragraph (1)

47. The substance of paragraph (1) was found to be generally acceptable. With respect to subparagraph (a), however, a concern was expressed that the reference to assignments made "for personal, family or household purposes" might introduce some uncertainty to the extent that the purpose for which any given assignment had been made might not always be easily determined. In order to address that concern, it was agreed that the commentary would clarify, possibly by way of examples inspired from case law on article 1 of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as "the Sales Convention"), the types of assignments covered under the reference to "personal, family or household purposes". With regard to subparagraph (b), it was suggested that it might need to be reformulated in order to clarify that endorsement was not required in all cases (e.g., in negotiable instruments payable to the bearer). As to subparagraph (c), it was agreed that the commentary could usefully clarify that the assignment from the old to the new owner was excluded and not the assignment from the new owner to an institution financing the sale.

48. In order to avoid any interference with well-established and sufficiently regulated practices, the Working Group considered various suggestions as to additional practices that should be excluded from the scope of application of the draft Convention. One suggestion was to exclude operations of clearing houses settling payments between banks. The example was given of uncertificated securities, the transfer of which should continue to be effected under the rules of clearing houses. Another suggestion was that netting schemes, which might play an important role in transactions involving derivatives, should be excluded from the sphere of application of the draft Convention. Still another suggestion was that repo transactions, involving the sale and the buying back of securities, should be excluded. Still another suggested exclusion concerned swap agreements (which involved an undertaking to accept a risk, e.g., a floating charge, and in which any party could be a creditor or a debtor). It was explained that transactions involving clearing houses, netting arrangements and repo or swap agreements would typically include anti-assignment clauses or would condition the assignment on acceptance by the debtor and would thus contradict draft article 12. Yet another suggested exclusion concerned real estate leases that were typically recorded in a land registry and were often subjected to the law of the country where the real estate was located (i.e., the *lex situs*).

49. While the Working Group noted the importance of avoiding any interference with the normal operation of such transactions, it was widely felt that the issue should be considered further, possibly after additional consultation had been carried out with the relevant industry and practitioners in order to determine whether such (or other) transactions should be excluded from the scope of application of the

draft Convention altogether (either in paragraph (1) or in paragraph (2) of draft article 4), or simply excluded from the scope of draft article 12.

Paragraph (2)

50. It was noted that paragraph (2) was intended to allow States to exclude assignment practices other than those listed in paragraph (1). A note of caution was struck that such an approach might not be the most appropriate approach to law unification to the extent that: the scope of application of the draft Convention might differ from State to State; and unclear declarations by States might reduce certainty with regard to the application of the draft Convention. It was noted, however, that such an approach might make the draft Convention more acceptable to States.

51. It was stated that, in its current formulation, paragraph (2) did not clarify which State would have to make the declaration so that the draft Convention would not apply to assignments listed in that declaration. In order to address the matter, it was suggested that a reference should be included in paragraph (2) to the State of the assignor's location, since the territorial scope of the draft Convention was determined by reference to the assignor's location. It was observed that, for the same reason, reference would need to be made with respect to the provisions of the draft Convention that dealt with the debtor's rights and obligations to the State of the debtor's location.

52. Subject to addressing that matter, a task with which the Working Group entrusted the drafting group, the Working Group decided to retain paragraph (2) within square brackets, deferring final decision on paragraph (2) until it had concluded its discussion on paragraph (1).

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

53. The text of draft article 5 as considered by the Working Group was as follows:

"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 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 in writing which reasonably identifies the assigned receivables, the assignee and the person to whom or for whose account or the address to which the debtor is required to make payment;

"(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 or other competent authority for the purpose of reorganization or liquidation;

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

"(j) For the purposes of articles 23 and 24, an individual is located in the State in which it has its habitual residence; a corporation is located in the State in which it is incorporated; a legal person other than a corporation is located in the State in which its constitutive document is filed and, in the absence of a filed document, in the State in which it has its chief executive office;

"[(k) For the purposes of articles 1 and 3:

(i) the assignor is located in the State in which it has that place of business which has the closest relationship to the assignment;

(ii) the assignee is located in the State in which it has that place of business which has the closest relationship to the assignment;

(iii) the debtor is located in the State in which it has that place of business which has the closest relationship to the original contract;

(iv) in the absence of proof to the contrary, the place of central administration of a party is presumed to be the place of business which has the closest relationship to the relevant contract. If a party does not have a place of business, reference is to be made to its habitual residence;

(v) several assignors or assignees are located at the place in which their authorized agent or trustee is located;

"(l) 'Time of the assignment' means the time specified in an agreement between the assignor and the assignee and, in the absence of such an agreement, the time when the contract of assignment is concluded.]"

Subparagraph (a)

54. The substance of subparagraph (a) was found to be generally acceptable. Recalling its earlier decision to limit the scope of application of the draft Convention to assignments of contractual receivables (see para. 42), the Working Group decided that the words "if any" and the language in square brackets at the end of the subparagraph, which was intended to cover non-contractual receivables, should be deleted. Subject to that modification, the Working Group, adopted subparagraph (a) and referred it to the drafting group.

Subparagraph (b)

55. The view was expressed that, even if the scope of the draft Convention was limited to assignments of contractual receivables, the reference in subparagraph (b) to a decision of a judicial or other (e.g., arbitral or administrative) authority might nevertheless need to be retained in the event of a dispute over a contractual receivable. For consistency with subparagraph (a), however, the Working Group adopted subparagraph (b) without the bracketed portion of the text and referred it to the drafting group.

Subparagraph (c)

56. It was suggested that the definition of a future receivable should clarify that the operative event was the conclusion of the contract of assignment, rather than the act of assigning a given receivable. Subject to that amendment, the Working Group adopted subparagraph (c) and referred it to the drafting group.

Subparagraph (d)

57. It was noted that the definition of "receivables financing" had originally been included in draft article 5 when the term had been used in draft article 1 in order to circumscribe the scope of application of the draft Convention. It was also noted that, as the term "receivables financing" was no longer used in the text, other than in the title, in the preamble and in draft article 14 (3), the question arose as to whether there remained any need for a definition of the term.

58. There was general agreement in the Working Group that, if the term "receivables financing" was to remain in the title of the draft Convention, it ought to appear either in the definitions, or in the preamble or in the commentary. Various views were expressed with respect to the manner in which and the place where the notion of "receivables financing" should be dealt with in the draft Convention. One view was that, if the term appeared in the title, a definition had to be provided in the draft Convention. Another view was that, although a definition was not strictly necessary, it could play an instructive role. However, a concern was expressed that, if the term were to be retained in the definitions, then it could be used to interpret the scope of the draft Convention too narrowly, limiting the application of the draft Convention only to assignments of receivables made for financing purposes. Another concern, referring to the formulation of the definition of "receivables financing", was that the current definition was incomplete and that, as a consequence, existing or future practices might fall outside of the scope of the

draft Convention. It was therefore suggested that, should a definition of "receivables financing" be retained, the current text should be revised so that it would not be exclusive; under that suggestion, the beginning of the second sentence of subparagraph (d) would be amended to read that "receivables financing includes, but is not limited to, ..."

59. Another view was that, rather than incorporating the term "receivables financing" and defining it in the text of the draft Convention, it could be referred to in the commentary. In that connection, however, a concern was expressed that the visibility and value of the reference would be considerably minimized, in view of the fact that the commentary would not have the same status as the text of the draft Convention itself.

60. Yet another view was that the definition of the term "receivables financing" should be incorporated into the preamble. It was generally felt, however, that retaining the reference to the term "receivables financing" in both the title and the preamble, while having included no such reference in draft article 1, might result in uncertainty as to the scope of the draft Convention. A concern was expressed that the inconsistency between the title and the preamble, on the one hand, and draft article 1 on the other, would only be enhanced if the definition of receivables financing were also to be incorporated in the preamble, or retained in the definitions.

61. In an attempt to resolve that inconsistency, a suggested revision of the title and preamble was proposed. With respect to the title, it was suggested that it should be revised to read "Draft Convention on Assignment of Receivables" or "Draft Convention on Assignment of Receivables in International Trade". As to the preamble, it was suggested that it should be revised to read as follows:

> "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* problems created by uncertainties as to the content and choice of legal regime applicable to assignment of receivables in international trade,
>
> "*Desiring* to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to assignment of receivables, including but not limited to assignments used in factoring, forfaiting, securitization, project financing and refinancing, while protecting existing assignment practices and facilitating the development of new practices,
>
> "*Also desiring* to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,
>
> "*Being of the opinion* that the adoption of uniform rules governing assignments in receivables would facilitate the development of international trade and promote the availability of capital and credit at more affordable rates,"

62. It was pointed out that, if the proposed changes to the title and the preamble were to be adopted by the Working Group, the definition of "receivables financing" would be superfluous and a

consequential amendment would be necessary in draft article 14 (3), to replace the term "receivables financing practice" with "assignment practice".

63. A concern was expressed that revising the title of the draft Convention might exceed the mandate that had been given to the Working Group. It was recalled that the mandate given to the Working Group was to prepare a uniform law, the main purpose of which would be to remove obstacles to receivables financing arising from the uncertainty as to the validity and legal effect of assignment of receivables in international trade.[8/] The approach taken by the Working Group, according to which, while the main focus of the draft Convention would be on financing transactions, other related transactions should not be excluded (A/CN.9/420, paras. 41–43, A/CN.9/432, paras. 14–18 and A/CN.9/434, para. 18), was not inconsistent with the mandate given by the Commission to the Working Group. In view of the fact that the decision as to the scope of the draft Convention had already been taken by the Working Group, the proposal under consideration was simply an effort to align the title with the scope of application of the draft Convention.

64. The Working Group did not make a final decision with respect to the proposed changes to the title and the preamble. It was widely felt that the discussion should be resumed at a future session, after careful consideration of the proposal and appropriate consultations had taken place. While it was acknowledged that the proposed changes would resolve the recognized inconsistency between the title, the preamble and the scope of the draft Convention, concerns were expressed over the expanded scope of application. It was also stated that, under a wider scope, the provisions for exclusions from the scope of application would take on greater importance.

65. After discussion, the Working Group decided to leave subparagraph (d) in brackets and to include the proposals for the revised title and preamble also in brackets for continuation of the discussion at a future session.

Subparagraph (e)

66. It was recalled that subparagraph (e) defined the term "writing" by combining the definitions of "writing"and "signature" contained in articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce. Under the draft Convention, a signed writing was required for the assignment, for the notification of the assignment and for the debtor's agreement not to raise defences against the assignee. The view was expressed that, as a matter of drafting, the operation under the draft Convention of the terminology borrowed from the Model Law on Electronic Commerce (e.g., the concepts of "sender" and "addressee of the communication") might need to be further clarified.

67. As a matter of substance, doubts were expressed as to whether the concept of a "signed writing" as defined in subparagraph (e) was appropriate as a form requirement in all instances where a "writing" was required under the draft Convention. Examples were given of practical situations (particularly in the factoring industry) where, typically, assignments were made without any signature requirement being imposed on the parties to the transaction. However, the view was expressed that, while form

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

requirements might be inappropriate as between assignors and assignees, some sort of authentication might be needed in the context of notification of assignments to debtors and, more generally, in the area of debtor protection, where debtors might legitimately expect a degree of authenticity in the communications they received (e.g., notification of assignment or payment instructions). It was stated that the text of subparagraph (e) might constitute a good compromise between the urge to reduce formalism and the need to preserve the security of transactions.

68. It was agreed that the need for higher assurances as to the authenticity of communications might be assessed differently depending on the context in which the reference to "writing" was made and the type of contractual relationship involved. It was widely felt that, while requiring the equivalent of a signature might be detrimental to established practice in the context of draft article 9 (form of the assignment), or superfluous in the context of draft article 5 (f) (notification of the assignment), it would be more appropriate in the context of draft article 20 (agreement not to raise defences or rights of set-off). However, the concern was expressed that such a requirement would interfere with domestic practices currently existing in some jurisdictions. After discussion, the Working Group decided that subparagraph (e) should reflect the two distinct notions of "writing" and "signed writing". It was also decided that a "signed writing" should be required only for the debtor's agreement to waive its defences against the assignee. On that understanding, the Working Group adopted subparagraph (e) and referred its specific formulation to the drafting group.

Subparagraph (f)

69. The discussion focused on the question whether, as a condition of its validity, the notification of an assignment should necessarily include payment instructions. It was widely felt that there was no obvious logical link between notifying the debtor of an assignment, on the one hand, and "identifying the person to whom or for whose account or the address to which the debtor is required to make payment", on the other. It was stated that, should the debtor be notified of an assignment (which merely implied that the debtor should no longer pay the assignor) and receive no payment instructions, the debtor could normally (under the law applicable outside the draft Convention) obtain discharge of its payment obligation by paying a court or a public entity established for the purpose of receiving such payments. In addition, it was observed that conditioning the validity of the notification on the inclusion of payment instructions would disregard the rapid development of practices where assignments were notified without specific payment instructions being given.

70. Suggestions were made with a view to limiting the effect of the reference to payment instructions under subparagraph (f). One suggestion was to make the inclusion of payment instructions in the notification a mere option. Another suggestion was to qualify the reference to payment instructions by the words "if appropriate" or "if necessary". Yet another suggestion was that language should be added to subparagraph (f) along the following lines: "If the person to whom the debtor is required to make payment is not identified, payment is to be made to the assignee". The prevailing view, however, was that the reference to payment instructions ("and the person to whom or for whose account or the address to which the debtor is required to make payment") should be deleted.

71. After discussion, the Working Group decided that no reference to payment instructions should be included in subparagraph (f). Subject to that change, the Working Group adopted subparagraph (f) and referred it to the drafting group, on the understanding that the operation of the subparagraph in the context of draft article 18 (discharge of the debtor) would need to be considered at a later stage.

Subparagraph (g)

72. The substance of subparagraph (g) was found to be generally acceptable. As a matter of drafting, it was widely felt that the definition of "insolvency administrator" should include a reference to the existence of an insolvency proceeding. It was stated that such an amendment was needed to ensure consistency between the text of the draft Convention and that of the UNCITRAL Model Law on Cross-Border Insolvency (article 2 (d)). Subject to that amendment, the Working Group adopted subparagraph (g) and referred it to the drafting group.

Subparagraph (h)

73. The suggestion was made that subparagraph (h) should be revised so as to include in the definition of the term "insolvency proceeding" administrative receiverships and voluntary windings-up. That suggestion was objected to on the grounds that voluntary winding-up might take many different forms which should not be included in the scope of the definition. It was widely felt that the Working Group should adopt the definition of the term "insolvency proceeding" used in the UNCITRAL Model Law on Cross-Border Insolvency (article 2 (a)). It was observed that that definition had been carefully crafted to take into account differences among the insolvency laws of member States. After discussion, the Working Group adopted subparagraph (h) unchanged and referred it to the drafting group.

Subparagraph (i)

74. The Working Group adopted subparagraph (i) and referred it to the drafting group.

Subparagraphs (j) and (k)

75. The Working Group recalled its decision to retain the text of subparagraphs (j) and (k) in brackets (see para. 37).

Subparagraph (l)

76. The view was expressed that the parties to the contract of assignment should not be allowed to specify a time of assignment that was earlier than the time when the contract was concluded, but should be permitted to specify a later time. As a matter of drafting, it was observed that, subparagraph (l) did not make it sufficiently clear that the time specified by the parties was the time at which the transfer occurred.

77. A contrasting view was expressed in favour of full party autonomy, namely, that parties should also be allowed to agree that the transfer was to take place retroactively, provided that the rights of third parties were not adversely affected. In response, it was pointed out that party autonomy was sufficiently recognized under draft article 6, subject to the rights of third parties. Accordingly, it was suggested that the reference to party autonomy in subparagraph (l) should be deleted, so that the definition would read as follows: "'Time of assignment' means the time when the contract of assignment is concluded". In support of that suggestion, it was pointed out that the time of the contract assignment was a fact, rather than a matter for determination by the parties, in contrast to the effects of the assignment, which could be freely determined by the parties, subject to the rights of third parties.

78. After discussion, the Working Group decided to delete subparagraph (l) altogether and to replace the references to the "time of the assignment" in the draft Convention by a reference to the "time when the contract of assignment is concluded". The matter was referred to the drafting group.

Article 6. Party autonomy

79. The text of draft article 6 as considered by the Working Group was as follows:

> "The assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement."

80. It was recalled that the text of draft article 6 was intended to provide broad recognition of the principle of party autonomy, while avoiding interference with the rights of third parties. As to which specific parties might be covered by the notion of "third parties", it was explained that, typically, in the context of an agreement between the assignor and the assignee, "third parties" were the debtor, the assignor's creditors and the insolvency administrator. In the context of an agreement between the assignor and the debtor, "third parties" were the assignee, the assignor's creditors and the insolvency administrator. It was also recalled that agreements between the assignee and the debtor were not covered by the draft Convention. On the basis of that understanding, the Working Group adopted draft article 6 and referred it to the drafting group.

Article 7. Debtor's protection

81. It was noted that the general principle embodied in draft article 7 had been reflected in the preamble, while draft article 7 had been moved to the beginning of section II of chapter IV, dealing with the rights and obligations of the debtor (draft article 17 *ter*) (see paras. 21 and 168-176). The Working Group approved that approach.

Article 8. Principles of interpretation

82. The text of draft article 8 as considered by the Working Group was as follows:

> "(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 [of this Convention.
>
> "(3) Questions concerning matters governed by articles 9, 17 *bis*, 19 (2), 23 and 24 and 29 to 33 which are not expressly settled in those articles are to be settled in conformity with the general

principles on which they are based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law of the forum State]."

Paragraph (1)

83. The Working Group adopted paragraph (1) unchanged.

Paragraphs (2) and (3)

84. It was noted that paragraph (3) was intended to fill gaps in the private international law provisions of the draft Convention by reference to the private international law principles underlying the draft Convention and, in the absence of such principles, by reference to the private international law provisions of the forum State.

85. It was widely felt that the bracketed text in paragraph (2) and paragraph (3) was not necessary and could indeed create uncertainty, since it was not clear what principles were being referred to. It was stated that draft article 8 was inspired by article 7 of the Sales Convention, which appropriately dealt with the matter and did not need to be changed. In addition, it was observed that the reference to the private international law provisions of the draft Convention, inserted in paragraph (2), would be inappropriate in the case of a non-Contracting State. After discussion, the Working Group decided that the wording in square brackets contained in paragraph (2) and paragraph (3) should be deleted. Subject to those changes, the Working Group adopted paragraph (2).

CHAPTER III. FORM AND EFFECT OF ASSIGNMENT

Article 9. Form of assignment

86. The text of draft article 9 as considered by the Working Group was as follows:

"(1) An assignment in a form other than in writing is not effective [as against third parties], unless:

"(a) it is effected pursuant to a contract between the assignor and the assignee which is evidenced by a writing describing the receivables to which it relates; or

"(b) the law of the State in which the assignor is located at the time of the assignment provides otherwise.

"(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."

Paragraph (1)

87. It was noted that paragraph (1) addressed the validity of assignments made in a form other than writing, i.e., the validity of oral assignments. It was recalled that, at previous sessions, the Working Group had observed a stark difference between those States whose legislation established a writing requirement and those States where the validity of oral assignments was recognized (A/CN.9/432, paras. 82–86, and A/CN.9/434, paras. 102–106). The provisions of paragraph (1) had arisen out of efforts to derive a minimum requirement with respect to the form of an assignment, while maintaining a workable compromise between the alternative approaches followed by those two categories of States (A/CN.9/445, paras. 201–203). Recalling its decision concerning the meaning of "writing" (see para. 68), the Working Group based its discussions on the assumption that the term "writing", as used in paragraph (1), was to be understood as a reference to article 6 of the UNCITRAL Model Law on Electronic Commerce (i.e., without any signature or authentication requirement).

88. With respect to the purpose and scope of paragraph (1), it was generally agreed that the provision was not intended to establish a general form requirement, the non-observance of which would affect the validity of the assignment. It was stated that paragraph (1) was merely intended to protect third parties in situations where an oral assignment had taken place. Accordingly, it was generally felt that wording along the lines of "as against third parties" might be necessary. In that context, it was also suggested that, should paragraph (1) be retained, the title of draft article 9 might need to be amended to indicate more clearly that the focus of the draft article was on the protection of third parties and on oral assignments. It was pointed out that the heading of the chapter might require revision as well.

89. As regards subparagraph (a), it was stated that, if the form requirement related to the effectiveness of oral assignments as against third parties, it would be advisable to retain a reference to the description of receivables (a description which was said to be unnecessary as between the parties to the assignment). It was pointed out, however, that requiring that the assigned receivables should be "described" in the written document evidencing the assignment might not constitute a workable rule, in particular, in the case where future receivables were assigned. It was suggested that the words "a writing describing the receivables to which it relates" should be replaced by wording along the lines of "a writing reasonably identifying the receivables to which it relates".

90. Given the minimalist nature of the form requirements contained in subparagraph (a) (which referred to an unsigned writing), the view was expressed that subparagraph (b) was not necessary, since it was difficult to envision that any domestic law would have an even lesser requirement. The concern was expressed, however, that the deletion of subparagraph (b) might invalidate assignments in those States where no writing at all was required (or where writing related to an act of a party but not necessarily to the contract as a whole), a result which could adversely affect the rights of third parties. In response, it was pointed out that the main issue addressed in paragraph (1) was the effectiveness of an assignment as against third parties, a matter that was addressed in draft articles 23 and 24. In respect of the form requirements as between the assignor and the assignee, it was observed that the matter was addressed in draft article 6. In respect of form requirements as against the debtor, it was stated that the matter was addressed in draft article 16. Any additional requirements under domestic law were not supplanted by the draft Convention. It was thus suggested that both subparagraphs (a) and (b) should be deleted.

91. The view was expressed that there was no harm in retaining both subparagraphs (a) and (b), whereas their deletion might have unforeseen consequences. The prevailing view, however, was that, if subparagraph (b) were to be retained, subparagraph (a) did not achieve its intended purpose, namely, to provide at least a minimal writing requirement for assignments. It was stated that: under paragraph (1),

there was no minimal writing requirement for transactions made in writing, since the opening words of paragraph (1) excluded such assignments; and as to oral assignments, the effect of subparagraph (b) was to defer to the law of the State of the assignor, which might not establish any such requirement. After discussion, the Working Group decided to delete paragraph (1).

Paragraph (2)

92. Wide support was expressed in favour of the principle embodied in paragraph (2) that one act was sufficient to transfer several, or future, receivables. After discussion, the Working Group adopted paragraph (2) and referred its formulation and placement in the text to the drafting group.

Article 10. Effect of assignment

93. The text of draft article 10 as considered by the Working Group was as follows:

> "Subject to articles 23 and 24, an assignment of existing or future, one or more, receivables, and parts of, or undivided interests in, receivables is effective, if
>
> "(a) the receivables are specified individually as receivables to which the assignment relates; or
>
> "(b) the receivables can be identified as receivables to which the assignment relates, 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."

94. It was noted that the main purpose of draft article 10 was to validate assignments of future receivables, bulk assignments and partial assignments as between the assignor and the assignee and as against the debtor, but not as against third parties. In order to indicate more clearly the purpose of draft article 10, it was agreed that the title should refer to the "effectiveness" of the types of assignment referred to in draft article 10. As to the way in which the purpose of draft article 10 might be better reflected in the text of draft article 10, it was stated that use of the term "validity" might be more appropriate, since in many legal systems the term "effectiveness" was used to reflect effects as against third parties. In response, it was observed that the term "effectiveness" was preferable to the extent that it reflected the notion of a transfer of property rights. In addition, it was pointed out that the term "validity" was not universally understood in the same way.

95. It was noted that the opening words of the *chapeau* of draft article 10 ("subject to articles 23 and 24"), which appeared also in the *chapeau* of draft article 11 (1), were intended to ensure that: draft articles 10 and 11 left the rights of third parties unaffected, since, in the absence of those words: draft article 10 could be read as validating the first assignment and invalidating any further assignment of the same receivables by the same assignor; and draft article 11 could be read as setting a rule dealing with the effectiveness of the assignment as against third parties, including the administrator in the insolvency of the assignor (e.g., receivables arising after the opening of an insolvency proceeding could be taken out of the insolvency estate or be subject to a security right if the assignment had taken place before the opening of the insolvency proceeding).

96. However, it was also noted that the opening words of draft article 10 might inadvertently result in the effectiveness of the assignment of future receivables or of bulk assignments being left altogether to the law applicable under draft articles 23 and 24. In order to avoid that unintended result, the Working Group decided that the opening words of draft articles 10 and 11 should be deleted. It was stated that such an approach would not give the impression that those draft articles dealt with the rights of third parties, if the draft Convention was read as a whole. In addition, it was observed that the result would rather be that the draft Convention validated such assignments, as a matter of civil or commercial law, while leaving to other law specific challenges to their validity (e.g., the invalidation of an assignment made within the suspect period before the opening of an insolvency proceeding as a fraudulent or preferential transfer). As to the question whether the matter needed to be clarified further in draft articles 23 and 24, the Working Group postponed a final decision until it had completed its review of the draft Convention.

97. General support was expressed for the principles embodied in subparagraphs (a) and (b). As to their specific formulation, a number of suggestions were made. One suggestion was that in subparagraph (a) the term "described" should be substituted for the term "specified", in order for the draft Convention to avoid invalidating practices in which the standard of "specification" of the assigned receivables was too high to be met. Another suggestion was that in subparagraph (b) the reference to agreement of the parties was not necessary in view of the general recognition of party autonomy in draft article 6. Subject to those changes, the Working Group adopted draft article 10 and referred it to the drafting group.

Article 11. Time of transfer of receivables

98. The text of draft article 11 as considered by the Working Group was as follows:

"(1) Subject to articles 23 and 24,

"(a) a receivable other than a future receivable is transferred at the time of the assignment;

"(b) a future receivable is deemed to be transferred at the time of the assignment.

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

99. It was noted that draft article 11 was intended to set the time of the transfer of both existing and future receivables, as between the assignor and the assignee, as well as against the debtor, but not as against third parties. In addition, it was noted that, in line with the decision made with regard to the opening words of draft article 10 (see para. 96), the opening words of draft article 11 and paragraph (2) should be deleted. Moreover, it was noted that, in view of the decision made by the Working Group to delete draft article 5(l) (see para. 78), the reference to the time of assignment in draft article 11 should be replaced by a reference to the time of the conclusion of the contract of assignment.

100. Diverging views were expressed as to whether draft article 11 should be retained. One view was that draft article 11 did not serve any useful purpose and should be deleted. It was stated that the assignor and the assignee could set the time of the transfer of the assigned receivables as between themselves on the basis of draft article 6. In addition, it was pointed out that draft article 10 was sufficient in providing that the assignment was effective as against the debtor even before notification, while the debtor was sufficiently protected through the defences set forth in draft article 18. Moreover, it was observed that the time of transfer as against third parties was, under draft articles 23 and 24, left to the law of the assignor's location.

101. The prevailing view, however, was that draft article 11 was useful in providing a flexible default rule with regard to the time of transfer of the assigned receivables. In addition, it was stated that draft article 11 usefully clarified that parties could specify that their contracts could take effect at a later point of time. In that connection, it was observed that, while parties could not change the time of the conclusion of the contract of assignment, they should be able to change the time of the transfer of the receivables as between themselves and as against the debtor and other third parties. It was pointed out that, while it was clear that that ability existed with regard to the relationship as between the assignor and the assignee on the basis of draft article 6, it was not clear whether it existed with regard to the debtor and other third parties. It was also said that the ability of the assignor and the assignee to set a different time of transfer as against the debtor and other third parties should be preserved and, at the same time, limited to the extent that the assignor and the assignee would be able to set a time of transfer which was later than the time of the conclusion of the contract of assignment. Such an approach would accommodate the needs of the assignor and the assignee without unduly affecting the rights of third parties. Moreover, it was pointed out that draft article 11 was useful in clarifying the meaning of other relevant provisions, such as draft articles 6, 10, 18, 23 and 24.

102. In the discussion, it was observed that, in view of the fact that "assignment" was defined as a transfer and draft article 10 referred to the effectiveness of assignment, it would be more appropriate to refer in the title of draft article 11 to the "time of the assignment".

103. Subject to the changes mentioned in paragraphs 99, 101 and 102, the Working Group adopted draft article 11 and referred it to the drafting group.

Article 12. Contractual limitations to assignment

104. The text of draft article 12 as considered by the Working Group was as follows:

> "(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor, or, in the case of any subsequent assignment, between the initial or any subsequent assignor and the debtor or any subsequent assignee, 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 for breach of such an agreement. A person who is not party to such an agreement is not liable under that agreement for its breach.

"[(3) This article does not apply to assignments of receivables arising under loan agreements, deposit accounts, independent guarantees and stand-by letters of credit, contracts concluded for personal, household or family purposes, and public procurement contracts.]"

105. It was noted that the main purpose of draft article 12 was to validate assignments made in violation of anti-assignment clauses, thus giving the assignee a priority position as against the assignor's creditors in the case of default by the assignor and enabling the assignee to collect directly from the debtor. It was also noted that the underlying policy was that it was more beneficial for everyone to reduce the transaction cost of examining contracts in order to ensure that they did not contain anti-assignment clauses rather than to protect the debtor from paying a person other than the original creditor (assignor).

Paragraph (1)

106. The substance of paragraph (1) was found to be generally acceptable. As to the reference to subsequent assignments, it was agreed that it should be limited to the identification of the parties between whom an anti-assignment clause could be agreed upon (i.e., the parties to the original contract and the parties to an initial or to a subsequent assignment). After discussion, the Working Group adopted paragraph (1) and referred it to the drafting group.

Paragraph (2)

107. It was noted that paragraph (2) was intended to ensure that any liability that the assignor might have as against the debtor, under law applicable outside the draft Convention, for breach of an anti-assignment clause was not interfered with, while such contractual liability would not be extended to the assignee. It was also noted that paragraph (2) was not intended to address the question of the potential tort liability of the assignee, which would arise, e.g., if the assignee induced the assignor to assign its receivables in violation of an anti-assignment clause with the intent to harm the interests of the debtor or another party. In that connection, it was noted, however, that tortious liability would sanction malicious behaviour on the part of the assignee. It was also noted that mere knowledge of the existence of an anti-assignment clause would not be sufficient to give rise to liability of the assignee since such a possibility could deter potential assignees from entering into a financing transaction, a result that would run counter to the main objective of the draft Convention to promote the availability of lower-cost credit. There was general support in the Working Group for the principle embodied in paragraph (2). After discussion, the Working Group adopted paragraph (2) unchanged.

Paragraph (3)

108. It was noted that the main purpose of paragraph (3) was to establish a specific debtor-protection rule, according to which in the case of a contractual limitation to assignment, while the assignment would be effective as between the assignor (and the assignor's creditors) and the assignee, it would be ineffective as against the debtor. As a result of such a rule, certain debtors would be entitled to discharge their obligation by continuing to pay the assignor despite an assignment or its notification. Some doubt was expressed as to the appropriateness of an approach based on a list of debtors to be exempted from the rule set forth in paragraph (1). Other suggested approaches included exemptions listed in draft article 4 (1) or exemptions to be made by way of declarations by States under draft article 4 (2).

109. The approach used in paragraph (3), which relied on a listing of financial practices not to be interfered with by the draft Convention, was criticized on the grounds that any such list would necessarily be incomplete in view of the rapid evolution of such financial techniques and might unduly interfere with future developments in that area. As examples of financial practices that might also need to be excluded from the scope of draft article 12, swap agreements and repo or reverse repo agreements were mentioned. The alternative approach that was suggested (i.e., the inclusion of an open-ended provision describing such financial practices in sufficiently broad terms to cover existing practices and future developments) was found to be impractical in view of the difficulty of describing a wide range of heterogeneous and rapidly changing practices with sufficient precision. With respect to the individual practices listed in paragraph (3), it was pointed out that the terminology used might be insufficiently clear.

"loan agreements, deposit accounts"

110. With respect to "loan agreements", it was explained that the aim of the provision was to recognize loan-syndication practice, under which an assignment was possible only if the terms of the loan agreement so permitted. However, it was widely felt that the words "loan agreements" might be interpreted as covering such various agreements as loans of currency or discounting of trade receivables. As to "deposit accounts", it was widely felt that the notion itself and the legal regime that might be applied to such accounts might vary considerably from country to country.

111. After discussion, the Working Group decided that, instead of attempting to establish a list of financial practices to be excluded from the scope of draft article 12, such practices should be borne in mind when reviewing the provisions of the draft Convention dealing with debtor protection. Doubts were expressed, however, as to whether a specific debtor-protection mechanism was needed for the powerful debtors that would typically become involved in such financial transactions. It was also agreed that financial practices should be borne in mind in the review of draft article 4, to be conducted at the next session of the Working Group (see para. 49). After discussion, the Working Group decided that the reference to "loan agreements" and "deposit accounts" should be deleted from paragraph (3).

"independent guarantees and stand-by letters of credit"

112. As to independent guarantees and stand-by letters of credit, it was recalled that they had been included in paragraph (3) in view of the generally accepted rule of independent-guarantee or stand-by practice that the guarantor/issuer of an independent undertaking should not have to pay against its will a person other than the beneficiary (see, e.g., articles 10 and 11 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, hereinafter referred to as "the Guarantee and Standby Convention"). It was pointed out, however, that a distinction should be drawn between the transfer of the right to demand payment (article 9 of the Guarantee and Standby Convention), which was possible only if authorized in the undertaking, and the transfer of proceeds (article 10 of the Guarantee and Standby Convention), which was possible unless otherwise stipulated in the undertaking. On the understanding that the proceeds (as opposed to the right to demand payment) should be regarded as the receivable under an independent guarantee or a stand-by letter of credit, it was stated that there was no risk of conflict between the Guarantee and Standby Convention and the draft Convention. After discussion, it was agreed that the reference to "independent guarantees and stand-by letters of credit" should be deleted.

"contracts concluded for personal, household or family purposes"

113. A question was raised as to the possible interplay between the exclusion of assignments made for consumer, i.e., for personal, family or household purposes under draft article 4 and the exclusion of assignments of receivables arising from consumer contracts under draft article 12 (3). In response, it was explained that draft article 4 was intended to exclude assignments made for consumer purposes, but not the assignment of consumer receivables, while draft article 12 was intended to invalidate an assignment of a consumer receivable only as against the consumer-debtor. It was recalled that the benefit expected from the draft Convention was the increased availability of credit at a lower cost. In that context, it was generally felt that excluding the assignment of consumer receivables from the scope of draft article 12 might unnecessarily limit the availability of those benefits to consumers.

114. As to the reasons why paragraph (3) sought to invalidate the assignment of consumer receivables as against consumer-debtors, it was noted that, for example, in the case of securitization of mortgage loans, an assignment against the consumer-debtor might materially increase the burden of risk imposed on the consumer-debtor (e.g., if the mortgage loan was assigned by the friendly local savings and loan bank to a foreign lender, who might be more aggressive in the collection of the outstanding amounts of the loan or in handling any variable interest rate). While it was agreed that those reasons called for specific attention to the protection of consumer-debtors in the context of the draft articles dealing with debtor protection, it was widely felt that they should not result in an invalidation of assignments of consumer receivables as against consumer-debtors. It was pointed out that the majority of consumer contracts were contracts of adhesion where, typically, no anti-assignment clauses would be included. Thus, the practical relevance of overriding anti-assignment clauses in consumer transactions was said to be limited. After discussion, it was decided that the words “contracts concluded for personal, household or family purposes” should be deleted.

“public procurement contracts”

115. Diverging views were expressed as to whether an assignment made despite an anti-assignment clause should be invalidated if the debtor was a Government. One view was that such an approach would not be appropriate. It was stated that once the principle embodied in paragraph (1) was accepted, there was no substantive reason why special protection should be granted to any powerful debtor. In addition, it was observed that such an approach might be unnecessary, since in any case governmental debtors could protect themselves by law. Moreover, it was pointed out that permitting anti-assignment clauses to invalidate the assignment of receivables as against a sovereign debtor could inadvertently result in raising the cost of credit for small- and medium-size suppliers of goods and services, which would make it even harder for them to compete with large suppliers for public procurement contracts, since large suppliers would normally have alternative sources of credit. The prevailing view, however, was that the specific legal regime of public procurement and other administrative contracts should be preserved, since any interference with such a legal regime might seriously affect the acceptability of the draft Convention. In addition, it was pointed out that, unless such an approach were to be followed, Government-debtors in a number of countries might be left without protection, to the extent that the non-assignability of public procurement receivables would stem not from legislation but from case law or from established practice. Moreover, it was observed that the extent to which exemptions would have a practical effect, possibly affecting competition between suppliers, as described above, would depend on the degree to which sovereign debtors would include anti-assignment clauses in public procurement contracts, and that was a decision that sovereign debtors should be free to make. It was also mentioned that, while the assignment of procurement contracts was beyond the scope of the draft Convention, the assignment of the proceeds of receivables arising from such contracts was within the scope of the draft Convention. Thus, it was

said, a provision along the lines of paragraph (3), allowing a governmental debtor to discharge its obligation by paying the assignor, would appropriately address any legitimate concerns of such a debtor.

116. As to the scope of paragraph (3), it was observed that, in addition to the central Government, the paragraph might apply to emanations of the State, including local public authorities, State-owned and other public companies. It was stated that, while paragraph (3) might appropriately apply to governmental entities performing governmental functions, it should not apply to publicly owned commercial entities (e.g., airlines) or to governmental entities acting in a commercial capacity. It was agreed that a specific provision should be introduced within square brackets in the draft Convention for consideration by the Working Group at its next session, based on the relevant definitions contained in the UNCITRAL Model Law on Procurement. Subject to that change and to the deletion of the other practices listed in the paragraph, the Working Group adopted paragraph (3) and referred it to the drafting group.

Article 13. Transfer of security rights

117. The text of draft article 13 as considered by the Working Group was as follows:

> "(1) A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer, unless it is by law [independent] [transferable only with a new act of transfer]. If such a right is by law [independent] [transferable only with a new act of transfer], the assignor is obliged to transfer the proceeds of this right to the assignee.
>
> "(2) A right securing payment of the assigned receivable is transferred under paragraph (1) notwithstanding an agreement between the assignor and the debtor or other person granting the right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.
>
> "(3) Nothing in this article affects any obligation or liability of the assignor for breach of an agreement under paragraph (2). A person who is not a party to such an agreement is not liable under that agreement for its breach.
>
> "(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 receivable."

Paragraph (1)

118. It was noted that paragraph (1) was intended to reflect a principle accepted in most legal systems, namely that accessory security rights were inextricably linked with the receivable which they secured. General support was expressed for that principle. It was stated that often the value relied on by the lender extending credit to the assignor was in the right securing the receivable rather than in the receivable itself.

119. As to the exact way in which the notion of an accessory right might be expressed in paragraph (1), while the concern was expressed that the second set of bracketed language might be circular, it was agreed that it was preferable, since it left the question of the accessory or independent nature of the

security right to law applicable outside the draft Convention. In order to avoid any uncertainty as to whether the law applicable to the assignment or to the security right was meant, it was agreed that the paragraph should be revised to make it sufficiently clear that the independent or accessory character of a security right would be determined on the basis of the law governing that right. On the assumption that the beneficiary's right to demand payment in the case of an independent guarantee or a stand-by letter of credit was not a receivable (see para. 112), the Working Group agreed that the assignor should be obliged to assign not only the proceeds but also the right to payment arising from such an instrument. Subject to those changes, the Working Group adopted paragraph (1) and referred it to the drafting group.

Paragraph (2)

120. It was noted that, in line with draft article 12 (1), paragraph (2) was intended to ensure that, with regard to contractual limitations to assignment, a security right would be treated as a receivable in the sense that an agreement limiting the assignor's right to transfer a security right would not invalidate its transfer. It was also noted that, in the case of an assignment, such an agreement would in effect result in the security right being extinguished if an accessory right was involved, or, in the right being not assignable, if an independent right was involved.

121. The view was expressed that, while that rule was appropriate if the security right had been granted by the debtor, it might not be appropriate if the right had been granted by a third party (e.g., a third-party guarantor). The prevailing view, however, was that the paragraph was appropriately cast. It was stated that it would be of no concern to the third party whether to pay the assignor or the assignee, since the conditions under which that third party might have to pay would remain unchanged.

122. The view was expressed that, if the third party granting the security was a governmental entity, in the case of a contractual limitation to assignment, the assignment should be ineffective as against the governmental entity. It was stated that such an approach would be consistent with the approach adopted in draft article 12 with regard to governmental debtors (see paras. 115–117).

123. While it was observed that governmental entities, securing payment of the assigned receivable as third parties, should be treated differently from governmental debtors, it was agreed that such governmental entities needed to be exempted from the rule set forth in paragraph (2). The Working Group adopted paragraph (2) and referred the formulation and the placement of an appropriate provision to the drafting group.

Paragraph (3)

124. It was noted that, in line with draft article 12 (2), paragraph (3) was intended to ensure that any liability that the assignor might have, under law applicable outside the draft Convention, for the breach of an anti-assignment clause should not be affected by the draft Convention, but should not be extended to the assignee either (see para. 107).

125. It was also noted that paragraph (3) was intended to cover any liability that the assignor might have under the law governing the security right for damages suffered as a result of the assignment by the debtor or other person granting a possessory property right (e.g., if pledged shares ended up in the hands of a foreign assignee who caused damage to the debtor or other person granting the security right; A/CN.9/434, paras. 145–146). However, in view of the doubt expressed as to whether that matter was

sufficiently covered in paragraph (3), it was suggested that it should be addressed explicitly along the lines of an earlier version of paragraph (3) (A/CN.9/WG.II/WP.96). After discussion, the Working Group adopted paragraph (3) unchanged and asked the drafting group to reintroduce in the text an additional paragraph as suggested.

Paragraph (4)

126. It was noted that paragraph (4) was intended to ensure that form requirements existing under the law governing a security right would not be affected. It was suggested that an explicit reference to the law governing the security right might be usefully added. However, the Working Group adopted paragraph (4) unchanged and referred it to the drafting group.

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 14. Rights and obligations of the assignor and the assignee

127. The text of draft article 14 as considered by the Working Group was as follows:

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

128. It was noted that draft article 14 had already been adopted by the Working Group (A/CN.9/447, paras. 17–24 and 161). Some doubt was expressed as to whether the opening words of paragraph (1), or paragraph (1) altogether, were necessary, in view of the fact that they appeared to be inconsistent with, or at least repeat, the principle of party autonomy set forth in draft article 6. The text of draft article 14 was referred to the drafting group with a view to ensuring consistency with draft article 6 and with the more recent amendments of the draft Convention with regard to the title of the draft Convention and the preamble (see paras. 61-65).

Article 15. Representations of the assignor

129. The text of draft article 15 as considered by the Working Group was as follows:

> "(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the contract of assignment that:

(a) the assignor has the right to assign the receivable;

(b) the assignor has not previously assigned the receivable to another assignee; and

(c) the debtor does not and will not have any defences or rights of set-off.

"(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."

130. It was noted that draft article 15 had already been adopted by the Working Group (A/CN.9/447, paras. 25–40 and 161).

Article 16. Right to notify the debtor

131. The text of draft article 16 as considered by the Working Group was as follows:

"(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 person or to the address identified in the notification. [However, after notification is received by the debtor only the assignee may notify the debtor and request that payment be made to another person or address.]

"(2) Notification of the assignment or request for payment made by the assignor or the assignee is not ineffective for the sole reason that it is in breach of an agreement referred to in paragraph (1) of this article. 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."

132. It was noted that the Working Group, at its twenty-eighth session, had adopted the substance of draft article 16 without drawing a distinction between a notification and a request for payment. In addition, it was noted that, while some support had been expressed at that session in favour of drawing such a distinction, that approach had been objected to on a number of grounds, including the following: it unnecessarily formalized a distinction that eventually had practical importance in exceptional situations only, since assignees notifying debtors could not afford to leave any uncertainty as to whom the debtor should pay; it could inadvertently raise the cost of credit, if seen as encouraging parties to serve two "notifications", one without and one with payment instructions; and would complicate the discharge of the debtor, since the debtor would have to know the legal consequences of each type of notification (A/CN.9/447, paras. 75–78). Moreover, it was noted that the matter had come up again in the context of a discussion of draft articles 18 (3) (as to whether the assignee could change or correct the payment instructions given to the debtor with the notification), 19 (2) and 21 (4) (as to whether a notification which did not identify the payee should bring about the legal consequences described in those draft articles) and had not been resolved (A/CN.9/447, paras. 46, 74–76, 82–83, 99–100 and 135).

133. It was recalled that, at the present session, the Working Group had decided that, subject to further review of the matter in the context of draft article 18, the reference to the payee contained in the definition of "notification of the assignment" should be deleted (see para. 71). As a result, there was a need for a distinction to be drawn between a notification and a payment instruction for draft articles 16 and 18 to apply. While the Working Group postponed a final decision on the matter until it had the

opportunity to review draft article 18, with a view to reflecting that distinction, a proposal was made (A/CN.9/WG.II/WP.100) that draft article 16 should be redrafted as follows:

> "(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of assignment and a payment instruction not at variance with article 7 (2).
>
> "(2) A notification of assignment or payment instruction sent in breach of any agreement described in paragraph (1) is not ineffective for purposes of article 18 by reason of such breach, but 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."

The proposal was used by the Working Group as a basis for its deliberations.

Paragraph (1)

134. A number of questions were raised. One question was whether a payment instruction could create an obligation for the debtor in addition to the obligations arising from the original contract with the assignor. In response, it was explained that draft article 16 dealt with the relationship between the assignor and the assignee and was not intended to affect the debtor's rights or obligations. Another question was whether the debtor would be discharged of its payment obligation by paying according to the original contract, while ignoring a payment instruction that was at variance with article 7 (2), i.e. with "the debtor's right to pay in the currency and in the country specified in the payment terms contained in the original contract" (A/CN.9/WG.II/WP.96, draft article 7 (2)). It was suggested that the words "not at variance with article 7 (2)"could be deleted, while the matter could be reviewed in the context of the discussion of draft article 17*ter* (2), which had replaced draft article 7 (2).

135. It was stated that, after notification, whether the notification contained a payment instruction or not, the assignor was no longer the owner of the assigned receivables. It was thus suggested that paragraph (1) should be amended to provide that after notification was given only the assignee could issue a payment instruction. With a view to reflecting the above suggestion, it was proposed that paragraph (1) might be revised to read as follows:

> "(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of the assignment and a payment instruction, but after a notification is sent only the assignee may send a payment instruction."

136. General support was expressed for the substance of the proposal. A question was raised as to the reasons why the proposed text referred to the time when the notification was "sent" and not to the time when it was "received". In response, it was explained that neither the assignor nor the assignee had a way of assessing the time of receipt, which was important for the protection of the debtor, a matter which was not affected by draft article 16. After discussion, the Working Group adopted the substance of the proposal and referred it to the drafting group.

Definition of "payment instruction"

137. In the context of the discussion of paragraph (1), it was widely felt that a definition of a "payment instruction" should be provided. The following text was proposed for inclusion in the relevant article of the draft Convention:

> "'Payment instruction' means a writing sent by the assignor or the assignee or both, reasonably describing the receivables to which it applies and an address or account to which payment is to be made."

138. The Working Group engaged in an initial discussion of the formulation proposed. Various suggestions were made as to how that formulation might be improved. One suggestion was that the word "writing" should be replaced by the word "information", since there was no need to subject the validity of a payment instruction to written form. In response, it was stated that, in view of the fact that the main function of a payment instruction was to provide a point of reference for the debtor's discharge under draft article 18, the existence of a writing might be useful in that it would facilitate evidence.

139. Another suggestion was that reference should be made to identification of the "person" to whom payment was to be made, in addition to the address or account, since a mere reference to "an address or account" might be insufficient if, for example, payment was to be effected by cheque. While support was expressed in favour of that suggestion, it was pointed out that in most cases notification and payment instructions would be sent to the debtor at the same time; in the few cases in which they might be sent at a different time, there might be no need to burden a payment instruction with information that would duplicate information already provided in the notification.

140. A further suggestion was that the definition should include a reference to a positive request for payment. It was explained that, under the laws of certain countries, the mere notification of the assignment, even if it did not contain a positive payment instruction, might entail the obligation for the debtor to pay the assignee. The view was expressed that the draft Convention could play a useful role in clarifying that the debtor should pay the assignee only if positive payment instructions had been given to that effect. It was widely felt, however, that the matter might need to be further discussed in view of the risk that establishing such a rule might result in two different debtor-discharge rules being applicable to domestic assignments of domestic receivables, on the one hand, and to other types of assignments, on the other.

141. With a view to reflecting some of the above suggestions and concerns, the following definition was proposed:

> "'Payment instruction' means a writing sent by the assignor or the assignee or both, reasonably describing the receivables to which it applies, and containing a direction to make payment to the person, address or account specified in the writing."

142. The Working Group noted the various suggestions and postponed its decision as to the definition of "payment instruction" until it had completed its review of draft article 18 (see para. 193).

Paragraph (2)

143. It was stated that, under paragraph (2), a notification given in breach of an agreement between the assignor and the assignee should not be ineffective for the purposes of the discharge of the debtor (draft article 18), but should be ineffective for the purposes of: cutting off the debtor's rights of set-off

(draft article 19); triggering a change in the way in which the original contract might be modified (draft article 21); or determining priority under the law of the assignor's location (draft articles 23 and 24). There was support in the Working Group for the provision to the extent that it was intended to protect the debtor by setting forth a clear debtor-discharge rule, while preserving the debtor's rights of set-off and the right to modify the original contract without the consent of the assignee. As to the question whether the notification could produce other effects, e.g., provide the point of time for the determination of priority under domestic law, it was stated that the commentary should explain that such effects were not being dealt with in the draft Convention.

144. Subject to future deliberations regarding draft articles 18 to 21, the Working Group adopted paragraph (2), as proposed, and referred it to the drafting group.

Article 17. Right to payment

145. The text of draft article 17 as considered by the Working Group was as follows:

> "(1) Subject to articles 23 and 24, unless otherwise agreed between the assignor and the assignee:
>
> (a) the assignee is entitled to claim payment of the assigned receivable from the debtor and, if payment with respect to the assigned receivable is made to the assignee, to retain whatever is received in total or partial discharge of the assigned receivable ("proceeds");
>
> (b) if payment with respect to the assigned receivable is made to the assignor, the assignee is entitled to claim payment from the assignor and to retain any proceeds.
>
> "(2) If payment with respect to the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to any proceeds.
>
> "(3) The assignee may not retain an amount in excess of its right in the receivable."

146. It was noted that draft article 17 reflected the agreement of the Working Group that the draft Convention should recognize the assignee's right in the proceeds of the assigned receivables, leaving to law applicable outside the draft Convention the question whether that right was a personal (*ad personam*) or a property (*in rem*) right.

Paragraph (1)

147. General support was expressed in the Working Group for the principles reflected in paragraph (1). As to the particular formulation of the paragraph, a number of suggestions were made. One suggestion was that, in line with the decision taken by the Working Group with regard to the words "subject to articles 23 and 24" in draft articles 10 and 11 (see paras. 96 and 99) and in view of the fact that draft article 17 was directed towards the right of payment as between the assignor and assignee, rather than as against third parties, those words should be deleted. There was broad support in the Working Group for that suggestion.

148. Another suggestion was that the words “unless otherwise agreed between the assignor and the assignee” should be deleted. It was stated that party autonomy had already been addressed in draft article 6. However, in view of the fact that other provisions in chapter IV, section I, dealing with the rights and obligations of the assignor and the assignee contained those words, it was agreed that the words could be retained. In that connection, a note of caution was struck that the provisions of the draft Convention would need to be reviewed with a view to ensuring that they dealt with party autonomy in a consistent manner.

149. Another suggestion was that the opening words of subparagraph (a) (“the assignee is entitled to claim payment of the assigned receivable from the debtor and,”) should be deleted. It was pointed out that draft article 16 had already provided for the assignee’s entitlement to request payment from the debtor and draft article 18 was sufficient in dealing with the debtor’s discharge. In addition, it was observed that those words might be misread as referring to a property right of the assignee in the proceeds of receivables. There was broad support for that suggestion in the Working Group.

150. Yet another suggestion was that the term “discharge” should be substituted for the term “payment”, in order to ensure that payment in kind would be included (e.g., by way of goods returned by the debtor to the assignor). It was generally thought, however, that that change was not necessary and that the matter could be usefully clarified in the commentary.

151. A further suggestion was that subparagraph (a) should be reformulated, perhaps by avoiding the use of the term “proceeds”, which was not universally understood in the same way, in order to ensure that the assignee’s right in the proceeds of the assigned receivables was not cast as a property right. Still another suggestion was that, in order to ensure that the assignee would obtain from the assignor only what the assignor had received and no more, subparagraph (b) should be reworded to read “the assignee is entitled to claim proceeds received by the latter and to retain same”. Those suggestions attracted sufficient support.

152. Another suggestion was that the assignee should be entitled to the proceeds received by the assignor, irrespective of whether payment had been received before or after notification and thus the debtor had been discharged or not. It was stated that, if, after notification, only the debtor could obtain reimbursement from the assignor, the assignee would be exposed to the risk that the assignor or the debtor might become insolvent. That suggestion received wide support.

153. Yet another suggestion was that subparagraph (b) should clarify that, if payment had been made by the debtor to the assignor after notification of the assignment, the assignee could demand payment from the debtor or from the assignor. In response, it was stated that that result would be obtained anyway, since the right of the assignee to pursue the debtor as creditor was part of the original contract and the draft Convention was not intended to affect it; and draft article 18 (2) made it sufficiently clear that, after notification, the debtor would be discharged only by paying the assignee. It was pointed out that, from a practical point of view, the assignee would normally not pursue the debtor for a second payment unless the assignor had become insolvent. As to the right of the assignee to pursue the assignor, it was said that it was sufficiently dealt with in subparagraph (b).

154. In the discussion, the question was raised as to the interplay between draft articles 12 (3) and 17 (1) (b). In response, it was stated that, in the case of an anti-assignment clause, the assignment would be effective as against the assignor and the assignor’s creditors, while it would be ineffective as against the debtor. As a result, the debtor, under draft article 12 (3), could discharge its obligation by payment to

the assignor, but the assignee would have, under draft article 17 (1) (b), a right to demand that the proceeds of such payment be turned over to the assignee. As to the question whether that right in the proceeds would be a personal or property right, it was stated that that matter was left to the law applicable to priority in proceeds under draft article 17*bis*.

155. After discussion, the Working Group adopted the substance of paragraph (1) and referred the matter of the implementation of the suggestions referred to in paragraphs 147, 149, 151 and 152 above to the drafting group.

Paragraph (2)

156. The suggestion was made that paragraph (2) should be deleted or placed elsewhere in the text of the draft Convention. It was stated that, to the extent it dealt with payment to a person other than the assignor and the assignee, paragraph (2) was inconsistent with the general purpose of draft article 17. In addition, it was observed that the paragraph might be misinterpreted as granting rights to the assignee as against the assignor in cases where payment had been made to the wrong person, even if the assignee had no priority as against that person. Such a result, which would be obtained by a rule on restitution, was said to be a matter that could not be dealt with in the draft Convention.

157. The suggestion to delete or move paragraph (2) elsewhere in the text was objected to on the grounds that paragraph (2) did not only deal with cases in which payment had been made to a person who did not have priority but also with cases in which payment had been made by mistake. In addition, it was observed that paragraph (2) usefully clarified that the assignee was not entitled to anything more than the proceeds of payment.

158. After discussion, the Working Group adopted paragraph (2) and referred the implementation of the suggestions referred to in paragraph 151 above to the drafting group.

Paragraph (3)

159. The Working Group adopted paragraph (3) unchanged.

Article 17*bis*. Competing rights with respect to proceeds

160. The text of article 17*bis* as considered by the Working Group was as follows:

"(1) *Variant A*

In case of competing rights referred to in articles 23 and 24:

(a) if the proceeds take the form of receivables, priority with respect to proceeds is governed by the law of the State in which the assignor is located;

(b) if the proceeds take the form of other assets, priority with respect to proceeds is governed by the law of the State in which they are located.

Variant B

Priority with respect to cash proceeds is governed by the law of the State in which the assignor is located. For the purposes of this article, cash proceeds means money, cheques[, balances in deposit accounts and similar assets].

"(2) Paragraphs (3) to (5) of article 24 apply to a conflict of priority arising between an assignee and the insolvency administrator or the assignor's creditors with respect to proceeds."

161. Diverging views were expressed as to whether draft article 17*bis* should be retained. One view was that it should be deleted altogether. It was stated that it was not appropriate to address in a legal text dealing with assignment of receivables property rights in assets as diverse as money, cheques, wire transfers and goods. The prevailing view, however, was that draft article 17*bis* should be retained. It was observed that the effect of draft article 17*bis* would be that the question whether the assignee's right in the proceeds of the assigned receivables would be a property (*in rem*) or a personal (*ad personam*) right would be left to the law of the assignor's or the asset's location. While it was recalled that the Working Group had not been able to agree on the question whether the assignee's right in the proceeds would be a personal or a property right, it was agreed that the matter could be dealt with by way of a conflict-of-laws provision (A/CN.9/447, paras. 63-68). It was also agreed that that provision should be placed in the context of draft articles 23 and 24, since it dealt with competing rights of third parties.

162. The discussion focused on variant A, which was found to be generally preferable. However, a number of concerns were expressed. One concern was that variant A appeared to be dealing with competing rights of third parties with regard to proceeds without creating property rights in proceeds (affecting the rights of third parties) . A similar concern was that variant A addressed issues of priority without specifying how priority would be exercised. Yet another concern was that variant A inappropriately referred to the term "proceeds", a term which was not universally understood in the same way, without defining it. It was suggested that the term "proceeds of receivables" should be defined for the purpose of the draft Convention as what was to be received with respect to receivables.

163. In order to address those concerns, it was suggested that the draft Convention should create a property right in proceeds of receivables in the limited situations where the assignor received payment in cash as a fiduciary of the assignee and held the proceeds of payment separated from its own assets. It was further suggested that such a rule could be usefully supplemented: by a rule providing that, if payment was made to the assignee, the assignee had a property right in that payment and could retain it, as long as the assignee had priority in the assigned receivable; and by a rule along the lines of variant A, which would deal with situations other than those in which the assignor received payment as a fiduciary of the assignee.

164. In order to reflect that suggestion, language along the following lines was proposed:

"(1) If proceeds of an assigned receivable are received by the assignee from the debtor, the assignee has the same priority in the proceeds as in the assigned receivable.

"(2) In the case of proceeds of an assigned receivable received by the assignor from the debtor, the assignee has the same priority in the proceeds as in the assigned receivable if:

(a) the proceeds are money, cheques, wire transfers, credit balances in deposit accounts or similar assets (cash proceeds),

(b) the assignor has collected the cash proceeds under instructions from the assignee to hold the cash proceeds for the assignee, and

(c) the cash proceeds are held by the assignor for the assignee separately from other assets of the assignor, such as in the case of a separate deposit account containing only cash proceeds of receivables assigned to the assignee.

"(3) In other cases, if proceeds of an assigned receivable are received by the assignor, priority of competing rights in the proceeds is determined as follows: ...[choice of law rule]."

165. Support was expressed for the proposed text. It was stated that such a rule would constitute a significant contribution to practices, such as invoice discounting and securitization, in which the assignor acted as a trustee of the assignee. In addition, it was stated that such a rule would benefit the assignor in that the assignor would be able to obtain financing without disrupting its business relationships with its clients; the assignor's creditors, to the extent that the assignor's business would grow; and the debtor, to the extent that the assignor would be more likely to extend better credit terms to the debtor. Moreover, it was observed that such a rule would not infringe on national practices, since, even in jurisdictions in which the notion of "proceeds" was unknown, cash receipts held in a separate account by an assignor acting as a fiduciary of an assignee were considered not to be part of the assignor's estate.

166. However, a number of concerns were expressed. One concern was that there was a need to protect the assignor's creditors from the appearance of wealth that the holding of the account by the assignor would inevitably create. Another concern was that the proposed text made it insufficiently clear that the assignor acted as a fiduciary of the assignee. A further concern was that, far from creating a substantive law property right of the assignee in the proceeds of the assigned receivables, the proposed text appeared to leave the issue of priority to the conflict-of-laws rules of the draft Convention. Yet another concern was that the efficiency of the proposed text depended on the assignor acting in accordance with the assignee's instructions, a result which could not be ensured with any degree of certainty. In response to that concern, it was pointed out that it was normal practice for parties to financing transactions to be rated in accordance with their track record and for transactions to be priced in accordance with that rating and the risks involved. Another concern was that such a rule would deprive the assignor's creditors, including privileged creditors such as employees, of an important asset, on which they could rely in order to obtain payment. In response to that concern, it was observed that, the assignor's estate having been enriched by the credit advanced by the assignee, it would be inappropriate to allow the assignor's creditors to obtain payment of the assigned receivables, since such an approach would result in a situation in which the assignor's creditors would have unduly benefited if the assignor became insolvent.

167. After discussion, the Working Group decided that the proposed text should be retained within square brackets for further consideration at its next session, along with variant A and paragraph (2) of draft article 17*bis*, and referred those provisions and the proposed text to the drafting group.

Section II. Debtor

Article 17*ter*. Principle of debtor-protection

168. The text of draft article 17*ter* as considered by the Working Group was as follows:

"(1) Except as otherwise provided in this Convention, an assignment does not have any effect on the rights and obligations of the debtor.

"(2) With the exception of a change in the identity of the person to whom or for whose account or to the address of which the debtor is required to make payment, which may be effected by way of a notification of the assignment, nothing in this Convention affects the payment terms contained in the original contract without the consent of the debtor."

169. The Working Group recalled its earlier decision to include in the preamble a general reference to debtor protection (see para. 21). It was noted that draft article 17*ter* originated in the version of draft article 7 contained in document A/CN.9/WG.II/WP.96 (hereinafter referred to as "old article 7").

Paragraph (1)

170. It was noted that the intended effect of paragraph (1) was that, with the exception of certain debtor-related matters expressly settled in the draft Convention (i.e. in draft articles 9 to 12 and 16 to 22), the rights and obligations of the debtor were left to the contract between the assignor and the debtor and the law governing that contract. The Working Group adopted paragraph (1) and referred it to the drafting group.

Paragraph (2)

171. It was noted that the provision contained in paragraph (2) of old article 7 had been reformulated in broader terms to align paragraph (2) with draft article 16 and to avoid an interpretation *a contrario* of paragraph (2) that, apart from the country and the currency of payment, the assignee might change any other payment terms contained in the original contract. With a view to aligning paragraph (2) with the definition of "payment instruction" , it was suggested that the words "the person to whom or for whose account or to the address of which the debtor is required to make payment" should be replaced by the words "the person, address or account" (see paras. 141 and 193). It was also suggested that, in order to reflect the decision of the Working Group to introduce a distinction between the notions of "notification of the assignment" and "payment instruction" (see paras. 138-142), the words "notification of the assignment" in paragraph (2) should be replaced by the words "payment instruction". Those suggestions received broad support.

172. It was widely felt that the reference to "the debtor's right to pay in the currency and in the country specified in the payment terms contained in the original contract" contained in old article 7 should be added to paragraph (2) to delineate the costs and risks borne by the debtor.

173. A question was raised as to whether specific provision should be made for the consumer-debtor. It was suggested that, in all instances, a consumer-debtor should be granted the possibility to obtain discharge of its obligation by paying the assignor. In support of that suggestion, it was stated that such an approach would be consistent with the proposed amendment to draft article 17*bis* (see para. 164), under which a debtor could continue making payments to the assignor. No support was expressed in favour of that suggestion.

174. The discussion next focused on the question whether a specific provision was needed to deal with situations where the debtor might be instructed to make payment at a place which, although located in the same country, would differ from the place stipulated in the original contract. Various views were

expressed as to how the draft Convention should deal with the allocation of the costs that might result from such a change in the place of payment. One view was that, where the original contract referred to a specific place of payment, the debtor should not, without its consent, be deprived of its contractual right to pay at that place. It was explained that significant inconvenience might result for the debtor, for example, from the need to pay through a bank or branch other than the one initially stipulated. The draft Convention should thus recognize the debtor's right to ignore such an instruction, or at least to be indemnified for any cost incurred as a result of a change in the place of payment even within the same country. It was suggested that language inspired from draft article 12 (2) might be used to deal with the breach of a clause specifying the place of payment. In response, it was stated that in all practical instances where special importance was attached by the debtor to the place of payment and where the debtor was in a position to negotiate the inclusion of a specific clause in that respect, the debtor would in fact introduce an anti-assignment clause in the original contract. Thus, the question of the possible right of the debtor to seek indemnity from the assignor for breach of such a clause would be sufficiently addressed by draft article 12 (2). It was also stated that, in most practical cases, a change in the place of payment within the borders of one country would be of little relevance and would not be interpreted as a breach of contract.

175. Another view, which attracted significant support, was that in the context of certain financial practices, including factoring, it was essential to allow for the payment instructions to change the place of payment. It was suggested that in practice no additional costs were to be expected from such a change in the place of payment, and that assignees had an interest in facilitating payment by the debtor in its own country and currency, even if the original contract provided for payment in another country and currency. It was also pointed out that in most practical circumstances domestic law allowed for a change in the place of payment for domestic assignments. It was thus suggested that paragraph (2) should expressly recognize the possibility for the payment instructions to change the country of payment specified in the original contract to provide for payment in the debtor's country.

176. Subject to the changes suggested in paragraphs 171, 172 and 175 above, the Working Group adopted draft article 17*ter* and referred it to the drafting group.

Article 17*quater*. Notification of the debtor

177. The text of draft article 17*quater* as considered by the Working Group was as follows:

> "(1) Notification of the assignment is effective when received by the debtor, if it is in any language that is reasonably designed to inform the debtor about the content of the notification. It shall be sufficient if notification of the assignment is in the language of the original contract.
>
> "(2) Notification of the assignment may relate to receivables arising after notification.
>
> "(3) Notification of a subsequent assignment constitutes notification of any prior assignment."

Paragraphs (1) and (2)

178. It was recalled that the Working Group had already adopted the substance of the paragraphs that comprised draft article 17*quater*. However, it was agreed that, as the Working Group had decided to differentiate between a notification of the assignment and a payment instruction, it would be necessary to

incorporate the latter concept into paragraphs (1) and (2). Subject to that change, the Working Group adopted paragraphs (1) and (2) and referred them to the drafting group.

Paragraph (3)

179. The question was raised as to whether paragraph (3) had to be aligned with paragraphs (1) and (2), as a consequence of the distinction that had been made between a notification and a payment instruction. In response, it was explained that such a reference to a payment instruction was not required in paragraph (3), since in those situations where, as in the case of a factors' chain, a receivable had been reassigned many times, there would be no business reason for the debtor to be notified until the receivable had been assigned to the last assignee in the chain. In addition, it was observed that paragraph (3) would enable the last assignee to provide to the debtor a notification which would also be considered as notification of the previous assignments. Such an approach would enable the last assignee to fill in the gaps in the chain of notifications and to give to the debtor payment instructions.

180. A number of concerns were raised, however, over the situation where there may have been an interruption in the chain of notifications in a series of subsequent assignments. One concern was that the debtor might not be able to determine with certainty the rights of the assignee. In order to address that concern, it was suggested that the notification should identify the original assignor and all assignees in the chain. In response, it was noted that the Working Group at its previous session had agreed that listing in the notification all successive assignees would be "excessively burdensome, contrary to established practice and potentially confusing for debtors" and that, while "reasonable assignees, in order to ensure that payment be made by the debtor according to their instructions, would normally provide sufficient information to the debtor", "the debtor was sufficiently protected against any uncertainty under draft article 18([6])" (A/CN.9/455, paras. 63–66). However, some doubt was expressed as to whether draft article 18 (6) was sufficient to protect the debtor. On the understanding that that matter could be addressed in the context of draft article 18, the Working Group adopted draft article 17*quater* and referred it to the drafting group.

Article 18. Debtor's discharge by payment

181. The text of draft article 18 as considered by the Working Group was as follows:

> "(1) Until the debtor receives notification of the assignment, it is entitled to discharge its obligation by paying in accordance with the original contract.
>
> "(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (8) of this article, it is discharged only by paying the person or to the address identified in such notification.
>
> "(3) If the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying the person or to the address identified in the first notification received.
>
> "(4) If the debtor receives more than one notification relating to a single assignment of the same receivables by the same assignor, the debtor is discharged by paying the person or to the address identified in the last notification received before payment.

"(5) If the debtor receives notification of one or more subsequent assignments, the debtor is discharged only by payment to the person or to the address identified in the notification of the last of such subsequent assignments received before payment.

"(6) If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide 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, any writing emanating from the assignor and indicating that the assignment has taken place.

"(7) 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.

"[(8) This article does not affect any ground on which the debtor may be discharged by paying a person to whom an invalid assignment has been made.]"

Paragraphs (1) and (2)

182. It was noted that the Working Group had already adopted draft article 18 (A/CN.9/447, paras. 69–93). However, recalling its decision to delete the reference to the payee contained in the definition of notification (see para. 71), the Working Group considered a proposal to replace the reference to a notification contained in paragraphs (1) and (2) with a reference to a payment instruction. It was stated that, in a number of practices, it was customary for a notification to be given without a payment instruction (e.g., notification relating to security arrangements). It was also observed that, for such practices to be accommodated without undermining the protection of the debtor, the discharge of the debtor would have to be based on a payment instruction rather than on a notification, since the notification would not necessarily indicate the name, address or account of the payee. Under such an approach, even if the debtor had received a notification, the debtor should be entitled to discharge by paying the assignor, as if there had been no assignment.

183. That proposal was objected to on a number of grounds. It was stated that such an approach would unduly interfere with significant practices, in which a debtor receiving a notification would normally be discharged by paying the assignee. The example was mentioned of disclosed invoice discounting, in which the notice was given for the purpose of cutting off the debtor's rights of set-off, while the assignor continued to collect from debtors as the agent of the assignee. In addition, it was observed that such an approach would inadvertently result in the debtor being uncertain as to whom to pay in order to discharge its obligation or as to whether the draft Convention would apply in a particular case. Such uncertainty, it was said, would delay payment, which was not in the interest of assignees or assignors.

184. In order to address the concerns expressed, the proposal was modified to the extent that paragraph (1) could provide that, after notification, the debtor could discharge its obligation by paying the assignee on the condition that the notification would not indicate otherwise and would provide sufficient information for the debtor to be able to determine whom to pay. Language along the following lines was proposed: "Upon the receipt of a notification of assignment, unless the notification indicates to the contrary, the debtor is discharged only by paying the assignee if the notification of assignment provides sufficient information to enable the debtor to determine where to make payment."

185. That proposal was not met with approval either. It was stated that such an approach would create uncertainty and would allow the debtor to refuse or delay payment on the pretext of the absence of sufficient information. In addition, it was observed that such an approach could inadvertently result in the debtor having to take action in order to determine where to make payment in order to discharge its obligation. Moreover, it was said that normally, even in the cases in which the assignor continued to receive payment after notification, the assignor would be acting on behalf of the assignee and thus payment to the assignor should be considered as payment to the assignee.

186. It was thus suggested that reference could be made in paragraph (2) to the notification and to payment "to the assignee or to the person designated by the assignee in the notification". The concern was expressed, however, that the proposed wording might make it insufficiently clear that a notification could be given by the assignor. In order to address that concern, a number of suggestions were made, including that the words "by the assignee" or "in the notification" should be deleted, and that reference should be made rather to payment to the assignee unless a contrary payment instruction was given. The latter suggestion received broad support. After discussion, the Working Group adopted paragraph (1) unchanged and paragraph (2), subject to the insertion of a reference to payment to the assignee unless the debtor was otherwise instructed, and referred them to the drafting group.

Paragraphs (3), (4) and (5)

187. In order to align the language of paragraphs (3), (4) and (5) with the new definition of notification adopted at the present session (see para. 71), it was agreed that: the reference to the "person or to the address" contained in paragraphs (3), (4) and (5) should be deleted; and in paragraph (4) reference should be made to a payment instruction.

188. A number of questions were raised. One question was whether paragraph (3) provided an exclusive way for the debtor to discharge its obligation. In response, it was noted that, unlike paragraph (2) (which provided that the debtor "is discharged *only*"), paragraph (3) did not refer to an exclusive way in which the debtor could discharge its obligation, since under paragraph (3) (as under paragraphs (4) and (5)), the debtor had a choice, namely, either to pay as foreseen in paragraph (3) or to pay the person entitled to payment under paragraph (7). In the latter case, it was noted, the debtor would be taking the risk of paying the wrong person and, as a result, of having to pay twice. Another question was whether, under paragraphs (3), (4) and (5), the debtor would be discharged only if the debtor acted in good faith. In response, it was noted that at previous sessions the Working Group had agreed that making the debtor's discharge subject to good faith standards or to the absence of knowledge about, e.g., the invalidity of an assignment or the superior right of another assignee would jeopardize certainty with regard to one of the main objectives of the draft Convention, namely, the protection of the debtor (A/CN.9/420, paras. 100–104, A/CN.9/432, paras. 168–172 and A/CN.9/434, para. 180). As to those situations in which bad faith of the debtor could be exceptionally relevant, it was noted that they were left to law applicable outside the draft Convention.

Paragraph (6)

189. In response to a question, it was noted that the fact that the debtor received notification could not in itself trigger the debtor's obligation to pay, which was subject to the original contract. Thus, if the debtor received notification before the debt became due, the debtor would not have an obligation to pay either the capital of the debt or interest thereon. If notification was given after the debtor's debt had become due and the requirements of paragraph (7) were met, the debtor's payment obligation to pay the

capital of its debt would be suspended and thus no interest would accrue. It was suggested that matters relating to interest should be addressed explicitly in the text of the draft Convention. In that connection, it was observed that such matters were often part of complex contractual arrangements and did not lend themselves to unification. It was agreed, however, that those interest-related matters could be usefully explained in the commentary.

Paragraph (7)

190. The view was expressed that paragraph (7) set forth the most important rule in draft article 18, i.e., that the debtor could be discharged by paying the rightful creditor. It was stated that all the other paragraphs of the draft article provided a "safe harbour rule" aimed at protecting the debtor if the debtor had paid the wrong person. It was thus suggested that paragraph (7) should be moved to the beginning of article 18. The suggestion was met with interest.

191. In order to avoid any interference with national law governing the discharge of the debtor, it was suggested that in paragraph (7) reference should be made to the law governing the receivable. That suggestion was objected to on the grounds that, as long as the paragraph made it sufficiently clear that the draft Convention was not intended to exclude grounds (contractual or non-contractual) for the discharge of the debtor existing under law applicable outside the draft Convention, it did not need to specify the applicable law. It was also noted that the wording of paragraph (7) was intended to track the language of the Ottawa Convention (A/CN.9/420, para. 131, A/CN.9/434, paras. 190–191 and A/CN.9/447, paras. 91–92).

Paragraph (8)

192. It was noted that paragraph (8) had been introduced in the text of draft article 18 within square brackets in order to address exceptional situations in which the debtor might pay an assignee of a non-existing assignment (A/CN.9/455, paras. 55–58). Diverging views were expressed as to whether the paragraph should be retained. One view was that it should be deleted or more specifically describe the issue addressed as that of a non-existing assignment. It was stated that the definition of assignment was sufficient in clarifying that the debtor could not be discharged if it paid an assignee deriving rights from a non-existing assignment. In addition, it was pointed out that paragraph (6), allowing the debtor to request adequate proof of the assignment in the case of a notification by the assignee, was sufficient to protect the debtor. In response, it was observed that paragraph (6) did not cover situations in which notification was given by the assignor. In that connection, some doubt was expressed as to the reasons why, in the case of notification by the assignor, the debtor should not be discharged even if the assignment was non-existing. In addition, some doubt was expressed as to whether paragraph (8) was compatible with draft article 18 as a whole, which, with the exception of paragraph (7), was intended to provide a "safe harbour rule" for the debtor in the case of payment to the wrong person. For lack of sufficient time, the Working Group tentatively decided to retain paragraph (8) within square brackets for consideration of the matter at its next session.

"Payment instruction"

193. Recalling its decision to consider the need of defining the term "payment instruction", which was used in draft article 16, as revised, and draft article 18 (2) and (4), the Working Group considered a revised definition of the term "payment instruction" (see para. 141). It was generally agreed that such a definition would not be necessary, since the meaning of the term "payment instruction" was self-

explanatory. It was also agreed that the drafting group would examine draft article 18 (4) to ascertain whether any aspects of the deleted definition should be incorporated in draft article 18 (4).

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

194. The text of draft article 19 as considered by the Working Group was as follows:

> "(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 or rights of set-off 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 other right of set-off, provided that[, under the law of the State in which the debtor is located,] it was available to the debtor at the time notification of the assignment was received. [For the purposes of this paragraph, the notification of assignment is effective even if it does not identify the person to whom or for whose account or the address to which the debtor is required to make payment.]
>
> "(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."

195. Noting that draft article 19 had already been adopted (A/CN.9/447, paras. 94–102), the Working Group focused on a few pending issues.

Paragraph (1)

196. Recalling its decision to exclude from the scope of the draft Convention receivables other than contractual receivables (see para. 42), the Working Group decided to delete the bracketed text in paragraph (1).

Paragraph (2)

197. The view was expressed that the question of when a right of set-off became "available" should be left to the law of the State governing the receivable, rather than to the law of the debtor's location. It was stated that such an approach would be consistent with the European Union Convention on the Law Applicable to Contractual Obligations (Rome, 1980; hereinafter referred to as "the Rome Convention") and draft article 30 of the draft Convention and would enable the parties to agree on the law governing rights of set-off. While that view enjoyed some support, greater support was expressed for the view that the matter should not be addressed in the draft Convention. It was stated that, in most cases, the law of the debtor's location was likely to apply in any event. After discussion, the Working Group agreed to delete the bracketed language contained in the first sentence of paragraph (2).

198. In view of the Working Group's decision to delete the reference to the payee from the definition of "notification" (see para. 71), it was also agreed that the second sentence contained in brackets was no longer necessary, and could be deleted.

Paragraph (3)

199. The question was raised as to the interplay between paragraph (3) and draft article 12. In response, it was noted that under draft article 12 (2) an anti-assignment clause would remain effective as between the assignor and the debtor. It was also noted that, to the extent that, under national law, an assignment might be considered to be a breach of contract, the debtor would have a cause of action against the assignor, but not against the assignee. On the other hand, it was noted that paragraph (3) was intended to ensure that the debtor would be unable to raise a breach of an anti-assignment clause as a set-off against the assignee, since such an approach would render the assignment of no value to the assignee. In addition, it was noted that governmental debtors could not lose their rights of set-off, since an assignment made despite an anti-assignment clause would not be effective as against governmental debtors and thus paragraph (3) would not apply. Subject to the changes referred to in paragraphs 196 to 198 , the Working Group adopted draft article 19.

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

200. The text of draft article 20 as considered by the Working Group was as follows:

> "(1) Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes 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 exclude:
>
> (a) defences arising from fraudulent acts on the part of the assignee;
>
> (b) defences based on the debtor's incapacity or the lack of authority of the debtor's agent to incur the debtor's liability on the original contract;
>
> [(c) where the original contract is in writing, defences based on the fact that the debtor signed the original contract without knowledge that the debtor's signature made the debtor a party to the contract, provided that such lack of knowledge was not due to the debtor's negligence and provided that the debtor was fraudulently induced to sign.]
>
> "(3) Such an agreement may only be modified by written agreement. The effect of such a modification as against the assignee is determined by article 21(2)."

201. It was noted that draft article 20 had already been adopted (A/CN.9/447, paras. 103–121).

Paragraph (1)

202. It was agreed that, in order to cover transactions that were made both for consumer and commercial purposes, reference should be made to transactions made "primarily" for consumer purposes.

Paragraphs (2) and (3)

203. It was agreed that the reference to the agent's lack of authority to incur the debtor's liability contained in subparagraph (b) of paragraph (2) should be deleted. It was stated that it would be inappropriate to extend concepts from the law on negotiable instruments to the law of assignment, in particular in view of the possibility of the assignor acting in some cases as an agent of the debtor.

204. It was agreed that subparagraph (c) of paragraph (2) was unnecessary and should be deleted. Insofar as the draft Convention was concerned with receivables rather than negotiable instruments, obligations on the part of the debtor would not arise as a result of signature, but instead as a consequence of the will of the parties. In addition, it was observed that in any event, in some legal systems, a defence of nullity of the original contract could not be waived by the debtor. Subject to the changes referred to in paragraphs 202 to 204, the Working Group adopted draft article 20.

Article 21. Modification of the original contract

205. The text of draft article 21 as considered by the Working Group was as follows:

> "(1) An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee and the assignee acquires corresponding rights.
>
> "(2) After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:
>
> (a) the assignee consents to it; or
>
> (b) the receivable is not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.
>
> "(3) Paragraphs (1) and (2) of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.
>
> "[(4) For the purposes of this article, the notification of assignment is effective even if it does not identify the person to whom or the account or address to which the debtor is required to make payment.]"

206. Noting that draft article 21 had already been adopted (A/CN.9/447, paras. 122–135) and recalling its decision to delete from the definition of notification any reference to the concept of a payment instruction (see para. 71), the Working Group agreed to delete paragraph (4).

Article 22. Recovery of payments

207. The text of draft article 22 as considered by the Working Group was as follows:

> "Without prejudice to the law governing the protection of the debtor in transactions made for personal, family or household purposes in the State in which the debtor is located and the debtor's rights under article 19, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee."

208. Noting that draft article 22 had already been adopted (A/CN.9/447, paras. 136–139), the Working Group decided that consumer transactions should be qualified by a reference to transactions made "primarily" for consumer purposes.

Section III. Other parties

Article 23. Competing rights of several assignees

209. The text of draft article 23 as considered by the Working Group was as follows:

> "(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) An assignee entitled to priority may at any time voluntarily subordinate its priority in favour of a competing assignee, whether or not that competing assignee is then in existence. [The subordination may be unilateral or may occur by agreement with the assignor, the competing assignee or any other person.]"

210. The Working Group noted that it had already adopted draft article 23 (A/CN.9/455, paras. 18–21) and went on to consider the bracketed language in paragraph (2). Diverging views were expressed. One view was that the bracketed language should be deleted. It was stated that the first sentence of paragraph (2) was sufficient, since a voluntary subordination would necessarily have to be either unilateral or by agreement. The prevailing view, however, was that the bracketed language usefully clarified a matter with regard to which some uncertainty prevailed in some legal systems. As a matter of drafting, it was suggested that, for the sake of economy and clarity, paragraph (2) should be revised to read as follows: "An assignee entitled to priority may at any time subordinate unilaterally or by agreement its priority in favour of any existing or future assignee." Subject to those changes, the Working Group adopted paragraph (2).

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

211. The text of draft article 24 as considered by the Working Group was as follows:

> "(1) Priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

"(2) In an insolvency proceeding relating to the assets of the assignor, priority between the assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

"(3) Notwithstanding paragraphs (1) and (2), the application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

"(4) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, 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.

"[(5) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any non-consensual right or interest which under the law of the forum State would have priority over the interest of an assignee has such priority notwithstanding paragraph (2) but only to the extent that such priority was specified by the forum State in an instrument deposited with the depositary prior to the time when the assignment was made.]

"(6) An assignee asserting rights under this article has no less rights than an assignee asserting rights under other law."

212. It was noted that the text of draft article 24 had already been adopted by the Working Group (A/CN.9/455, para. 175).

Paragraph (2)

213. It was noted that paragraph (2) had been reformulated to reflect the fact that the insolvency administrator might not always be the holder of the rights of the assignor's creditors, but might merely exercise the rights of those creditors. It was also noted that the current formulation reflected the fact that, in some reorganization proceedings, there might be no insolvency administrator. As a matter of drafting, it was agreed that, in view of the definition of "insolvency proceeding", the words "relating to the assets of the assignor" should be deleted. Subject to that change, the Working Group adopted the revised text of paragraph (2).

Paragraph (3)

214. Doubts were expressed as to the appropriateness of limiting the impact of public policy to the cases where the applicable law was "manifestly contrary" to the public policy of the forum State. It was stated that the notion of "*manifestly* contrary" might not be commonly used in certain legal systems and might thus result in uncertainty as to the reach of the provision. In response, it was explained that the expression "*manifestly* contrary" was also used in many other international legal texts (e.g., article 6 of the UNCITRAL Model Law on Cross-Border Insolvency) as a qualifier of the expression "public policy". It was noted that the purpose of the term "manifestly" was to emphasize that public policy exceptions should be interpreted restrictively and that paragraph (3) was only intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the forum State (see Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, para. 89). It was widely felt that such an approach was sufficient to preserve fundamental public policy considerations of the forum State, without unduly undermining the certainty achieved by the draft Convention.

Paragraph (4)

215. It was widely felt that appropriate explanations should be inserted in the commentary as to the meaning of the words “except as provided in this article”.

Paragraph (5)

216. The Working Group discussed the question whether, in order to ensure that draft article 24 (2) did not override national rules creating preferential (non-consensual or super-priority) rights (e.g., in favour of the State for taxes), a separate provision along the lines of paragraph (5) was required.

217. General support was expressed in favour of the principle expressed in paragraph (5), namely, the possibility for the forum State to preserve the operation of national rules creating super-priority rights. In response to a question whether that principle was already sufficiently reflected in paragraph (3), it was pointed out that, under paragraph (3), the forum State would be able to refuse the application of a provision of the law applicable under paragraph (2) if it was manifestly contrary to its own public policy, but it could not positively apply provisions reflecting its own public policy. It was also stated that the commentary could explain that paragraph (5) was intended to preserve non-consensual rights or interests with priority under the law of the forum State.

218. The discussion then focused on whether the reference placed at the end of paragraph (5) to a declaration by States enumerating those non-consensual rights that would take precedence over the rights of an assignee should be retained. Diverging views were expressed.

219. One view was that such a reference to a list of rights to be preserved by way of declaration by States should be retained. It was stated that a declaration along the lines contemplated in paragraph (5) might play an essential role in providing certainty as to the operation of the draft Convention by delineating the scope of super-priorities in a given State. In addition, it was pointed out that precedence for such an approach could be found in the draft Unidroit Convention on International Interests in Mobile Equipment. Moreover, it was observed that the absence of such a declaration and the resulting uncertainty as to the nature and extent of super-priority rights recognized in a given State might significantly increase the cost of credit in that State.

220. The prevailing view, however, was that such a reference should be deleted. It was pointed out that requiring States to enumerate in a declaration non-consensual rights that would take precedence over the rights of an assignee might reduce the acceptability of the draft Convention to States, since any oversight or error in the declaration would result in such rights becoming subject to the rights of an assignee. In addition, it was stated that certainty might not be served if, contrary to the expectations on which paragraph (5) was based, declarations were not sufficiently clear and detailed, or were constantly being revised. Moreover, it was observed that the uncertainty resulting from the absence of such declarations should not be overestimated, since, while the drafting of a detailed list identifying each super-priority right might prove technically difficult, the broad categories of non-consensual rights that would typically be treated as super-priority rights were already well known to the international financing community. Furthermore, it was said that the formulation of such declarations might be constitutionally impossible for Governments in those States where super-priority rights were not exhaustively listed in statute.

221. With a view to accommodating the need for increased certainty with respect to super-priority rights in those countries that wished to do so, it was suggested that States should, at least, have the possibility of making such a declaration. Language along the following lines was proposed:

> "A State may deposit at any time a declaration identifying those [non-consensual][preferential] rights or interests which have priority over the interest of an assignee, notwithstanding application of the priority rule set out in paragraph (2)."

222. Subject to the deletion of the reference to declarations by States at the end of paragraph (5) and the addition of the above-mentioned suggested wording within square brackets, the Working Group adopted paragraph (5).

Multiple parties

223. It was recalled that the Working Group had deferred consideration of draft articles 1 (6) and 3 (2) and (3) in order to allow for consultations with regard to practices involving a multiplicity of parties (see para. 28). It was stated that a multiplicity of parties could arise in three contexts: two or more debtors might be jointly (i.e., fully) and severally (i.e., independently) liable to payment of one or more receivables; two or more assignors might be joint owners of one or more receivables; or, one or more receivables might be assigned to two or more assignees.

224. It was observed that a multiplicity of debtors could arise in the case where a lender had extended credit to more than one debtor (e.g., a group of companies under common ownership) and all debtors had agreed to be jointly and severally liable under the original contract. In addition, it was stated that multiple assignees would be involved in the case where several assignees had loaned money to one assignor under a single loan agreement (e.g., a syndicated loan agreement). Moreover, it was pointed out that cases where joint assignors were involved were very rare in practice (e.g., where several assignors jointly owned one or more receivables).

225. In the case of multiple debtors, it was stated, the rights and obligations of all debtors would be subject to the rules of the draft Convention if the original contract were to be governed by the law of a Contracting State. If, however, the original contract was not governed by the law of a Contracting State and only one debtor was located in a Contracting State, each transaction should be viewed as an independent transaction. Thus, the draft Convention should be applicable only to those debtors who were located in Contracting States. In addition, a receivable should be treated as an international receivable if each debtor and the assignor were located in different countries. Moreover, it was observed that, in the case of multiple assignees or assignors, the joint ownership should be ignored in the determination as to whether the assignor was located in a Contracting State or an assignment or a receivable was international. It was agreed that the draft Convention would produce those results without the addition of language along the lines of draft articles 1 (6) and 3 (2) and (3). As a result, it was stated that there was no need to determine primary or secondary liability; the rules of the draft Convention would be applicable as if there were no joint and several liability; and applicability would be determined on the basis of the parties and the economic effect of the transaction without regard to its structure or format. After discussion, the Working Group decided to delete draft articles 1 (6), and 3 (2) and (3).

226. The discussion then focused on the question whether the location of multiple assignors and assignees could be determined on the basis of their authorized agent or trustee (draft article 5 (k) (v)).

Diverging views were expressed. One view was that draft article 5 (k) (v) should be retained. It was stated that a provision along the lines of draft article 5 (k) (v) might provide useful clarification in those instances where it would be reasonable for location to be determined on the basis of the agent's location, since the agent would be a party to the transaction.

227. Another view was that draft article 5 (k) (v) should be deleted. It was observed that it would be inappropriate for an entire transaction to be referred to the law of the agent's location, irrespective of whether the agent was a party to the transaction or merely performed administrative functions. In addition, it was pointed out that such an approach might result in the draft Convention often being inapplicable, to the extent that agents were located in a tax haven, which normally would not be a Contracting State. Moreover, it was said that the terms "authorized agent" and "trustee" were not universally understood. In response, it was observed that it might be premature to delete draft article 5 (k) (v) before the Working Group had an opportunity to discuss draft article 5 (k) as a whole. On that basis, the Working Group decided to retain draft article 5 (k) (v) within square brackets.

IV. REPORT OF THE DRAFTING GROUP

228. The Working Group requested a drafting group established by the Secretariat to review the title, the preamble and draft articles 1 to 22, with a view to ensuring consistency between the various language versions.

229. At the close of its deliberations, the Working Group considered the report of the drafting group and adopted the title, the preamble and draft articles 1 to 22, as revised by the drafting group, as well as draft articles 23 and 24. The text of those revised draft articles, as well as of draft articles 23 and 24, as adopted by the Working Group, is reproduced in the annex to the present report. In line with its decision made after the preparation of the report of the drafting group (see para. 225), the Working Group decided that draft articles 1 (5) and 3 (2) and (3) should be deleted. It was agreed that, in the second sentence of draft article 2 (a), reference should be made to a creation of a security right being "deemed to be" a transfer of receivables, in order to reflect the fact that the Working Group was establishing a legal fiction. With regard to draft article 5 (c), it was decided that it should be made clear that an existing receivable was one arising "upon or after the conclusion of the contract of assignment". It was decided that the reference to certain draft articles contained in the *chapeau* of draft article 5 (j) and (k) should be placed within square brackets to indicate the prevailing view in the Working Group that one "location" rule for the purposes of the draft Convention as a whole was preferable. With regard to draft article 12, it was decided that the reference to the various government departments and agencies, as well as the reference to commercial activities of governmental entities, should be placed within square brackets for further consideration at the next session of the Working Group. It was suggested that the words "by payment" should be added after the word "discharge" in draft article 19 (2). That suggestion was objected on the grounds that such an addition was superfluous in view of the fact that draft article 19 dealt only with discharge by payment. It was decided that in draft article 19 (4) it should be made clear that, once notification had been given, only the assignee could give a payment instruction. With regard to draft article 21, it was recalled that the reference to a defence based on the nullity of the original contract had been deleted, *inter alia*, on the grounds that, in any event, such a defence could not be waived by the debtor. As to the reference to a "signed writing", it was stated that the matter would need to be reconsidered at the next session of the Working Group.

V. FUTURE WORK

230. It was stated that the Working Group should intensify its efforts to reach agreement on the meaning of the term "location" for the purposes of the draft Convention as a whole. In that connection, it was observed that, with regard to the location of the assignor and the assignee, a possible basis for agreement might be found in the notions of "chief executive office" or "place of central administration", while, with regard to the location of the debtor, reference could be made to the place most closely connected to the original contract. As to the provisions in chapter VI that related to mandatory rules and public policy issues, a note of caution was struck that their exception from the rules from which Contracting States could opt out might inadvertently give the impression that they were intended to apply not only to the private international law provisions of the draft Convention outside chapter VI, but also to the substantive law provisions of the draft Convention. It was observed that such a result would significantly reduce the certainty achieved by the draft Convention. With regard to the optional annex to the draft Convention, it was suggested that issues arising in that regard could be advanced before the next session of the Working Group by way of informal consultations.

231. It was noted that the next session of the Working Group was scheduled to take place at Vienna from 11 to 22 October 1999, those dates being subject to confirmation by the Commission at its thirty-second session, to be held at Vienna from 17 May to 4 June 1999.

VI. RELATIONSHIP BETWEEN THE DRAFT CONVENTION AND THE UNIDROIT DRAFT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

232. It was noted that the International Institute for the Unification of Private Law (Unidroit) was currently preparing, in cooperation with the International Civil Aviation Organization (ICAO) and other organizations, a convention on security interests (including conditional sales and leases) in mobile equipment of high value, such as aircraft, space equipment and railway rolling stock (hereinafter referred to as "the Unidroit draft"). It was also noted that the Unidroit draft was intended to remove obstacles to international trade created by the application of the law of the location of the equipment (*lex situs*), as a result of which a security right created in country A might not be enforceable in country B.

233. In addition, it was noted that one of the key features of the Unidroit draft was that it was divided into a base convention, which contained provisions applicable to a number of types of mobile equipment, and to protocols, which contained equipment-specific provisions. Moreover, it was noted that the base convention would enter into force only to the extent that an equipment protocol would enter into force. It was also noted that another key feature of the Unidroit draft was that it was based on equipment-specific international registries that would need to be established some time in the future for the Unidroit draft to apply. So far, an aircraft protocol had been prepared in cooperation with ICAO, while a space protocol and a railway rolling stock protocol were being prepared in cooperation with other organizations. Under the current draft aircraft protocol, three ratifications were required for the protocol to enter into force (although, in line with ICAO practice, the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, which would be superseded by the aircraft protocol, required 20 ratifications).

234. The Unidroit draft would cover, *inter alia*, the creation of security interests in, as well as the outright assignment of, rights to payment or rights to performance by the obligor under a contract of sale or a lease of equipment (art. 1 and art. 41). In addition, the Unidroit draft would cover the assignment of

security interests in equipment, which would result, under the current draft, in the transfer of the receivables arising under the contract of sale or lease of equipment to the transferee of the security right in equipment (art. 31). Moreover, the Unidroit draft would cover the question of priority in insurance proceeds payable in respect of the loss or physical destruction of equipment (art. 28.5).

235. It was noted that such an approach would create an overlap with the draft Convention being prepared by the Working Group. To the extent that the Unidroit draft would resolve assignment-related issues in a way other than the way in which those matters were resolved in the draft Convention, such an overlap could result in two conflicting regimes applying to the same matters. It was noted that there were three ways in which such conflicts could be resolved, i.e., by excluding from the scope of the draft Convention the assignment of receivables arising from the sale or lease of equipment, by excluding from the Unidroit draft the assignment of receivables or by leaving conflicts to be dealt with by way of a provision governing the relationship of the draft Convention with other international texts. Such a provision could provide that the draft Convention superseded or gave way to the Unidroit draft. Alternatively, it could provide, along the lines of draft article 42, that a State, if interested in adopting both texts, should decide which text it wished to give precedence to.

236. It was noted that, if the assignment of receivables arising from the sale or lease of equipment were to be excluded from the scope of the draft Convention, on the assumption that the Unidroit draft would be widely adopted and would enter into force within a reasonable period of time (which depended on the establishment of equipment-specific international registries in the future), the assignment of those receivables would be covered by that text. The most notable results of such an approach would be that: the receivable secured by an accessory security right in equipment would be treated as an associated, accessory right following the security interest; the assignment of such receivables would be possible only with the consent of the debtor; priority with regard to those receivables would be determined on the basis of priority in time of registration in the relevant international registry; the equipment financier would be able to take advantage of the self-help remedies provided in the Unidroit draft (art. 9), as well as of the remedies foreseen in that text in the case of insolvency of the borrower (assignor of receivables), including the repossession of the encumbered equipment within 30 or 60 days after the opening of the insolvency proceedings (art. XI of the aircraft protocol).

237. If, on the other hand, the assignment of receivables arising from the sale or lease of equipment were to be excluded from the Unidroit draft, assuming that the draft Convention would be widely adopted, their assignment would be covered by the draft Convention. The most notable result of such an approach would be that priority in respect of those receivables would be determined in accordance with the law of the State of the assignor's location. If that State were a party to the Unidroit draft, priority would be determined in accordance with the order of priority in time of registration in the respective international registry. However, if the assignor were located in a State which was not a party to the Unidroit draft and that text applied on the basis that the equipment was registered in a national registry (e.g., aircraft registered with a national aviation authority; art. 4), two different priority rules could be applicable.

238. It was stated that, in determining how to address the conflict between the draft Convention and the Unidroit draft, the key question that would need to be answered was an empirical one, namely whether receivables arising from the sale or lease of equipment were part of equipment or receivables financing. In that connection, it was pointed out that, in aircraft financing transactions, rights associated with the sale or lease of aircraft (i.e., rights to payment as well as rights to performance) were inextricably linked with the aircraft in the sense that the financier would normally seek to obtain a security

interest in the aircraft, as well as in the flow of income arising from the lease and in the rights relating to the maintenance of the encumbered aircraft. It was thus suggested that, in order to avoid affecting settled equipment financing practices, the assignment of receivables arising from the sale or lease of aircraft, and possibly similar mobile equipment, should be excluded from the draft Convention. Unlike receivables arising from the sale or lease of aircraft, receivables arising from the sale of airline tickets were said to be often used in receivables financing transactions, such as securitization, and, where combined with other receivables, could be excluded from the Unidroit draft.

239. While some support was expressed for that suggestion, the Working Group deferred final decision until its next session to allow time for consultations. It was observed that, in light of the broad scope of application of the base convention of the Unidroit draft, the exclusion of the assignment of receivables arising from the sale and lease of all types of mobile equipment could significantly reduce the benefit to be derived by States from the adoption of the draft Convention. On the other hand, it was stated that the impact of such an exclusion would not be so serious, since the Unidroit draft would affect at most a narrow range of receivables financing transactions, leaving the broad range of such transactions unaffected. It was observed, however, that the possibility of referring the assignment of receivables to the protocols or of the assignment of receivables being excluded altogether from the base convention of the Unidroit draft would also need to be considered. In addition, it was stated that the possibility of addressing the conflict between the draft Convention and the Unidroit draft by way of a provision dealing with conflicts between international texts would also need to be carefully studied.

ANNEX

[DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING]

[DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES [IN INTERNATIONAL TRADE]]

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 content and choice of legal regime applicable to assignments [of receivables] in international trade [constitute an obstacle to financing transactions],

Desiring to establish principles and adopt rules [relating to the assignment of receivables] that would create certainty and transparency and promote modernization of law relating to [assignments of receivables] [receivables financing] [including but not limited to assignments used in factoring, forfaiting, securitization, project financing, and refinancing,] while protecting existing [financing] [assignment] practices and facilitating the development of new practices,

Also desiring to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables,

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

Have agreed as follows:

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

(1) This Convention applies to:

(a) assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State;

(b) subsequent assignments provided that any prior assignment is governed by this Convention; and

(c) subsequent assignments that are governed by this Convention under subparagraph (a) of this paragraph, notwithstanding that any prior assignment is not governed by this Convention.

(2) This Convention does not affect the rights and obligations of the debtor unless the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State.

[(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] [independently of the provisions of this chapter]. However, the provisions of articles 29 to 31 do not apply if a State makes a declaration under article 42 *bis*.]

(4) The annex to this Convention applies in a Contracting State which has made a declaration under article 43.

Article 2. Assignment of receivables

For the purposes of this Convention:

(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

(b) In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.

Article 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 of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

Article 4. Exclusions

[(1)] This Convention does not apply to assignments:

(a) made for personal, family or household purposes;

(b) to the extent made by the delivery of a negotiable instrument, with any necessary endorsement;

(c) made as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.

[(2) This Convention does not apply to assignments listed in a declaration made under draft article 42 *quater* by the State in which the assignor is located, or with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, by the State in which the debtor is located.]

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

For the purposes of this Convention:

(a) "original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;

(b) a receivable is deemed to arise at the time when the original contract is concluded;

(c) "existing receivable" means a receivable that arises upon or before the conclusion of the contract of assignment; "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 information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;

(f) "notification of the assignment" means a communication in writing which reasonably identifies the assigned receivables and the assignee;

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

(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 or other competent authority for the purpose of reorganization or liquidation;

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

[(j) [For the purposes of articles 24 and 25,] an individual is located in the State in which it has its habitual residence; a corporation is located in the State in which it is incorporated; a legal person other than a corporation is located in the State in which its constitutive document is filed and, in the absence of a filed document, in the State in which it has its chief executive office.]

[(k) [For the purposes of articles 1 and 3:]

(i) the assignor is located in the State in which it has that place of business which has the closest relationship to the assignment;

(ii) the assignee is located in the State in which it has that place of business which has the closest relationship to the assignment;

(iii) the debtor is located in the State in which it has that place of business which has the closest relationship to the original contract;

(iv) in the absence of proof to the contrary, the place of central administration of a party is presumed to be the place of business which has the closest relationship to the relevant contract. If a party does not have a place of business, reference is to be made to its habitual residence[;

(v) several assignors or assignees are located at the place in which their authorized agent or trustee is located]].

Article 6. Party autonomy

The assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

Article 7. 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.

CHAPTER III. EFFECTS OF ASSIGNMENT

Article 8. Effectiveness of bulk assignments, assignments of future receivables, and partial assignments

(1) An assignment of existing or future, one or more, receivables, and parts of, or undivided interests in, receivables is effective, whether the receivables are described:

(a) individually as receivables to which the assignment relates; or

(b) in any other manner, provided that they can, at the time when the receivables arise, be identified as receivables to which the assignment relates.

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

Article 9. Time of assignment

An existing receivable is transferred, and a future receivable is deemed to be transferred, at the time of the conclusion of the contract of assignment, unless the assignor and the assignee have specified a later time.

Article 10. Contractual limitations on assignments

(1) An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee, 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 for breach of such an agreement. A person who is not party to such an agreement is not liable under that agreement for its breach.

Article 11. Transfer of security rights

(1) A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer, unless, under the law governing the right, it is transferable only with a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer this right and any proceeds to the assignee.

(2) A right securing payment of the assigned receivable is transferred under paragraph (1) notwithstanding an agreement between the assignor and the debtor or other person granting the right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

(3) Nothing in this article affects any obligation or liability of the assignor for breach of an agreement under paragraph (2). A person who is not a party to such an agreement is not liable under that agreement for its breach.

(4) 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.

(5) 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 receivable.

Article 12. Limitations relating to Governments and other public entities

Articles 10 and 11 do not affect the rights and obligations of a debtor, or of any person granting a personal or property right securing payment of the assigned receivable, if that debtor or person is a governmental department[, agency, organ, or other unit, or any subdivision thereof, unless:

(a) the debtor or person is a commercial entity; or

(b) the receivable or the granting of the right arises from commercial activities of that debtor or person.]

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 13. Rights and obligations of the assignor and the assignee

(1) The rights and obligations of the assignor and the assignee as between them 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 which in international trade is widely known to, and regularly observed by, parties to the particular [receivables financing] practice.

Article 14. Representations of the assignor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of the conclusion of the contract of assignment that:

(a) the assignor has the right to assign the receivable;

(b) the assignor has not previously assigned the receivable to another assignee; and

(c) the debtor does not and will not have any defences or rights of set-off.

(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.

Article 15. Right to notify the debtor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor a notification of the assignment and a payment instruction, but after notification is sent only the assignee may send a payment instruction.

(2) A notification of the assignment or payment instruction sent in breach of any agreement referred to in paragraph (1) of this article is not ineffective for the purposes of article 19 by reason of such breach. 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.

Article 16. Right to payment

(1) Unless otherwise agreed between the assignor and the assignee and whether or not a notification of the assignment has been sent:

(a) if payment with respect to the assigned receivable is made to the assignee, the assignee is entitled to retain whatever is received in respect of the assigned receivables;

(b) if payment with respect to the assigned receivable is made to the assignor, the assignee is entitled to payment of whatever has been received by the assignor.

(2) If payment with respect to the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of whatever has been received by such person.

(3) The assignee may not retain more than the value of its right in the receivable.

Section II. Debtor

Article 17. Principle of debtor-protection

(1) Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.

(2) A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not:

(a) change the currency of payment specified in the original contract, or

(b) change the State specified in the original contract, in which payment is to be made, to a State other than that in which the debtor is located.

Article 18. Notification of the debtor

(1) A notification of the assignment and a payment instruction are effective when received by the debtor, if they are in a language that is reasonably expected to inform the debtor about their contents. It shall be sufficient if a notification of the assignment or a payment instruction is in the language of the original contract.

(2) A notification of the assignment or a payment instruction may relate to receivables arising after notification.

(3) Notification of a subsequent assignment constitutes notification of any prior assignment.

Article 19. Debtor's discharge by payment

(1) Until the debtor receives notification of the assignment, the debtor is entitled to discharge its obligation by paying in accordance with the original contract.

(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (8) of this article, the debtor is discharged only by paying the assignee or as otherwise instructed.

(3) If 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 first notification received.

(4) If the debtor receives more than one payment instruction relating to a single assignment of the same receivables by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

(5) If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.

(6) If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide 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, any writing emanating from the assignor and indicating that the assignment has taken place.

(7) 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.

[(8) This article does not affect any ground on which the debtor may be discharged by paying a person to whom an invalid assignment has been made.]

Article 20. 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 or rights of set-off arising from the original contract of which the debtor could avail itself if such claim were made by the assignor.

(2) The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received.

(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 10 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.

Article 21. Agreement not to raise defences or rights of set-off

(1) Without prejudice to the law governing the protection of the debtor in transactions made primarily for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a signed writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 20. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.

(2) The debtor may not exclude:

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

(b) defences based on the debtor's incapacity.

(3) Such an agreement may only be modified by an agreement in a signed writing. The effect of such a modification as against the assignee is determined by article 22 (2).

Article 22. Modification of the original contract

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

(2) After notification of the assignment, an agreement between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:

(a) the assignee consents to it; or

(b) the receivable is not fully earned by performance and either modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

(3) Paragraphs (1) and (2) of this article do not affect any right of the assignor or the assignee for breach of an agreement between them.

Article 23. Recovery of payments

Without prejudice to the law governing the protection of the debtor in transactions made primarily for personal, family or household purposes in the State in which the debtor is located and the debtor's rights under article 20, failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.

Article 24. 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) An assignee entitled to priority may at any time subordinate unilaterally or by agreement its priority in favour of any existing or future assignees.

Article 25. Competing rights of assignee and creditors of the assignor or insolvency administrator

(1) Priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

(2) In an insolvency proceeding, priority between the assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

(3) Notwithstanding paragraphs (1) and (2), the application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

(4) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, 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.

(5) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any [non-consensual] [preferential] right or interest which under the law of the forum State would have priority over the interest of an assignee has such priority notwithstanding paragraph (2). [A State may deposit at any time a declaration identifying those [non-consensual] [preferential] rights or interests which have priority over the interests of an assignee notwithstanding application of the priority rule set out in paragraph (2).]

(6) An assignee asserting rights under this article has no less rights than an assignee asserting rights under other law.

[Article 26. Competing rights with respect to payments

(1) If payment with respect to the assigned receivable is made to the assignee, the assignee has a property right in whatever is received in respect of the assigned receivable.

(2) If payment with respect to the assigned receivable is made to the assignor, the assignee has a property right in whatever is received in respect of the assigned receivable if:

(a) what is received is money, cheques, wire transfers, credit balances in deposit accounts or similar assets ("cash receipts");

(b) the assignor has collected the cash receipts under instructions from the assignee to hold the cash receipts for the benefit of the assignee; and

(c) the cash receipts are held by the assignor for the benefit of the assignee separately from assets of the assignor, such as in the case of a separate deposit account containing only cash receipts from receivables assigned to the assignee.

(3) With respect to the property rights referred to in paragraphs (1) and (2) of this article, the assignee has the same priority as it had in the assigned receivables.

(4) If payment with respect to the assigned receivable is made to the assignor and the requirements of paragraph (2) are not met, priority with respect to whatever is received is determined as follows:

(a) if what is received is a receivable, priority is governed by the law of the State in which the assignor is located;

(b) if what is received is an asset other than a receivable, priority is governed by the law of the State in which it is located.

(5) Paragraphs (3) to (5) of article 25 apply to a conflict of priority arising between an assignee and the insolvency administrator or the assignor's creditors with respect to whatever is received.]

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