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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS THIRTY-FIRST SESSION (Vienna, 11 - 22 October 1999)

CONTENTS

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* Only articles and issues discussed at this session are listed in this report. With the exception of the proposal with regard to the issue of location of the parties, issues are listed in the order they were discussed. The annex to this report contains the consolidated text of the draft Convention and the annex to the draft Convention as a whole, as adopted by the Working Group.

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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/] This was the eighth session devoted to the preparation of this uniform law, tentatively entitled the draft Convention on Assignment in Receivables Financing.

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

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the

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

assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. [2/]

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).

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. [3/]

6. At its twenty-fifth and twenty-sixth sessions (New York, 8-19 July and Vienna, 11-22 November 1996 respectively), 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 respectively). At those sessions, the Working Group adopted the working assumptions that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include conflict-of-laws provisions (A/CN.9/434, para. 262).

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. [4/] 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. [5/]

8. At its twenty-seventh and twenty-eighth sessions (Vienna, 20-31 October 1997 and New York, 2-13 March 1998 respectively), 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 respectively). At its twenty-seventh session, the Working Group had decided that basic priority rules of the draft Convention would be private international law rules and the substantive law priority rules of the draft Convention would be subject to an opt-in by States (A/CN.9/445, paras. 26-27), while, at its twenty-eighth session, the Working Group had adopted the substance of draft articles 14 to 16, dealing with the relationship between the assignor and the assignee, and 18 to 22, dealing with the relationship between the assignee and the debtor (A/CN.9/447, paras. 161-164).

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

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

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

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). [6/]

10. At its twenty-ninth and thirtieth sessions (Vienna, 5-16 October 1998 and New York, 1-12 March 1999 respectively), the Working Group considered three notes prepared by the Secretariat (A/CN.9/WG.II/WP.96, A/CN.9/WG.II/WP.98 and A/CN.9/WG.II/WP.102), 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 those sessions, the Working Group adopted the substance of the preamble and draft articles 1(1) and (2), 5 (g) to (j), 18 (5*bis*), 23 to 33 and 41 to 50 (A/CN.9/455, para. 17) and the title, the preamble and draft articles 1 to 24 (A/CN.9/456, para. 18).

11. At its thirty-second session (1999), the Commission had before it the report of the twenty-ninth and thirtieth sessions of the Working Group (A/CN.9/455 and A/CN.9/456). The Commission expressed appreciation for the work accomplished by the Working Group and requested the Working Group to proceed with its work expeditiously so as to make it possible for the draft Convention, along with the report of the next session of the Working Group, to be circulated to Governments for comments in good time and for the draft Convention to be considered by the Commission for adoption at its thirty-third session (2000). As regards the subsequent procedure for adopting the draft Convention, the Commission noted that it would have to decide at its next session whether it should recommend adoption by the General Assembly or by a diplomatic conference to be specially convened by the General Assembly for that purpose. [7/]

12. The Working Group, which was composed of all States members of the Commission, held the present session at Vienna from 11 to 22 October 1999. The session was attended by representatives of the following States members of the Working Group: Algeria, Australia, Austria, Bulgaria, Cameroon, China, Colombia, Egypt, Finland, France, Germany, Honduras, Hungary, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

13. The session was attended by observers from the following States: Benin, Bolivia, Cambodia, Canada, Congo, Czech Republic, Gabon, Georgia, Greece, Guatemala, Indonesia, Iraq, Ireland, Lebanon, Libyan Arab Jamahiriya, Namibia, Netherlands, Poland, Republic of Korea, Saudi Arabia, Slovakia, Sweden, Switzerland, Tunisia and Turkey.

14. The session was attended by observers from the following international organizations: Association of the Bar of the City of New York (ABCNY), Commercial Finance Association (CFA), European Federation of National Factoring Associations (EUROPAFACTORING), Factors Chain International (FCI), Fédération bancaire de l'Union européenne, Federacion Latinoamericana de Bancos (FELABAN) and International Institute for the Unification of Private Law (Unidroit).

15. The Working Group elected the following officers:

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

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Ms. Victoria Gavrilescu (Romania).

16. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.II/WP.103), a note by the Secretariat entitled "Draft Convention on Assignment in Receivables Financing: text with remarks and suggestions" (A/CN.9/WG.II/WP.104), and two other notes by the Secretariat entitled "Commentary to the draft Convention on Assignment in Receivables Financing" (A/CN.9/WG.II/WP.105 and 106).

17. 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

18. The Working Group considered pending issues identified in the text of the draft Convention with language in square brackets or in the remarks of the Secretariat (A/CN.9/WG.II/WP.104). Noting that the provisions of the draft Convention dealing with conflicts of priority had not been sufficiently discussed at the previous session, the Working Group decided to begin its deliberations with draft articles 23 to 26 and to consider in that context the issue of "location". Also noting the importance of scope and exclusions, before continuing in the numerical order of the draft articles, the Working Group addressed exclusions in draft article 4.

19. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapters III to VII. The Working Group considered draft articles 1 (3), 2 to 5, 8, 10 to 12, 16, 19 to 29 and 33 to 42 of the draft Convention, as well as draft articles 1 to 7 of the annex to the draft Convention. With the exception of the wording within square brackets which was referred to the Commission, the Working Group adopted the draft Convention and the annex thereto as a whole. Having completed its work, the Working Group decided to submit the draft Convention to the Commission for adoption at its thirty-third session (New York, 12 June to 7 July 2000).

III. DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [OF RECEIVABLES IN INTERNATIONAL TRADE]

Article 24. Competing rights of several assignees

20. The text of draft article 24 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 subordinate unilaterally or by agreement its priority in favour of any existing or future assignees."

21. In order to avoid leaving to the law of the assignor's location issues that were intended to be covered by the draft Convention (e.g., the question whether an assignee may give a notification with regard to future receivables so as to obtain priority under the law of the assignor's location), the Working Group decided to include at the beginning of paragraph (1) language along the opening words of draft article 27 (1): "With the exception of matters which are settled in this Convention".

22. Confirming its understanding that paragraph (1) applied to a conflict of priority between a foreign and a domestic assignee of the same domestic receivables from the same assignor (A/CN.9/445, para. 22), the Working Group decided to include at the end of paragraph (1) language along the following lines: "This rule applies even if one of the assignees is an assignee in a domestic assignment of domestic receivables".

23. The question was raised as to whether a conflict with an inventory financier or a supplier of goods with a retention of title, who had a right in the proceeds from the sale of the inventory or the goods, would be covered by draft article 24. In response, it was observed that the reference in draft article 25 (1) to "the assignor's creditors" was sufficient to encompass conflicts with inventory financiers and suppliers of goods on credit. In any case, it was stated, if the right of such persons in the proceeds was contractual, they should be treated as assignees.

24. After discussion, the Working Group adopted draft article 24 as amended and referred it to the drafting group.

<u>"Location" of the parties</u>

25. In the context of its discussion of draft article 24, the Working Group considered the meaning of the term "location" (defined in draft article 5 (j) and (k)). The Working Group based its discussion on a draft prepared by the Secretariat, which was as follows:

"(i) a party is located in the State in which it has its place of business;

"(ii) if the assignor or the assignee have more than one place of business, the place of business is that which has the closest relationship to the contract of assignment. If the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract. If a party does not have a place of business, reference is to be made to the habitual residence of that party;

"(iii) for the purposes of articles 24 to 26, the place where the central administration of an entity is exercised *de facto* is deemed to be the place of business with the closest relationship to the contract of assignment[;

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

26. It was noted that that text was an attempt to build on the common points that emerged from the discussion at the previous session of the Working Group. Those points were: that the need for certainty was much stronger in the priority provisions than in the scope provisions; that the scope of application of the draft Convention should be as broad as possible; that, in order to achieve a sufficient degree of debtor-protection, at least, with regard to the debtor's location, reference should be made to the relevant place of business; and that a solution with regard to the priority provisions could be built around the concept of central administration/chief executive office of an entity (A/CN.9/456, paras. 35-37).

27. Support was expressed in favour of the above-mentioned text. However, the concern was expressed that the application of two different location rules could lead to inconsistent results. The concern was also expressed that adoption of a central-administration test would result in priority conflicts involving branch offices being inappropriately subjected to the law of the location of the head office, even if that jurisdiction had nothing to do with the transactions that gave rise to such conflicts. In order to address those concerns, a number of suggestions were made. One suggestion was that a more flexible rule along the lines of draft article 5 (k) (iv) should be established, allowing parties to prove that the place of central administration was not the place most closely connected to the relevant transaction. That suggestion was objected to on the ground that such a rule would introduce an unacceptable degree of uncertainty.

28. Another suggestion was to devise a rule along the lines of the above-mentioned text with an exception for branch offices of banks. In support of that suggestion, it was observed that, although branch offices had no separate legal personality from that of the head office, they were subject to the financial services regulations of the country in which they were located in respect of their activities in that country. It was also stated that the exception referred only to branch offices of banks, since it was normal practice for banks to operate through branch offices, while other industries operated more through subsidiaries, which were separate legal persons even if they operated under the instructions of the parent company. While that suggestion was met with interest, the view was expressed that there was no reason to limit the exception to branch offices of banks. It was also said that the formulation of such a limited exception would be a very difficult task since there was no universally acceptable definition of the term "bank". It was, therefore, suggested that the exception should apply to branch offices in general. That suggestion was objected to on the ground that such an exception would undermine the certainty achieved by a central administration-based rule, since third parties would need to do a factual search to establish which branch office a transaction was most closely connected to. It was stated that problems might arise from a double assignment of the same receivables by the head office and a branch office. It was also observed that a solution along the lines of the above-mentioned text, offering two different location rules, would be preferable to one rule with a broad exception for branch offices in general.

29. In the discussion, it was agreed that subparagraph (iv) of the above-mentioned text should be deleted. It was observed that assignments by multiple assignors were rare in practice and, in any case, the application of the draft Convention only to the assignment of an interest in receivables, which fell within the ambit of the draft Convention under chapter I, was an appropriate result. As to assignments to multiple assignees, it was stated that such assignments were part of well developed practices in which parties normally settled the matter of location in their agreements. It was also agreed that the reference to a "*de facto*" central administration, contained in subparagraph (iii), was superfluous and could be deleted on the understanding that the actual place of central administration was meant. It was observed that use

of the words "*de facto*" could inadvertently raise interpretation questions as to whether there was another "*de jure*" central administration (i.e. one artificially designated in the constitutive or other documents of a legal entity). It was also stated that the words "is exercised", which were intended to reflect a fact, were sufficient in clarifying that the actual place of central administration was meant.

30. After discussion, the Working Group decided that, for the continuation of the discussion, two alternatives should be included in the text of draft article 5 with regard to the definition of the term "location", one alternative along the lines of the text mentioned in paragraph 25 above and another that would read along the following lines:

> "A person is located in the State in which it has its place of business. If an assignor or assignee has more than one place of business, it is located in the State in which it has its central administration. If a debtor has more than one place of business, it is located in the State in which it has that place of business which has the closest relationship to the original contract. [A branch of a person [engaged in the business of accepting deposits or providing other banking services] is deemed to be a separate person.] If a person does not have a place of business, it is located in the State of its habitual residence."

The Working Group left the specific formulation of those alternatives to the drafting group (for the continuation of the discussion on "location", see paras. 96-100).

Renvoi

31. In order to avoid the risk of *renvoi* (i.e. the application of the law designated by the private international law provisions -conflict of laws- of a State other than the forum State), the Working Group decided to include in draft article 5 a new subparagraph along the following lines: "'law' means the law in force in a State other than its rules of private international law".

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

32. The text of draft article 25 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, 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."

33. With regard to paragraphs (1) and (2), the Working Group confirmed its understanding that they were intended to apply irrespective of the place in which a proceeding commenced.

34. Recalling its decision to include at the beginning of draft article 24 the words "With the exception of matters which are settled in this Convention" (see para. 21), the Working Group decided that the same wording should be included in draft article 25 to apply to both paragraphs (1) and (2).

35. The Working Group noted that, in paragraph (2), the term "assignor's creditors" had been substituted for the term "insolvency administrator", since: in some legal systems, the insolvency administrator did not become the holder of the rights of the creditors; and, in some reorganization proceedings, there might be no insolvency administrator. However, in view of the fact that, in other legal systems, the insolvency administrator did become the holder of the creditors' rights, the Working Group decided that a reference to the insolvency administrator should be inserted in paragraph (2).

36. As to the policy underlying paragraph (3), it was noted that it was intended to strike a balance between the need to ensure certainty and the need to preserve fundamental policy decisions of the law of the forum State. Accordingly, the right of the forum State to set aside a provision of the law applicable was recognized and, at the same time, limited to cases in which that provision was manifestly contrary to the public policy of the forum State. It was observed that, by definition, paragraph (3) referred to international public policy, the application of which could result in setting aside a priority rule of the law applicable but not in the positive application of a priority rule reflecting the public policy of the forum State. The Working Group noted that the matter was appropriately explained in the commentary (see A/CN.9/WG.II/WP.106, paras. 89-90).

37. As to the scope of paragraph (3), a number of suggestions were made. One suggestion was that paragraph (3) should be revised to be made applicable only in the case of a conflict of priority arising in an insolvency proceeding. In support of that suggestion, it was stated that a broader public policy exception would create uncertainty and thus have a negative impact on the availability and the cost of credit. It was also observed that such an approach would be in line with paragraph (5), which was intended to preserve super-priority rights arising by operation of law only in an insolvency proceeding. That suggestion was objected to on the ground that the right of a court or other authority to apply its own public policy could not be limited. It was stated that such a limitation could reduce the acceptability of the draft Convention. It was also said that, in any case, it would be doubtful whether such a limitation, even if included in paragraph (3), would be implemented by courts. Another suggestion was that paragraph (3) should be revised to be made applicable only to cases in which a proceeding commenced in a State other than the State of the assignor's location. While it was agreed that a conflict between the applicable law and the public policy of the forum State could arise only if two jurisdictions were

involved, it was generally felt that no change was necessary. Paragraphs (1) and (2) were generally thought to sufficiently reflect the understanding that, if the law applicable to priority and the law governing any insolvency or other proceeding were laws of a single jurisdiction, the internal rules of that jurisdiction would resolve any conflict. Yet another suggestion was that the words "notwithstanding paragraphs (1) and (2)" were superfluous and should be deleted. On the understanding that even without those words paragraph (3) sufficiently reflected the fact that it applied both within and outside an insolvency proceeding, the Working Group approved that suggestion.

38. With regard to paragraph (4), the Working Group noted that it was intended to preserve rights of the insolvency administrator or the assignor's creditors in a proceeding opened in a State other than the State of the assignor's location ("secondary insolvency proceeding"). Such rights, while falling short of reflecting the public policy of the forum State, were based on rules of mandatory law (e.g., the right to challenge the validity of an assignment on the ground that it was a preferential or fraudulent transfer). It was observed that, in view of the fact that paragraphs (1) and (2) dealt with priority questions without affecting special rights based on insolvency law, paragraph (4) was superfluous and could be deleted. It was also stated that the words "except as provided in this article" raised doubts as to whether the rights that were intended to be preserved were in fact protected. After discussion, the Working Group decided that paragraph (4) should be deleted.

39. As to paragraph (5), it was noted that it was intended to preserve super-priority rights (e.g., in favour of the State for tax claims or of employees for wages) in the case of an insolvency proceeding commenced in a State other than the State of the assignor's location. A number of suggestions were made as to the appropriate term to reflect those super-priority rights. One suggestion was that those rights should be qualified as non-consensual rights. That suggestion was objected to on the ground that it might not sufficiently cover preferential rights which arose out of consensual relationships. Another suggestion was that the term "preferential" should be used. That suggestion was objected to on the ground that it would inadvertently result in broadening the scope of the exception from the rule of paragraph (2) and in giving priority to creditors of the assignor that had a property right in receivables recognized in a court judgement. Yet another suggestion was that no qualification of the rights arising under the law of the forum State was necessary. That suggestion too was objected on the ground that it would in effect overturn the rule of paragraph (2) and subject priority to the law of the forum State. Yet another suggestion was that the super-priority rights meant in paragraph (5) could be described as preferential rights arising by operation of the law of the forum and having priority status in an insolvency proceeding in the forum State. That suggestion received sufficient support.

40. With regard to paragraph (6), the Working Group noted that it was originally intended to ensure that an assignee asserting priority under the substantive law provisions of the draft Convention would not have less rights than if it asserted priority under substantive law outside the draft Convention (A/CN.9/455, para. 40; and A/CN.9/445, para. 44). It was also noted that, once the Working Group decided to turn the priority rules of the draft Convention into private international law rules (A/CN.9/445, para. 22), paragraph (6) did not appear to be appropriate. It was observed that paragraph (6) appeared suggesting that, although a conflict of priority was covered by the draft Convention, a law other than the law of the assignor's location might be applicable. After discussion, the Working Group decided that paragraph (6) should be deleted.

41. The Working Group adopted draft article 25 as amended and referred it to the drafting group.

Article 26. Competing rights with respect to payments

42. The text of draft article 26 as considered by the Working Group was as follows:

"[(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.]"

43. The Working Group noted that paragraphs (1) and (2) were intended to give the assignee a right *in rem* in proceeds, without affecting the order of priority established in paragraphs (3) and (4). It also noted that, in order to better reflect that understanding, the Secretariat had separated the issue of priority in proceeds from the issue of the remedies available to an assignee with priority in such proceeds and addressed those issues in two separate provisions that were as follows:

"Article 26. Priority in proceeds

"(1) Priority among several assignees of the same receivables from the same assignor and between the assignee and the assignor's creditors or the insolvency administrator with respect to

whatever is received in payment [, or other discharge,] of the assigned receivable 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.

"(2) Paragraphs (3) to (5) of article 25 apply to a conflict of priority arising between an assignee and the assignor's creditors or the insolvency administrator with respect to whatever is received in payment [, or other discharge,] of the assigned receivable.

"Article 26*bis*. Rights *in rem* in proceeds

"(1) With the exception of the cases foreseen in paragraphs (2) to (4) of this article, whether an assignee [has a right *in rem* or *ad personam* in] [is entitled to claim and retain] whatever is received in payment [, or other discharge,] of the assigned receivable is subject to the law governing priority under article 26 of this Convention.

"(2) If payment [, or other discharge,] with respect to the assigned receivable is made to the assignee, the assignee with priority over the assignor's creditors or the insolvency administrator under article 26 of this Convention has [a right *in rem* in] [the right to retain] whatever is received up to the value of its right in the receivable[, including interest].

"(3) If payment [, or other discharge,] with respect to the assigned receivable is made to the assignor, the assignee with priority over the assignor's creditors or the insolvency administrator under article 26 of this Convention has [a right *in rem*] [the right to retain] whatever is received up to the value of its right in the receivable[, including interest,] if:

(a) the assignor has received payment [, or other discharge,] under instructions from the assignee to hold whatever it received for the benefit of the assignee; and

(b) whatever the assignor received is held by the assignor for the benefit of the assignee separately and is reasonably identifiable 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."

44. The Working Group decided to use those draft articles as a basis for the continuation of its deliberations.

Priority in proceeds

45. It was generally agreed that priority in proceeds that were receivables, including receivables in the form of negotiable instruments, as well as balances in deposit and securities accounts, should be governed by the law of the assignor's location.

46. With regard to priority in other types of proceeds, such as goods, a number of suggestions were made. One suggestion was to retain draft article 26 (1) (b), proposed by the Secretariat, as it was or with the addition of language aimed at ensuring that the rights of third parties in goods were not affected. That suggestion did not receive sufficient support. Another suggestion was that priority in proceeds in the form of goods should be governed by the law of the assignor's location. In support of that view, it was observed that the application of the law of a single and easily determinable jurisdiction would enhance certainty. It was also stated that such an approach would be in line with the approach taken with regard to priority in receivables, which deviated from the traditional approach of the law of the "location" of a receivable (i.e. of the place in which it was payable). That suggestion was objected to on the ground that such an approach could frustrate the expectations of third parties in the country where the goods were located and reduce the acceptability of the draft Convention. Yet another suggestion was that a distinction should be drawn between goods received in total or partial satisfaction of the receivable and goods returned (e.g., because they were defective and the sale contract had been cancelled or because the sale contract allowed the buyer to return those goods after a trial period). It was stated that the former type of goods were another form of the same receivable and priority with respect to those goods should be subject to the same rule as priority with respect to receivables, while the latter type of goods had no relationship with the receivable and priority with respect to those goods should be subject to the law of their location. That suggestion attracted sufficient support. The Working Group requested that the commentary include an explanation of the notion of "returned goods".

47. In the discussion, the Working Group noted that the issue of proceeds arose also in the context of article 16 with respect to the relationship between the assignor and the assignee. The question was raised as to whether the assignee's right in proceeds as against the assignor should extend to goods given in total or partial satisfaction of the assigned receivable. The Working Group postponed discussion of that question until it had completed its review of draft article 16 (see para. 120).

48. It was agreed that the term "proceeds" should be defined, without prejudice to the question whether "returned goods" would be covered in draft article 16 (see para. 120). Language along the lines of draft article 16 (1) (a) was generally considered to be acceptable ("whatever is received with respect of the assigned receivable"), with the addition of the notions of payment and satisfaction of the assigned receivable, whether total or partial. As to the use of the term "discharge", objections were raised on the ground that that term implied payment in full.

49. After discussion, the Working Group adopted draft article 26 as amended and referred its formulation, as well as the formulation of the definition of the term "proceeds", to the drafting group.

Rights *in rem* in proceeds

50. With regard to draft article 26*bis*, a number of concerns were expressed. One concern was that draft article 26*bis* was complicated and inappropriately dealt with substantive law issues in paragraph (1) and private international law issues in paragraphs (2) and (3). Another concern was that in creating rights *in rem* in proceeds, draft article 26*bis* was inconsistent with fundamental notions of law in many countries that did not recognize such rights and yet provided sufficient protection for assignees. Yet another concern was that draft article 26*bis* was unnecessary since parties could structure their transactions so as to meet their needs.

51. In response, it was stated that a right *in rem* in the limited cases described in paragraphs (2) and (3) of draft article 26*bis* could significantly facilitate non-notification factoring transactions, securitization transactions and transactions involving sovereign receivables, in which assignors received payments on behalf of assignees and normally held such payments in separate accounts, since, with such a right, assignees would be protected in the case of insolvency of assignors. If, in order to be protected, assignees would need to notify debtors and structure their transactions so as to receive payments themselves, non-notification and the other practices mentioned above would be hampered and the costs of those transactions would increase. It was also observed that, the estate of the assignor having been enriched through the credit provided by the assignee to the assignor in return for the receivables, allowing the insolvency administrator or the creditors of the assignor to receive payment of the receivables should be considered as unjust enrichment. Furthermore, it was stated that, while such *in rem* rights in proceeds of receivables might be foreign to many jurisdictions, fiduciary arrangements, on the basis of which assignors received payments on behalf of assignees and had certain obligations as against such assignees, were not unknown, if not in statutory, at least, in case law of those jurisdictions. It was, therefore, suggested that, if an assignee had priority in the assigned receivable, the assignee or the assignor received payment, payment was received by the assignor on behalf of the assignee and the proceeds of payment were held by the assignor separately, that assignee should be given priority with regard to those proceeds. That suggestion received sufficient support.

52. In the discussion, the suggestion was made that the rules to be prepared should also cover the extent of the assignee's right in the assigned receivable, the existence and the extent of the assignee's right in proceeds, as well as the existence and the extent of the right of a creditor, who had a right in other property of the assignor, which right was, by operation of law, extended to the assigned receivable. That suggestion too received sufficient support.

53. After discussion, the Working Group requested the drafting group to formulate a specific rule with regard to priority in proceeds along the lines mentioned in paragraphs 51 and 52 above, which would not address the question of the legal nature of rights in proceeds. The Working Group left to the drafting group the question of consolidating the priority rules contained in section III of chapter IV of the draft Convention in one or more rules.

Article 4. Exclusions

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

"[(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 35 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.]"

General remarks

55. Some doubt was expressed as to whether draft article 4 was necessary. The Working Group recalled its decision that the scope of application of the draft Convention should not be limited by reference to the commercial or financing purpose of a transaction. The Working Group also recalled its decision that assignments for consumer purposes and certain practices that did not need to be regulated should be excluded. The Working Group, therefore, confirmed its decision that draft article 4 should be retained and decided that the brackets in paragraph (2) should be removed on the understanding that draft article 35 would be reviewed at a later stage (as to the brackets around draft article 4 (2), see paras. 86, 199-201 and 211).

56. The Working Group went on to consider exclusions relating to assignments for consumer purposes, assignments of receivables arising from financial instruments, funds transfer orders, payment and securities settlement systems and from deposit accounts, as well as assignments of receivables arising from the sale and lease of aircraft and other types of mobile equipment.

Assignments for consumer purposes

57. It was noted that subparagraph (a) was intended to limit the scope of the draft Convention to commercial transactions, whether they related to trade or to consumer receivables. It was also noted, however, that, in its current formulation, subparagraph (a) might result in excluding inappropriately certain commercial transactions, such as: assignments of insurance policies from consumers to financing institutions; and assignments from consumers to financing institutions in return for loans used for consumer purposes. In order to address that problem, a number of suggestions were made. One suggestion was to ensure that only assignments "exclusively" for consumer purposes would be excluded. Another suggestion was to exclude transactions "made from an individual to an individual for personal, family or household purposes". Neither suggestion was found to be sufficient in reflecting the general understanding of the Working Group that only assignments from a consumer to a consumer should be excluded. Another suggestion was to make explicit reference to the term "consumer". That suggestion was objected to on the ground that the term "consumer" was not universally understood in the same way.

58. Yet another suggestion was that subparagraph (a) should be replaced by a general provision aimed at ensuring that the rights of consumers were not affected by the draft Convention. It was stated that that provision might be limited to consumer-protection legislation. That suggestion was objected to on the

grounds that such a provision would be unnecessary in view of the fact that the draft Convention was not intended to override consumer-protection law; and would inadvertently result in excluding significant practices involving the assignment of consumer receivables. The Working Group confirmed its decision that, unlike the Unidroit Convention on International Factoring (Ottawa, 1988; hereinafter referred to as "the Ottawa Convention"), the application of which was limited to trade receivables, the draft Convention should cover commercial practices involving the assignment of consumer receivables.

59. After discussion, the Working Group decided that only assignments made from a business entity or a consumer to a consumer and only if made for consumer purposes should be excluded, adopted subparagraph (a) on that understanding and referred its exact formulation to the drafting group.

Assignments of receivables arising from financial instruments, funds transfer orders, payment and securities settlement systems, and deposit accounts

60. It was stated that financial instruments, such as money-market and stock-exchange instruments, swaps and derivatives, were traditionally governed by international standard agreements, such as the International Swaps and Derivatives Association (ISDA) Master Agreement and the International Securities Market Association (ISMA) Master Agreement, or other national standard agreements. It was also observed that those standard agreements usually included a clause under which a party could not assign its claim against the other party without that party's consent. In the case of a breach of such a clause, it was said, a party had the right to terminate not only the transaction in question but all the transactions governed by a master agreement. It was added that many master agreements contained a cross-default clause, under which, in the case of any such breach, all the transactions governed by all those master agreements could be terminated. In addition, it was observed that, under standardized arrangements existing with regard to the execution of funds transfer orders and payment of securities among participants of payments and securities settlement systems, the assignment of receivables from transfer orders was normally prohibited. Moreover, it was said that it was normal practice for financing institutions to preclude in their general terms and conditions their clients from assigning receivables arising from deposit accounts. It was explained that such receivables were regularly used as collateral for credit facilities offered by financing institutions to their clients.

61. It was observed that, contrary to such practices, draft article 10 (1) validated assignments made in violation of an anti-assignment clause, without, however, precluding the debtor from terminating the transactions in question or all transactions governed by a master agreement or more than one master agreement with a cross-default clause. It was also stated that such a result could undermine international financial markets. In addition, it was observed that validating the assignment of receivables arising from deposit accounts in violation of anti-assignment clauses could impair the relationship between financing institutions and their clients, pose problems in the use of those deposit accounts as collateral for credit facilities offered by such institutions and increase the risk of money laundering. Moreover, draft article 20 (3), under which the debtor could not raise against the assignee any claim that the debtor might have against the assignor for breach of an anti-assignment clause, was said to create serious problems for swaps and derivatives markets. It was explained that such a provision would render useless netting arrangements that formed a key component of such financial transactions. It was also stated that such a provision would run counter to normal practices existing under master repurchase and master netting agreements.

62. There was general agreement in the Working Group that the above-mentioned concerns should be addressed. Differing views were expressed, however, as to the most appropriate way to address them.

One view was that, in order to avoid undermining well-functioning practices, transactions involving money market or stock exchange instruments, swaps and derivatives, and receivables arising from transfer orders or settlements through payment or securities settlement systems should be excluded from the scope of the draft Convention by way of a blanket exclusion in draft article 4. In support of that view, it was observed that an exclusion in draft article 4 was preferable for reasons of simplicity and predictability. Alternatively, if consensus could not be reached by the Working Group on such a blanket exclusion, such transactions could be covered by the draft Convention on the condition that an assignment made without the consent of the debtor would be treated as null and void. The suggestion was also made that the latter approach could be followed in any case with regard to receivables from deposit accounts.

63. In order to implement the first suggestion mentioned above, it was stated that a new paragraph should be added to the preamble in order to express the specificity of receivables arising from deposit accounts as well as receivables arising from transactions involving such financial instruments.

64. Concerning receivables arising from deposit accounts, language along the following lines was proposed:

"Article 1. Scope of application

"(1) This Convention applies to:

...

(d) receivables arising from deposit accounts subject to the conditions of article 8 (3)".

"Chapter III. Validity and effects of assignment

"Article 8. Validity and effectiveness of bulk assignments, assignments of future receivables, partial assignments and assignments of receivables arising from deposit accounts

...

"(3) An assignment of receivable(s) arising from deposit accounts is valid and effective subject to the prior explicit consent of the debtor. Any assignment made in breach of this provision shall be deemed null and void under the present Convention."

65. Concerning receivables arising from transactions involving financial instruments, language along the following lines was proposed:

"Article 4. Exclusions

"[(3)] This Convention does not apply to receivables arising from:

(a) transactions involving financial instruments such as money-market or stock exchange instruments, swaps and other derivatives,

(b) transactions involving the temporary assignment of securities for cash,

(c) transfer orders or settlements through a payment or securities settlement system."

66. Alternatively, in the event that consensus could not be reached on the amendments mentioned in paragraph 65 above, language along the following lines was proposed:

"Article 1. Scope of application

"(1) This Convention applies to:

...

(e) receivables arising from transactions:

(i) involving financial instruments such as money-market and stock exchange instruments, swaps and other derivatives, receivables arising from transactions involving the temporary assignment of securities for cash and, in both cases, any collateral related to, under the express reservation of article 10 (2) (i),

(ii) transfer orders or settlements through a payment or securities settlement system under the express reservation of article 10 (2) (ii)."

"Article 10. Contractual limitations on assignment

"(2) Paragraph (1) shall not apply to receivables arising from:

(i) transactions involving financial instruments such as money-market and stock exchange instruments, swaps and other derivatives, receivables arising from transactions involving the temporary assignment of securities for cash, unless the debtor has explicitly consented to the assignment**,** whether or not there is a contractual clause limiting in any way the assignor's right to assign its receivables,

(ii) transfer orders or settlements through payment or securities settlement systems, unless the rules of such systems explicitly authorise such assignment."

67. Whether the Working Group preferred the wording mentioned above in paragraph 65 or in paragraph 66 above, the following definitions were proposed for addition to draft article 5:

"(...) 'Derivatives' means forward transactions related to stock exchange or market prices of [...] securities, money-market instruments, currencies, units of account, commodities, precious metals or interest rates or other income or to the creditworthiness of debtors, including spot and forward foreign exchange transactions and options on the above defined transactions or any combination thereof, or similar transactions.

"(...) 'Payment or securities settlement systems' means contractual arrangements between three or more participants with common rules for the settlement of payment or security transfer orders and any collateral related to between the participants, supported by a central counterparty, settlement agent or clearing house.

"(...) 'Temporary assignment of securities for cash' means repurchase and reverse repurchase transactions, as well as borrowing and lending transactions on financial instruments, such as securities or money-market instruments and similar transactions."

68. While the proposals mentioned above were met with great interest, the view was expressed that an outright exclusion or an invalidation of assignments not only as against the debtor but as against all parties would go far beyond what was needed to address the above-mentioned debtor-related concerns. It was stated that such an approach would unnecessarily deprive assignees of even a right in the proceeds after payment by the debtor of a financial receivable. In addition, it was observed that a blanket exclusion could result in excluding composite transactions involving the assignment of both trade and financial receivables. The suggestion was, therefore, made that it would be preferable to include those transactions in the scope of the draft Convention, while making the necessary adjustments so as to address the debtor-related concerns.

69. As to the types of adjustments that would need to be made, it was stated that rules dealing with payment to a new creditor (draft articles 17-19), rights of set-off of the debtor (draft article 20 (2) and (3)) and the right of the debtor to modify the original contract (draft article 22) should apply only to trade receivables (i.e. receivables arising from the sale of goods or the provision of services) and to transactions in which there was no restriction on assignment in the original contract. As a result, it was said, if there was a contractual restriction on the assignment of a receivable other than a trade receivable, the assignment would have no effect on the debtor's rights and obligations (i.e. the debtor would not need to pay the assignee and would not lose its rights of set-off or its right to modify the original contract), unless the debtor consented to the assignment. In view of that additional protection and in order to avoid the problems described above with regard to default and cross-default rules in master agreements (see paras. 60 and 61), the debtor of a receivable other than a trade receivable would not have the right to claim breach of, or terminate, the original contract on account of the assignment.

70. Such an approach was said to have several advantages, including the following: that it would address the special interests of debtors of financial receivables; that it would preserve an acceptable debtor-protection regime for debtors of trade and consumer receivables; that, in the case of an assignment of a financial receivable, it would allow the application of the draft Convention as between the assignor and the assignee and as against competing assignees, creditors of the assignor and the administrator in the insolvency of the assignor; and that it would avoid the difficulty in defining financial receivables, which would be difficult to define as indicated in the above-mentioned proposal (see para. 67).

71. Language along the following lines was proposed:

"Article 5. Definitions and rules of interpretation

"(...) "trade receivable" means a receivable arising under an original contract for the sale or lease of goods or the provision of services.

"Article .... Special Provisions Relating to Debtors on Receivables that are not Trade Receivables

"(1) This article applies only to a receivable that is not a trade receivable and only to the extent of a restriction on assignment provided in an agreement described in articles 10 (1) and 11 (2).

"(2) Notwithstanding articles 17, 18 and 19, an assignment of the receivable, and receipt by the debtor of a notification of the assignment or payment instruction, shall have no effect under this Convention on the debtor's rights or obligations except to the extent that the debtor consents.

"(3) Notwithstanding article 20 (2), nothing in this Convention limits any right of the debtor to raise against the assignee any defence or set-off available to the debtor, even if the defence or set-off became available to the debtor after the time notification of the assignment was received.

"(4) Notwithstanding article 22, nothing in this Convention limits the effectiveness against the assignee of an agreement concluded at any time between the assignor and the debtor to modify the original contract.

"(5) Notwithstanding articles 10 (2) and 11 (3), an assignor who assigns a receivable is not liable to the debtor for breach of the restriction on assignment and the breach shall have no effect."

72. It was also proposed that language along the following lines could be added at the end of articles 10, 11, 17, 18, 19, 20 and 22:

"(...) In the case of a receivable that is not a trade receivable, this article is subject to article ...."

It was stated that, if needed, a provision might also be added to article 4 directing attention to the special provisions mentioned above.

73. The proposal set forth in paragraphs 71 and 72 above was met with interest. As a matter of policy, it was widely felt that the Working Group should try to retain as broad a scope of application as possible, while ensuring that the concerns of the industry were addressed. If, after consultation with the industry, that approach were proven to be unworkable, a blanket exclusion could be considered. In response to a question as to the impact of the proposal on the legislative treatment of the assignment of financial receivables, it was stated that certain provisions of the draft Convention would not apply to debtor-related issues (e.g., discharge of the debtor or rights of set-off of the debtor), which would be left, as a result, to law applicable outside the draft Convention. However, it was said, the rest of the provisions of the draft Convention would apply (e.g., draft article 10 (1), and, as a result, the assignment would be effective as between the assignor or the assignor's creditors and the assignee). In addition, it was pointed out that paragraph (5) was based on the assumption that, once the debtor's rights were not affected by the assignment, the debtor did not need to terminate any agreement. It was explained that paragraph (5) was intended to address the problem raised with regard to systemic risks arising in the case of a breach of an anti-assignment clause in the case of master agreements with cross-default clauses.

74. As to the merits of an approach based on a definition of trade receivables, it was stated that, in defining the well-known notion of trade receivables, the proposed text avoided the need for a list of financial receivables, which could be neither homogeneous nor exhaustive. However, a number of concerns were expressed. One concern was that the reference to services in the definition of trade receivables could inadvertently result in financial receivables being treated as trade receivables. In order to address that concern, it was suggested that reference should be made to "services other than financial services". That suggestion received broad support. Another concern was that, in defining financial receivables in a negative way, the proposal might inadvertently result in subjecting inappropriately the assignment of certain types of trade receivables to a special regime (e.g., trade receivables held by a financing institution and assigned to another financing institution). In order to address that concern, it was suggested that the proposed text would need to be examined carefully in consultation with the relevant industry so as to ensure that all different practices were treated appropriately. That suggestion too received sufficient support. Yet another concern was that it might not be appropriate to define in essence the scope of the draft Convention in a negative way. In response, it was observed that such an

approach was often followed in legislative texts and, in the present case, presented the obvious advantage of being based on the well-known notion of trade receivables.

75. As to the special regime for the assignment of financial receivables in the proposal, it was stated that it was in line with the policy of the Working Group to cover a range of transactions that would be as broad as possible, while addressing the concerns of the relevant industry. However, the concern was expressed that the proposed text did not make it sufficiently clear whether the special regime applying to the assignment of financial receivables was covered in the draft Convention or was left to law applicable outside the draft Convention. The concern was also expressed that paragraphs (1) to (4) of the proposed text might appear as conferring positive rights rather than creating a special regime under the draft Convention for debtors of financial receivables.

76. For those reasons, the proposal was made that draft articles 10, 11, 17, 18, 19, 20 and 22 should not apply to the assignment of receivables other than trade receivables and that, with respect to such assignments, the matters addressed in those provisions should be left to law outside the draft Convention. There was support for that proposal. It was stated that it might better address the concerns of the industry. It was also observed that that proposal was line with the policy underlying the proposal mentioned above in paragraphs 64 to 67. The concern was expressed, however, that that proposal went beyond its intended purpose of protecting debtors of financial receivables to the extent that it would unnecessarily result in an anti-assignment clause invalidating an assignment even as between the assignor or the assignor's creditors and the assignee.

77. After discussion, the Working Group was unable to reach a conclusion on the matter and decided that a new article 4*bis* with two alternatives along the lines of the proposals mentioned in paragraphs 71, 72 and 76 above should be included in the text of the draft Convention for the continuation of the discussion after consultation with the relevant industry. The formulation of new draft article 4*bis* was referred to the drafting group.

Assignments of receivables arising from the sale or lease of aircraft and other types of mobile equipment

78. It was noted that the International Institute for the Unification of Private International Law (Unidroit) was currently preparing, in cooperation with the International Civil Aviation Organization (ICAO), a draft convention on security and other interests in mobile equipment and an aircraft protocol, while further equipment-specific protocols were being prepared in cooperation with other organizations. It was also noted that those texts were aimed at reducing the cost of financing of mobile equipment, the application to which of the *lex situs* created uncertainty as to the effectiveness of security and similar interests in view of the movement of such equipment across borders and of certain mandatory aspects of national secured transactions law. Furthermore, it was noted that the draft convention and protocols addressed the assignment of receivables arising from the sale and lease of mobile equipment, as well as of insurance proceeds in the case of damage to or loss of such equipment. As to the main differences between the draft Convention and those texts, it was noted that, unlike the draft Convention, those texts: provided a system of self-help, which included the right of the financier to repossess the mobile equipment, even after the commencement of an insolvency proceeding; based priority in the equipment and the receivables arising from the sale and lease of equipment on the time of registration in an equipment-specific registry; and, in view of the high value of the equipment involved, provided that the secured obligation (the receivable for the price of the receivable) followed the legal regime of the accessory security or other similar right in the mobile equipment.

79. The Working Group considered ways to avoid conflicts between the draft Convention and those texts. It was noted that, in order to determine whether assignments of receivables arising from the sale and lease of mobile equipment could be excluded from the draft Convention or from the draft convention and protocols, the Working Group needed to either know the status of current law and practice or to be prepared to draw conclusions as to any generally acceptable new practices that, although they were not sufficiently accommodated under current law, could be accommodated by a new uniform law.

80. The view was expressed, however, that, at least, receivables arising from the sale and lease of aircraft and spacecraft should be excluded from the scope of the draft Convention. In support of that view, it was observed that the assignment of such receivables was an integral part of aircraft and spacecraft financing and should be left to aircraft and spacecraft financing law. Potential financiers of such receivables, it was said, would tend to look to the aircraft registry in order to determine their priority status and to decide whether to provide credit and at what cost. On the other hand, it was stated, receivables arising from ticket sales were normally part of securitization schemes and should not be excluded from the scope of the draft Convention. It was also observed that attempting to address the assignment of such receivables in the draft Convention might reduce the acceptability of the draft Convention to the aircraft industry. In that connection, it was suggested that the commercial financing industry, which included also aircraft financiers and was supporting a scope of the draft Convention that would be as broad as possible, could address that matter in consultation with the aircraft industry, with a view to achieving a more coordinated treatment of aircraft and receivables financing matters in the draft Convention.

81. After discussion, the Working Group generally felt that it did not have the specific information necessary to make a decision for a blanket exclusion of aircraft and spacecraft receivables from the scope of the draft Convention.

82. The Working Group next turned to the question whether any conflict between the draft Convention and those other texts could be left to treaty law. Differing views were expressed. One view was that draft article 33 (2), allowing a State to declare, in the case of a conflict, to which text it wished to give precedence and draft article 35, allowing States to exclude further practices, were sufficient. It was stated, however, that such an approach would result in disparity of legal treatment of the relevant matters and in uncertainty to the extent that States would take differing approaches. Another view was that the matter could be left to general principles of treaty law, under which the more specific or more recent text would prevail. It was stated, however, that that approach should be only the last resort if agreement could not be reached on another approach, since commercial transactions required a higher degree of certainty than could be achieved under such a treaty-law approach.

83. Yet another view was that the draft Convention should give, in a uniform way for all States, precedence to other texts dealing with secured transactions with respect, at least, to aircraft receivables secured by or associated with aircraft and registered in an aircraft registry. Language along the following lines was proposed:

> "This Convention does not prevail over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning security interests, conditional sales under reservations of title and leasing agreements with respect to aircraft and receivables arising from the sale or lease secured by or associated with such equipment."

84. The view was expressed that the same approach might need to be followed with respect to the assignment of receivables arising from the sale or lease of spacecraft, as well as with regard to the assignment of any insurance proceeds arising in the case of damage to or loss of spacecraft.

85. Yet another view was that the determination of whether a protocol would supersede the draft Convention could be made in each protocol on the basis of a decision as to whether receivables should be part of specific equipment rather than receivables financing. It was observed, however, that for the draft Convention to refer that matter to each protocol, those texts should be final and the Working Group would need to have sufficient knowledge of their contents. It was stated, that, in particular, the scope of those texts should be sufficiently clear. In that connection, it was observed that the absence of a definite list of equipment to be covered created the concern that the creation of security and similar rights in "any uniquely identifiable object" might be covered. On the other hand, that concern was said to be unjustified, since it was generally understood among the members of the group preparing the draft convention and protocols that work would be limited to high-value mobile equipment only. It was stated, however, that the concern was legitimate, since the terms "high-value mobile equipment" were not sufficiently clear, or were, at least, not universally understood in the same way. In view of the above, it was suggested that the Working Group should not feel pressured to make a decision. It was pointed out that more information and consultation with the relevant sectors of the industry was necessary and that the matter was of a political nature and might need to be left to the Commission.

86. After discussion, the Working Group agreed that the text of draft article 4 (2) should remain unchanged and without square brackets (see, however, para. 211). It was also agreed that, for the continuation of the discussion, draft article 33 should include a third paragraph within square brackets along the lines mentioned in paragraph 83 above. That matter was referred to the drafting group. It was generally understood that, in any case, draft article 33 would need to be revisited with a view to ensuring that it addressed appropriately conflicts with other international texts (see paras. 192-195).

Article 2. Assignment of receivables

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

> "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."

88. It was noted that, under subparagraph (a), what constituted a "contractual" right was left to law applicable outside the draft Convention. In order to avoid the uncertainty that could result in view of the divergences existing between legal systems, it was noted that the term "contractual" right could be defined in the draft Convention in a negative way (e.g., "a right to payment of a monetary sum other than

one arising by operation of law or determined in a court judgement"). It was also noted that the Working Group might wish to clarify whether the term "receivable" included: damages for breach of contract (liquidated or not); interest for late payment (contractual interest, statutory interest or interest liquidated in a court judgement); sums payable as dividends (present or future) arising from shares; and receivables based on arbitral awards.

89. In respect of damages for breach of contract, differing views were expressed. One view was that damages should not be treated as receivables. It was stated that the claim of the seller for the purchase price of goods sold under a contract of sale was a right to payment flowing directly from the contract. To the contrary, the claim for damages of the buyer, e.g., for delivery of non-conforming goods by the seller was the result of a contract violation and as such should not be considered as a "contractual right", unless it was liquidated in a settlement agreement. The prevailing view, however, was that damages for breach of contract should be treated in the same way as contractual receivables. In support of that view, it was said that the assignee should be entitled to all payment rights the assignor had been entitled to under the original contract. If damages were to be excluded, it was explained, in some cases the assignee's rights in the assigned receivables would be frustrated. In that connection, regret was expressed that the scope of the draft Convention was limited to contractual rights to payment, excluding contractual rights other than rights to payment and non-contractual receivables.

90. With regard to interest for late payment, it was widely felt that it was included in the term "receivable" if interest was owed under the original contract. In respect of dividends, it was agreed that they should be treated as contractual receivables, whether they were declared or were future, since they arose under a contractual relationship reflected in the share. As to receivables based on arbitral awards, it was generally thought that they should not be covered by the draft Convention.

91. After discussion, the Working Group adopted draft article 2 unchanged. It was agreed that all the matters mentioned above could usefully be explained in the commentary.

Article 3. Internationality

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

"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."

93. As a matter of drafting, it was noted that, in order to align the first with the second sentence of draft article 3 and to limit the references in the text to the time when a receivable arose, the words "at the time of the conclusion of the original contract" might be substituted for the words "at the time it arises". Subject to that change, the Working Group adopted draft article 3 and referred it to the drafting group.

Article 5. Definitions and rules of interpretation

94. 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 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]]."

95. On the understanding that direct reference would be made in draft articles 3 and 8 (2) to the time of the conclusion of the original contract, the Working Group decided to delete subparagraph (b). With regard to subparagraph (d), the Working Group decided to postpone discussion until it had completed its review of the title and the preamble of the draft Convention. As to subparagraphs (j) and (k), the Working Group recalled its decision to replace them with a new provision (see paras. 25-30).

"Location" of the parties (continued)

96. Recalling its earlier discussion of the issue of location, addressed in subparagraphs (j) and (k) (see paras. 25-30), the Working Group reopened discussion on the basis of a text that was as follows:

"For the purposes of this Convention:

...

"(j) (i) a person is located in the State in which it has its place of business;

(ii) Variant A

if the assignor or the assignee has more than one place of business, the place of business is that which has the closest relationship to the contract of assignment. For the purposes of articles 24 to [...], the place of business with the closest relationship to the contract of assignment is deemed to be the place where the central administration of the assignor is exercised;

Variant B

if the assignor or the assignee has more than one place of business, the place of business is that place where its central administration is exercised [.A branch [of a person engaged in the business of accepting deposits or providing other banking services] is deemed to be a separate person];

(iii) if the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract;

(iv) if a person does not have a place of business, reference is to be made to the habitual residence of that person;"

97. On the grounds that a single location rule would be preferable, the Working Group decided to delete variant A of subparagraph (j) (ii). Discussion focused on the bracketed language contained in variant B. A number of concerns were expressed. One concern was that, in the case of an assignment of the same receivables by the head office and by a branch in another country, application of the bracketed language would result in priority between competing assignments of the same receivables from the same assignor being governed by the laws of two States. Another concern was that the bracketed language appeared to distinguish between place of business and place of a branch. Yet another concern was that use of the term "branch" appeared to be problematic in view of the fact that increasingly transactions were closed through regional offices, departments or units in different countries. Yet another concern was that relating each assignment to the branch from which it was made might create uncertainty, since third parties could not be aware of the internal structure of the assignor and determine the place in which decisions were made. Yet another concern was that, in view of the fact that no distinction was made between branches in the same country and branches in different countries, one legal entity risked to be treated as a group of separate legal entities.

98. In order to address those concerns, a number of suggestions were made. One suggestion was that the bracketed language in variant B should be replaced by wording along the following lines: "or, in the case of branches, where the branch with which the assignment has the closest relationship is located". A related suggestion was to have a location rule along the lines of variant B with the exception just mentioned as to branch offices of banks only. While some support was expressed in favour of those suggestions, they were objected to on the grounds that, in the case of assignments made from branches in different countries, they would result in priority between competing assignments being governed by different laws. Another suggestion was that, in order to avoid that problem, reference should be made to the place with which the original contract had the closest relationship. While that suggestion was met with some interest, it was also objected to on the grounds that, in the case of bulk assignments involving multiple original contracts, priority issues would be referred to a multiplicity of laws. Yet another suggestion was that reference should be made to the branch in whose books the assigned receivables were carried. Language along the following lines was proposed to replace the bracketed wording in subparagraph (j) (ii):

"Notwithstanding the foregoing sentence, if, immediately prior to the assignment, the receivable is carried on the books of a branch of a financial services provider, the assignor is located in the State in which that branch is located. If, immediately after the assignment, the receivable is carried on the books of a branch of financial services provider, the assignee is located in the State in which that branch is located.

99. In addition, definitions along the following lines were proposed for inclusion in draft article 5:

"(...) A "financial service provider" is a bank or other financial institution that, in the ordinary course of its business, accepts deposits, makes loans or [provides other financial services"].

"(...) A "branch" of a financial service provider is a place of business of the financial service provider that is located in a different State than the financial service provider's place of central administration and that is separately regulated by the State in which the branch is located under the laws applicable to financial service providers in that State.

"(...) A receivable "is carried on the books"of a branch of a financial service provider if either:

(i) under [accounting] [regulatory] standards applicable to the branch, the receivable is an asset of that branch; or

(ii) in cases in which, because the financial service provider's interest in the receivable is only as security, the receivable is not [considered] an asset of the financial service provider, the rights for which the receivable is security are an asset of that branch."

100. Due to the lack of time, the Working Group was not able to discuss the proposed text. It was understood that the inclusion of the proposed text in the report would allow States to consider its merits in their preparations for the Commission session.

Form of assignment

101. It was noted that, after the deletion of the provision that dealt with form of an assignment, formal validity was left to the law applicable outside the draft Convention. In view of the fact that priority presupposed both substantive and formal validity, it was noted that an assignee would have to ensure that it had a valid assignment under the provisions of the draft Convention and under the law governing formal validity, as well as priority under the law of the assignor's location. In order to avoid such complications, it was suggested that the formal validity of the assignment as a transfer of property should be explicitly addressed in the draft Convention, perhaps by reference to the law of the assignor's location.

102. Differing views were expressed, however, as to the law that was most appropriate to govern formal validity. One view was that subjecting formal validity to the law of the assignor's location would enhance certainty and would simplify compliance on the part of the assignee, which might have an impact on whether priority would be vested in the assignee. Another view was that it would be more consistent with current trends in private international law to provide in the alternative that the assignment would be valid if it met the requirements of the law of the assignor's location or the law of the State in which the assignment was made. Yet another view was that a reference to the law of the assignor's location might run counter to private international law practice. It was also pointed out that such an approach might have a negative impact on international trade practices, since the law of the assignor's location might be irrelevant to the transaction in question.

103. After discussion, it was agreed that the draft Convention should not contain any provision in respect of formal validity and that that matter should be left to the law outside the draft Convention.

Article 10. Contractual limitations on assignments

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

"(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."

105. It was noted that the second sentence of paragraph (2) appeared to be stating the obvious (i.e. that the assignee could not have contractual liability for breach of a contract to which the assignee was not a party). In order to reflect the meaning intended by the Working Group (A/CN.9/455, paras. 50 and 51), it was suggested that the words "under that agreement for its breach" could be replaced by language along the following lines: "even if it had knowledge of such an agreement" or "on the sole ground that it had knowledge of such an agreement" or "unless that person acts with the specific intent to cause loss or recklessly and with actual knowledge that the loss would be likely to result".

106. It was agreed that the third alternative introduced an inappropriate limitation on any liability that the assignee might have under law applicable outside the draft Convention. After discussion, the second alternative was found to be preferable on the ground that it reflected in a clearer way that it was not intended to establish liability of the assignee if something more than knowledge was involved. Subject to that change and to any other changes the Working Group agreed upon so as to address issues of financial receivables (see para. 86), the Working Group adopted draft article 10 and referred it to the drafting group.

Article 12. Limitations relating to Governments and other public entities

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

"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.]"

108. It was recalled that draft article 12 was the result of a decision made at the previous session of the Working Group to ensure that sovereign debtors were not affected by assignments made in violation of anti-assignment clauses included in public procurement and other similar contracts. The Working Group thought that any interference with the legal regime of such contracts should be avoided, since it could seriously affect the acceptability of the draft Convention (A/CN.9/456, para. 115).

109. The concern was expressed that the reference to "commercial entity" and "commercial activities" in subparagraphs (a) and (b) would result in draft article 12 failing to protect sovereign debtors in those countries where government entities and their activities did not normally operate under a specific body of public law but were governed by the same rules as "commercial" entities and activities. With a view to

alleviating that concern, while reflecting even more strongly the above-mentioned policy decision, the following text was proposed as a substitute for draft article 12:

"(1) Articles 10 and 11 do not apply to the assignment of a receivable arising from a contract where the debtor is a public entity.

"(2) A "public entity" includes a government department, a federal, regional or local authority or a body controlled by a public entity.

"(3) A "body controlled by public entity" is any body

(a) established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

(b) having a legal personality; and

(c) financed for the most part or subject to management supervision by a public entity or having an administrative managerial or supervisory body more than half of whose members are appointed by a public entity."

110. Some support was expressed in favour of the proposal. The concern was expressed, however, that the proposed exception was excessively broad in that it would result in protecting inappropriately sovereign debtors who acted as commercial parties or in the context of commercial transactions. In order to address that concern, it was suggested that the exception should be limited to public entities acting in the exercise of their public functions. That suggestion was objected to on the ground that it was the prerogative of each State to determine which types of public entities it wished to protect.

111. It was widely felt, however, that both the proposed text and draft article 12, in establishing a rule that would be applicable to all sovereign debtors, might go beyond their intended purpose. It was observed that such a rule would result in protecting sovereign debtors who might not need such protection or who could be protected by other means (e.g., by a statutory anti-assignment limitation to the extent it was not affected by the draft Convention). It was stated that, while such sovereign debtors could decide whether to make use of the protection they were afforded by virtue of draft article 12 by determining whether to include an anti-assignment clause in their contracts, draft article 12 would still be seen as codifying generally acceptable good practice, a conclusion that the Working Group had never reached.

112. In addition, it was stated that the possibility of a contractual limitation to assignment invalidating the assignment as against a sovereign debtor might inadvertently raise the risk of non-collection from a sovereign debtor and thus raise the cost of credit to all sovereign debtors, irrespective of whether they needed the protection provided under draft article 12. Moreover, it was pointed out that allowing anti-assignment clauses in public procurement contracts to invalidate assignments as against a sovereign debtor could inadvertently raise the cost of credit to small- and medium-size suppliers of goods and services, which would make it even harder for them to compete for public procurement contracts with large suppliers who normally had alternative sources of credit.

113. As a compromise, it was suggested that draft article 12 should be revised so as to allow States to freely determine which entities they wished to protect, but only by way of a reservation in respect of the application of draft articles 10 and 11 to sovereign debtors. It was widely felt that a new provision should

be added to that effect to the final clauses of the draft Convention along the following lines: "A State may declare at any time that it will not be bound by draft articles 10 and 11 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or any public entity. If a State has made such a declaration, articles 10 and 11 do not affect the rights and obligations of that debtor or person". The suggestion was also made that the declaration should specify the types of entities to be protected. That suggestion was objected to on the ground that it would inappropriately limit the ability of States in effectively making use of their right to make such a declaration.

114. In the discussion, some doubt was expressed as to whether powerful debtors, such as sovereign debtors deserved any special protection. The view was also expressed that sovereign debtors could be protected in the same way as debtors of financial receivables. In response, it was stated that issues concerning sovereign debtors were different from those arising with regard to debtors of financial receivables and included the need for special protection for public funds as well as the need of sovereign debtors to be able to determine that they were dealing with reliable institutions.

115. After discussion, the Working Group decided that draft article 12 should be deleted, adopted the new provision mentioned in paragraph 113 above and referred its specific formulation and exact placement in chapter VI (final provisions) to the drafting group.

Article 15. Right to notify the debtor

116. 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 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."

117. It was noted that the first sentence of draft article 15 (2) appeared to deal with debtor-related issues and might be moved to draft article 18 or 19. The Working Group adopted draft article 15 and referred the matter to the drafting group.

Article 16. Right to payment

118. 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 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."

119. The concern was expressed that draft article 16 might appear as dealing with rights of third parties in proceeds. In order to alleviate that concern, it was suggested that: the chapeau of paragraph (1) should be reformulated along the following lines: "As between the assignor and the assignee, unless otherwise agreed, and whether or not ..."; and that paragraph (2) should be moved to the end of paragraph (1) as subparagraph (c). Those suggestions received broad support.

120. Recalling its decision that "proceeds" in the case of competing third-party rights should not include returned goods (see paras. 46-48), the Working Group decided that, as between the assignor and the assignee, the assignee had the right to claim payment in cash or in kind, as well as any proceeds in the form of returned goods. It was stated that there was no reason to limit the ability of the assignor and the assignee to agree that the assignee could claim any returned goods. It was also observed that, even in the absence of an agreement, a default rule allowing the assignee to claim any returned goods could reduce the risks of non-collection from the debtor and thus have a positive impact on the cost of credit.

121. In response to questions raised, it was observed that paragraph (3) applied to both paragraphs (1) and (2) in that it was intended to reflect current practice in assignments by way of security. In line with such practice, paragraphs (1) and (2) allowed the assignee to claim full payment from the debtor, the assignor or a third party, while paragraph (3) provided that it could retain only an amount up to the value of its right in the assigned receivable, including any interest if interest was owed on the ground of contract or law. It was agreed that that matter could usefully be clarified in the commentary.

122. In addition, it was stated that no reference to contrary agreement of the parties was necessary in paragraph (3), since the right in the assigned receivable flowed from the contract and it was subject to party autonomy, which was recognised in a general way in draft article 13.

123. Subject to the changes mentioned in paragraphs 119 and 120 above, the Working Group adopted draft article 16 and referred it to the drafting group.

Article 19. Debtor's discharge by payment

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

"(1) Until the debtor receives notification of the assignment, the debtor is entitled to be discharged 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.]"

125. With regard to paragraph (2), it was agreed that it should make clear that after notification the debtor could be discharged only by paying the assignee or, if otherwise instructed, in accordance with the payment instructions given by the assignee. As a matter of drafting, it was agreed that paragraphs (1) and (2) could be consolidated in one provision.

126. As to paragraph (6), it was noted that, if the payment obligation became due during the time when the assignee was expected to provide adequate proof and the debtor failed to pay, the debtor could be in default and become liable to damages and interest for late payment. It was also noted that the understanding of the Working Group so far had been that the payment obligation would be suspended. In order to avoid any uncertainty, it was suggested that the matter be addressed explicitly in paragraph (6) by providing either that the payment obligation should be suspended or that the debtor could be discharged by paying the assignor.

127. The suggestion to allow the debtor to discharge its obligation by paying the assignor was objected to on the grounds that: it would result in codifying a rule that would be inappropriate in principle; and it could lead to abuses by debtors acting in bad faith or in collusion with the assignor and waiting until payment became due before requesting adequate proof, so as to continue paying the assignor or to delay

payment. Some support was expressed in favour of a suspension of payments. It was stated that a debtor, in particular if it were a consumer debtor, would be in a difficult position if faced with a notification from an unknown, foreign assignee. In such a situation, it was pointed out, the debtor would not have sufficient time to examine the notification, would be subject to payment of damages and interest, if it delayed payment, and would not be discharged, if it paid an assignee who was not an assignee (i.e. the assignment was null and void, e.g., for fraud or duress). In order to address those concerns, a number of suggestions were made. One suggestion was to limit the application of paragraph (6) to cases in which the debtor had legitimate doubts. Another suggestion was that the assignee should be qualified as a "purported" assignee. Yet another suggestion was to define adequate proof by reference solely to a writing emanating from the assignor.

128. The prevailing view, however, was that the matter should not be explicitly addressed in the text of the draft Convention. It was stated that explicitly stating in paragraph (6) that the debtor could pay the assignor or that the payment obligation could be suspended might inadvertently result in encouraging abusive practices. In addition, it was observed that, if the debtor were able to continue to make payment to the assignor, even if the assignor had become insolvent or had ceased to exist, the assignee would find itself at a significant disadvantage. As to the problem of fraudulent assignees, it was widely felt that it rarely occurred in practice and, in any case, was sufficiently addressed in paragraph (7), which allowed debtors to obtain a valid discharge by paying in accordance with their own national law.

129. As to paragraph (7), it was noted that it might inadvertently result in a debtor ignoring a notification given under the draft Convention (e.g., because it related to future receivables, which might not be allowed under other law) and paying someone else in accordance with other law. It was, therefore, suggested that the paragraph be amended to validate payment under other law only if it were made to a legitimate assignee under the draft Convention, while limiting recourse to payment into court.

130. It was widely felt, however, that such an approach would actually narrow the protection available to the debtor. It was stated that paragraph (7) was originally intended to ensure that if, under other law apart from the draft Convention, there was a mechanism that would enable the debtor to obtain a discharge, the debtor should not be precluded from resorting to that mechanism.

131. As to paragraph (8), it was suggested that it should be deleted, since it either stated an obvious rule or placed on the debtor the risk of having to determine the validity of the assignment in order to obtain a valid discharge.

132. After discussion and subject to the consolidation of paragraphs (1) and (2), the change to paragraph (2) mentioned in paragraph 125 above and the deletion of paragraph (8), the Working Group adopted draft article 19 and referred it to the drafting group.

Article 20. Defences and rights of set-off of the debtor

133. The text of draft article 20 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 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."

134. The Working Group considered the question whether rights of set-off arising from contracts between the assignor and the debtor that were closely related to the original contract (e.g., a maintenance or other service agreement supporting the original sales contract) should be treated in the same way as rights of set-off arising from the original contract (i.e. the debtor should be able to raise them against the assignee irrespective of whether they arose before or after notification). It was generally agreed that such rights of set-off should receive the same treatment under the draft Convention as rights arising from the original contract. It was also agreed that, in expressing such a notion of "close connection" in the draft Convention, attention should be given to avoiding a formulation that would cover too wide a range of contracts. Language along the following lines was proposed: "rights of set-off arising from the same transaction as the original contract".

135. It was noted that paragraph (2) referred to rights of set-off being "available" at the time of notification for the notification to cut off such rights of set-off. In order to dispel any uncertainties and disparities that might exist with respect to the law applicable to set-off, it was suggested that reference should be made to the law governing the original contract. That suggestion was objected to on the grounds that it would not be appropriate to attempt addressing in the draft Convention such a general private international law issue. The suggestion was also objected since the law governing the original contract might not be the appropriate law and would, in any case, fail to cover non-contractual grounds of set-off (see paras. 155-156).

136. Subject to the change referred to in paragraph 134 above, the Working Group adopted draft article 20 and referred it to the drafting group.

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

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

"(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)."

138. It was noted that the reference to debtors in transactions for "personal, family or household purposes", contained in paragraph (1) (as well as in draft article 23), was qualified by the term "primarily", so as to ensure that the limitation would apply only to transactions for purely consumer purposes (i.e. transactions between consumers). It was widely felt, however, that, in order to be consistent with the purpose of protecting consumer debtors, that provision should apply to transactions serving consumer purposes with respect to one party and commercial purposes from the perspective of the other party (i.e. transactions between a consumer and a business entity).

139. It was also noted that paragraphs (1) and (3) referred to a signed writing, without clarifying whether the signature of the debtor only or both the debtor and the assignor was required. It was agreed that the provision should clarify that the writing needed to be signed only by the debtor, since the debtor was the party whose rights would be affected by a modification of an agreement to waive defences.

140. Subject to those changes, the Working Group adopted draft article 21 and referred it to the drafting group.

Article 22. Modification of the original contract

141. The text of draft article 22 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."

142. It was noted that paragraph (1) referred to notification, without clarifying whether it was effective when sent to or received by the debtor. The Working Group agreed that the relevant point of time was the time when notification was received by the debtor, since as of that time the debtor could discharge its obligation only in accordance with the assignee's payment instructions. Noting that the matter was addressed in draft article 18, the Working Group adopted draft article 22 unchanged.

Article 23. Recovery of payments

143. 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 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."

144. Subject to the deletion of the word "primarily", the Working Group adopted draft article 23 and referred it to the drafting group (see para. 138).

Scope and purpose of chapter V

145. Differing views were expressed as the scope or the purpose of the private international law rules of the draft Convention, a matter addressed in paragraph (3) of draft article 1, the text of which as considered by the Working Group was as follows:

> "[(3) The provisions of chapter V 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, those provisions do not apply if a State makes a declaration under article 34.]"

146. One view was that the application of chapter V should only supplement the substantive law provisions of the draft Convention and thus apply only to the transactions falling within the ambit of the draft Convention as defined in chapter I. In support of that view, it was stated that, from a legislative policy point of view, it would not be appropriate to attempt, in essence, to prepare a mini private international law convention within a substantive law convention. If chapter V were to supplement the substantive law provisions of the draft Convention, it was stated, it might be sufficient to retain only draft article 28 in section II of chapter IV with the opening words that appeared within square brackets. It was stated that, in such a case, draft article 28 could address matters not covered in the substantive law part of the draft Convention, such as the question of the law applicable to set-off and to statutory assignability, and would not need to be subject to an opt-out clause. In addition, it was pointed out that draft article 27 could be deleted, since it addressed the contractual aspects of assignment, namely a matter which was not the main focus of the draft Convention and might already be sufficiently regulated by private international law (even though the principle of freedom of choice of the applicable law might not be common to all legal systems). Moreover, it was observed that draft articles 29 to 31 could be deleted, since the matters addressed in those provisions were already sufficiently covered in draft articles 24 to 26. On the other hand, if chapter V were to be retained, it was suggested that it should be subject to an opt-in rather than an opt-out clause. That suggestion received significant support.

147. The Working Group noted that, in principle, it would not be appropriate to limit the application of private international law rules on the basis of the substantive law notions contained in chapter I (i.e. only to assignments as defined in draft article 2, or only to international transactions as defined in draft article 3 or only if the assignor or the debtor was located in a Contracting State).

148. However, in an effort to reach consensus, the view was expressed that the application of chapter V could be limited to international transactions as defined in chapter I, irrespective of whether the assignor or the debtor had their location in a Contracting State or the law governing the receivable was the law of a Contracting State (an approach which had a precedence in article 1 (3) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit). In support of that view, it was pointed out that such an approach would allow States that did not have adequate private international law rules on assignments or no rules at all to benefit from the rules contained in chapter V. While it was admitted that those rules reflected general principles which would need to be supplemented by other principles of private international law, it was observed that, in their generality, the provisions of chapter V introduced rules that might be useful for many States and usefully clarified matters (e.g., priority issues) over which a great degree of uncertainty prevailed in private international law. In addition, it was stated that, once the priority rules in draft articles 24 to 26 had become generally acceptable, there was no substantive reason to limit their application on the basis of the substantive law notions contained in chapter I. As to States that had adequate rules on assignment, it was pointed out that they could always opt out of chapter V. Those suggestions also received significant support, although some delegations favoured retention of draft articles 28 and 29 only.

149. After discussion, the Working Group was not able to reach agreement. It was, therefore, decided that paragraph (3) of article 1 should be revised along the following lines and be retained within square brackets:

> [(3) The provisions of chapter V 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. However, those provisions do not apply if a State makes a declaration under article 34.]"

It was also decided that the opening words in draft articles 27 and 28, as well as draft article 29 as a whole (with the exception of the opening words which could be deleted; see para. 160), should remain in square brackets, pending final determination of the issue of the scope of chapter V. Furthermore, the Working Group agreed that draft articles 30 and 31 raised questions that would need to be discussed further and decided that those provisions too should be placed within square brackets.

Article 27. Law applicable to the contract of assignment

150. The text of draft article 27 as considered by the Working Group was as follows:

> "(1) [With the exception of matters which are settled in this Convention,] the contract of assignment is governed by the law expressly chosen by the assignor and the assignee.
>
> "(2) In the absence of a choice of law by the assignor and the assignee, the contract of assignment is governed by the law of the State with which the contract of assignment is most closely connected. In the absence of proof to the contrary, the contract of assignment is presumed to be most closely connected with the State in which the assignor has its place of business. If the assignor has more than one place of business, reference is to be made to the place of business most closely connected to the contract. If the assignor does not have a place of business, reference is to be made to its habitual residence.

> "(3) If the contract of assignment is connected with one State only, the fact that the assignor and the assignee have chosen the law of another State does not prejudice the application of the law of the State with which the assignment is connected if that law cannot be derogated from by contract."

151. In order to reflect more clearly the matters that should be subject to party autonomy, the Working Group decided to substitute for "the contract of assignment" the terms "the rights and obligations of the assignor and the assignee under the contract of assignment". A suggestion to also include a reference to the "conclusion and validity of the contract of assignment" was objected to on the grounds that those terms were not universally understood in the same way and their use could create uncertainty.

152. The Working Group also considered whether paragraphs (2) and (3) were necessary. It was noted that, if the thrust of draft article 27 was to recognise party autonomy without going into any detail, paragraph (2) might not be absolutely necessary, in particular in view of the fact that the transactions intended to be covered were likely to be negotiated by highly sophisticated parties who normally included a choice of law clause in their contracts. As to paragraph (3), it was noted that it might not be useful without any detailed rules as to the relevant connecting factors (e.g., characteristic performance under article 4 (2) of the Convention on the law Applicable to Contractual Obligations "the Rome Convention" with the fall-back position of article 4 (5) of the Rome Convention if the characteristic performance could not be determined). The prevailing view, however, was that paragraphs (2) and (3) reflected important rules that might not exist in all legal systems and should thus be retained.

153. Subject to the change mentioned in paragraph 151 above and to the final determination of the scope of chapter V, the Working Group adopted draft article 27 and referred it to the drafting group.

Article 28. Law applicable to the rights and obligations of the assignee and the debtor

154. The text of draft article 28 as considered by the Working Group was as follows:

> "[With the exception of matters which are settled in this Convention,] the law governing the receivable to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

155. The Working Group considered, once more, the issue of the law applicable to rights of set-off. It was noted that the general principle as to contractual rights of set-off was that they were governed by the law of the contract from which they arose. It was also noted that, in line with that approach, the law governing rights of set-off would be the same as the law governing the receivable, if such rights of set-off arose from the original contract, and different, if rights of set-off arose from another contract.

156. In support of addressing the question of the law applicable to rights of set-off, it was stated that such an approach would enhance certainty and could have a beneficial impact on the cost of credit, since rights of set-off arose often and were bound to increase the risk of non-payment by the debtor. However, it was stated that, in order to achieve that result, rights of set-off should be subjected to the law governing

the receivable. In view of the difficulty of the matter and the lack of consensus as to the law applicable to set-off, the Working Group recalled and confirmed its decision not to address that matter (see para. 135).

157. The Working Group next considered the question whether draft article 28 should govern statutory assignability. It was noted that the application of the law governing the receivable might not be appropriate in the case of statutory assignability. Such an approach could inadvertently result in allowing the assignor and the debtor to evade possible statutory limitations, which involved matters of mandatory law or public policy, by choosing a convenient law to govern the receivable.

158. The Working Group recalled its decision not to include any additional provisions in draft article 28 on the understanding that statutory limitations to assignability, which would normally flow from mandatory law, would be preserved under draft article 30 (A/CN.9/456, para. 117). However, upon reflection, the Working Group decided that draft article 28 should be limited to contractual assignability. Subject to that change and to the final determination of the scope of chapter V, the Working Group adopted draft article 28 and referred it to the drafting group.

Article 29. Law applicable to conflicts of priority

159. The text of draft article 29 as considered by the Working Group was as follows:

"[With the exception of matters which are settled in chapter IV:]

(a) 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;

(b) priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located;

(c) priority between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located;

[(d) 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 would have priority over the interest of an assignee has such priority notwithstanding subparagraph (c), 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;]

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

160. It was noted that draft article 29 appeared within square brackets since, if chapter V were to supplement the substantive law part of the draft Convention, draft article 29 would repeat the rules in draft articles 24 and 25 and should be deleted. It was also noted that, if chapter V were to apply whether or not the assignor or the debtor were located in a Contracting State, the opening words would not be necessary, since chapter V would apply to matters not addressed in the draft Convention, while draft

articles 24 and 25 would apply to matters addressed in the draft Convention. Subject to that change, the alignment of draft article 29 with draft articles 24 and 25 and the final determination of the scope of chapter V, the Working Group adopted draft article 29 and referred it to the drafting group.

Article 30. Mandatory rules

161. The text of draft article 30 as considered by the Working Group was as follows:

> "(1) Nothing in articles 27 and 28 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.
>
> "(2) Nothing in articles 27 and 28 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable."

162. Pending final determination of the scope of chapter V (see paras. 145-149) , the Working Group decided that draft article 30 should be retained within square brackets.

Article 31. Public policy

163. The text of draft article 31 as considered by the Working Group was as follows:

> "With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter 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."

164. Pending final determination of the scope of chapter V (see paras. 145-149), the Working Group decided that draft article 31 should be retained within square brackets.

IV. ANNEX TO THE DRAFT CONVENTION

A. General comments

165. It was noted that the annex could be replaced by two provisions along the following lines:

> "Article X. Revision and amendment
>
> "1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.
>
> "2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

"Article Y. Revision of the priority regime

"1. Notwithstanding the provisions of article X, a conference of Contracting States only for the purpose of establishing an international regime for the public filing of notices to address issues of priority arising in the context of assignment of receivables under this Convention is to be convened by the depositary in accordance with paragraph 2 of this article.

"2. A revision conference is to be convened by the depositary when not less than one fourth of the Contracting States so request. The depositary shall request all Contracting States invited to the conference to submit such proposals as they may wish the conference to examine and shall notify all Contracting States invited of the provisional agenda and of all the proposals submitted.

"3. Any decision by the conference must be taken by a two-thirds majority of the participating States. The conference may adopt all measures necessary to establish an effective international regime for the public filing of notices to address priority issues arising in the context of the assignment of receivables under this Convention. No State shall be bound to participate directly or indirectly in the international regime so established.

"4. Any amendment adopted is communicated by the depositary to all the Contracting States for acceptance and to all the States signatories of the Convention for information. Such amendment enters into force on the first day of the month following one year after its acceptance by two thirds of the Contracting States. Acceptance is to be effected by the deposit of a formal instrument to that effect with the depositary.

"5. After entry into force of an amendment a Contracting State which has accepted the amendment is entitled to apply the Convention as amended in its relations with Contracting States which have not within six months after the adoption of the amendment notified the depositary that they are not bound by the amendment.

"6. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended."

166. It was generally agreed that the annex should be retained, since it could provide States with some guidance as to a substantive law priority regime. As to the registration regime envisaged in the annex, it was stated that it could enhance certainty as to rights of financiers, thus reducing the risks and the costs involved in financing transactions. With regard to draft articles X and Y, it was stated that draft article X would be better placed in the final clauses, while draft article Y paragraph (3) could be retained either in the final provisions or in draft article 3 of the annex, perhaps with a more flexible formulation, which would not refer to a diplomatic conference. In response to a question, it was noted that, under draft article 36, States could choose one or none of the options offered in the annex (see paras. 188-191 and 203). The Working Group proceeded to consider the substantive rules contained in the draft annex.

B. Discussion of draft articles of the annex

Section I. Priority rules based on registration

Article 1. Priority among several assignees

167. The text of draft article 1 of the annex as considered by the Working Group was as follows:

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

168. The Working Group was agreed that the registry meant in draft article 1 of the annex was a notice and not a document registry, in the sense that only certain information about the assignment needed to be registered and not the document of the assignment as a whole. It was widely felt that, for the operation of the registration system to be quick, simple and inexpensive, it would need to be based on registration of a limited amount of data. As a matter of drafting, a number of suggestions were made, including that reference should be made to "data", "notice" or "document". The suggestion to refer to "document of assignment" was objected to on the ground that it could inadvertently give the impression that a document-filing system was involved. Subject to that change, the Working Group adopted draft article 1 of the annex and referred it to the drafting group.

Article 2. Priority between the assignee and the insolvency administrator or the creditors of the assignor

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

> "[Subject to articles 25 (3) and (4) of this Convention and 4 of this annex,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:
>
> > "(a) the receivables [were assigned] [arose] [were earned by performance], and information about the assignment was registered under this Convention, before the commencement of the insolvency proceeding or attachment; or
> >
> > "(b) the assignee has priority on grounds other than the provisions of this Convention."

170. As to the opening words, the Working Group decided that they should be deleted on the understanding that an explicit reference to the preservation of super-priority rights dealt with in draft article 25 (5) would be included in draft article 2 of the annex. That matter was referred to the drafting group. It was stated, however, that the opening words would not be necessary if the annex were to include an explicit statement to the effect that, should a State choose a system of priority rules based on sections I and II of the annex, draft articles 1 and 2 of the annex would operate as the priority rule for that State. The Working Group postponed discussion of that matter until it had completed its review of the annex (see paras.188-191). As to subparagraph (a), the Working Group decided to retain the first set of bracketed words without the square brackets and to delete the second and third sets of bracketed words. The Working Group also decided to delete subparagraph (b). It was recalled that that provision was part of a previous substantive law priority rule contained in the draft Convention that did not belong in draft

article 2 of the annex since draft article 2 of the annex would be the sole basis on which an assignee could assert priority. Subject to those changes, the Working Group adopted draft article 2 of the annex and referred it to the drafting group.

Section II. Registration

Article 3. Establishment of a registration system

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

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

172. Support was expressed in favour of the policy underlying draft article 3. A number of suggestions were made. One suggestion was that the words "the exact manner" be replaced by the words "in detail" so as to avoid creating the impression that the regulations might need to be more detailed than was practically necessary and to give sufficient flexibility to the registrar and the supervising authority in preparing the regulations. Those suggestions received sufficient support. The suggestion was also made that draft article 3 needed to be more detailed in describing the registrar and the supervising authority. The Working Group postponed discussion of that matter until it had completed its review of the annex (due to the lack of sufficient time, the Working Group did not discuss that matter; see, however, the suggestion contained in para. 166). Subject to those changes, the Working Group adopted draft article 3 of the annex and referred it to the drafting group.

Article 4. Registration

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

> "(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the name and address of the assignor and the assignee and a brief description of the assigned receivables.
>
> "(2) A single registration may cover:
>
> (a) the assignment by the assignor to the assignee of more than one receivable;
>
> (b) an assignment not yet made;
>
> (c) the assignment of receivables not existing at the time of registration.
>
> "(3) Registration, or its amendment, is effective from the time that the data referred to in paragraph (1) are available to searchers. Registration, or its amendment, is effective for the period of time specified by the registering party. In the absence of such a specification, a registration is

effective for a period of [five] years. Regulations will specify the manner in which registration may be renewed, amended or discharged.

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

174. As to paragraph (1), the concern was expressed that allowing "any person" to register data with regard to an assignment might open the possibility of abuse and fraudulent registration. In order to address that concern, the suggestion was made that the basis on which a person might register data should be qualified. It was stated, however, that fraudulent registration did not pose a real problem, since registration under draft article 4 did not create any substantive rights. It was generally felt, however, that reference should be made to persons specified in the regulations. Language along the following lines was proposed: "any person authorized by the regulations". In order to accommodate electronic registration and to allow registration to function in a multilingual environment, it was agreed that the reference to "name and address" should be replaced by a reference to identification. It was stated that the regulations could provide that a person could be identified with a number and that more data than the identification of the parties and the assigned receivables might be required. It was also agreed that paragraph (1) should provide also for registration of any amendments.

175. With regard to paragraph (2) (b), the suggestion was made that it should be deleted. In support, it was stated that allowing registration of an assignment before it was made ("advance booking") could lead to abuses. That suggestion was objected to. It was widely felt that the ability to register a future assignment was at the heart of significant transactions. In the absence of certainty as to priority, it was observed, financiers would not enter into such transactions. It was also said that the risk of abusive registration practices developing was not real, since registration did not vest any rights in the registering party, unless such rights existed under a valid contract.

176. As to paragraph (3), it was agreed that it should permit a choice of the length of time of effectiveness from a range of options to be set out in the regulations. It was also agreed that at the end of paragraph (3) language along the following lines should be included: "and, consistent with this annex, such other matters as are necessary for the operation of the registration system".

177. Support was expressed in favour of the policy underlying paragraph (4) that an error with regard to the identification of the assignor was so essential that it would render the registration ineffective. It was stated that paragraph (4) was based on the assumption that: if the error was made by the registering party, the registering party would suffer the consequences of the registration being ineffective; and that, if the error was made by the registrar, the regulations would address the issue of liability. It was also suggested that in the first line of paragraph (4), the word "result" should be replaced by the words "would result" to indicate that, even if no one was actually misled, the registration would be ineffective.

178. Subject to the changes mentioned above, the Working Group adopted draft article 4 of the annex and referred it to the drafting group.

Article 5. Registry searches

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

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

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

(a) the date and time of registration; and

(b) the order of registration."

180. It was generally agreed that draft article 5 should make it clear that a public registry was meant and, for that reason, the use of the term "any person" in draft article 5 (1) was appropriate as reflecting the principle of public access to the registry for searching as opposed to registration purposes. In response to a concern expressed that the term "any person" might be too broad and undermine the confidentiality necessary in financing transactions, it was stated that that problem would not arise in view of the fact that registration would involve only a limited amount of data specified in draft article 4 of the annex and in the regulations and would not include information relating to the financial details of the transaction.

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

Article 6. Priority among several assignees

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

"(1) If a receivable is assigned several times, the right thereto is acquired by the assignee whose contract of assignment is of the earliest date.

"(2) The earliest assignee may not assert priority if it acted in bad faith at the time of the conclusion of the contract of assignment.

"(3) If a receivable is transferred by operation of law, the beneficiary of that transfer has priority over an assignee asserting a contract of assignment of an earlier date.

"(4) In the event of a dispute, it is for the assignee asserting a contract of assignment of an earlier date to furnish proof of such an earlier date."

182. There was sufficient support in the Working Group for the rule reflected in paragraph (1). As a matter of drafting, it was suggested that paragraph (1) should refer to several assignments of the same receivables by the same assignor.

183. With regard to paragraph (2), differing views were expressed as to whether the reference to "bad faith" would cover knowledge or notice of a previous assignment. One view was that, in line with current

law in many legal systems, paragraph (2) would apply to cases in which the assignee had knowledge or notice of a previous assignment. Another view was that, in line with the decision of the Working Group that mere knowledge or notice should not affect the debtor's discharge, it should not affect the priority position of the assignee either. It was stated that the scope of paragraph (2) should be limited to cases of fraud or collusion. A related view was that, in its current formulation, paragraph (2) could not apply in the case of a second-in-time assignee who might lose its priority position on the grounds that it had knowledge or notice of a previous assignment because it referred to the earliest assignee losing its priority if it were in bad faith and because knowledge or notice of a previous assignment was not relevant to priority in the case of a first-in-time of assignment priority rule. It was, therefore, pointed out that, if the scope of paragraph (2) was limited to cases involving fraud, it might not be necessary, since such matters were likely to be covered sufficiently in most legal systems. It was also stated that, in the case of fraud, there might be no conflict of priority to which paragraph (2) could apply, since the assignment would be set aside as a fraudulent conveyance. After discussion, the Working Group decided to delete paragraph (2) on the understanding that questions of good faith were left to law applicable outside the draft Convention (as to the application of the principle of good faith under the draft Convention, see A/CN.9/WG.II/WP.105, para. 62).

184. As to paragraph (3), there was agreement that it reflected an inappropriate rule and should be deleted. The Working Group also decided to delete paragraph (4) on the understanding that the commentary would explain that the important question of who had the burden of proof was left to other law applicable outside the draft Convention.

185. After discussion, subject to the changes mentioned above, the Working Group adopted draft article 6 of the annex and referred it to the drafting group.

Article 7. Priority between the assignee and the insolvency administrator or the creditors of the assignor

186. The text of draft article 7 of the annex as considered by the Working Group was as follows:

> "[Subject to articles 25 (3) and (4) of this Convention,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:
>
> (a) the receivables were assigned before the commencement of the insolvency proceeding or attachment; or
>
> (b) the assignee has priority on grounds other than the provisions of this Convention.

187. As to the opening words, the Working Group decided that they should be deleted on the understanding that a reference should be included to the preservation of super-priority rights dealt with in draft article 25 (5). That matter was referred to the drafting group (as to the need for the addition of a reference to draft article 25 (5), see paras. 170 and 188-191). The question was raised whether reference should be added to the rights of the insolvency administrator or the assignor's creditors that should be preserved on the grounds that they were based on mandatory law. In response, it was stated that draft article 25 (4) had been deleted on the understanding that priority did not cover those matters and that they

were left to the law applicable outside the draft Convention. It was agreed that that matter should be clarified in the commentary. In line with its decision on draft article 2 of the annex (see para. 170), the Working Group decided that subparagraph (b) should be deleted.

C. Proposal as to the application of the annex

188. It was pointed out that, under the current formulation of draft article 36, it was contemplated that a State could choose the priority rules of section I and the registration system of section II. The view was expressed that there should be two additional alternatives: a State should be able to choose the priority rules of section I and a registration system other than that proposed in section II, or, alternatively, the registration system of section II and priority rules other than those proposed in section I. It was suggested that those three alternatives should be set out in a new draft article.

189. It was also suggested that an explicit statement should be included in a new draft article to the effect that, should a State choose a system of priority rules based on sections I and II of the annex, the priority rules under draft article 1 of the annex would operate as the priority rules for that State under draft article 24 of the draft Convention.

190. On the basis of those suggestions, language along the following lines was proposed for a new article:

"(1) A Contracting State may:

(a) (i) accept the priority rules based on registration set out in section I of this annex and (ii) choose to participate in the registration system established pursuant to section II of this annex; or

(b) (i) accept the priority rules based on registration set out in section I of this annex and (ii) agree to effectuate such rules by use of a registration system that fulfills the purposes of such rules [as set forth in regulations promulgated pursuant to section II]. For purposes of section I, registration pursuant to such system shall have the same effect as registration pursuant to section II.

"(2) For purposes of article 24, the law of a Contracting State that has acted pursuant to paragraph (1) (a) or (1) (b) is the set of rules set forth in section I of this annex. The Contracting State is entitled to apply those rules for all assignments made more than six months after the Contracting State notifies the depositary that it is has so acted. The Contracting State may establish rules pursuant to which assignments made before the effective date shall, within a reasonable time, become subject to the priority rules set forth in section I of this annex.

"(3) A Contracting State that does not act pursuant to paragraph (1) (a) or (1) (b) may, pursuant to its domestic priority rules, utilize the registration system established pursuant to section II of this annex."

191. Due to the lack of time, the Working Group was not able to discuss the proposed new article. It was stated, however, that the rule in paragraph (2) should apply also in the case where a State chose the priority rules set forth in section III of the annex. Subject to that change, the Working Group decided that

the proposed new article should be introduced in the text of the draft Convention within square brackets. The specific formulation and the placement of the proposed new article in the text of the draft Convention were referred to the drafting group.

V. FINAL PROVISIONS OF THE DRAFT CONVENTION

Article 33. Conflicts with international agreements

192. The text of draft article 33 as considered by the Working Group was as follows:

> "(1) Except as provided in paragraph (2) of this article, this Convention prevails over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.
>
> "(2) A State may declare at any time that the Convention will not prevail over international conventions or other multilateral or bilateral agreements listed in the declaration, which it has entered or will enter into and which contain provisions concerning the matters governed by this Convention."

193. It was noted that, at its twenty-ninth session, the Working Group had adopted draft article 33 in order to deal with situations in which various texts gave precedence to each other and, as a result, uncertainty arose as to which one was applicable ("negative conflicts", e.g., with the Ottawa Convention; see A/CN.9/455, paras. 126-129). It was also noted, however, that potential conflicts with the Ottawa Convention were minimal, since the scope of the Ottawa Convention was narrower than the scope of the draft Convention and, in any case, the provisions of the draft Convention were, to a large extent, similar to those of the Ottawa Convention (with the exception, e.g., of the reservation to the rule on contractual limitations to assignment and the rule on recovery from the assignee of payments made by the debtor). Furthermore, it was noted that potential conflicts with the Rome Convention were also minimal since draft articles 27 and 28 were almost identical with article 12 of the Rome Convention or the relevant provisions of other texts, such as the Inter-American Convention on the Law Applicable to Contractual Obligations ("the Inter-American Convention"). As to the law governing priority, it was noted that, according to the prevailing view, article 12 of the Rome Convention did not address that matter. However, it was noted, even if draft article 12 of the Rome Convention addressed issues of priority, neither of the laws applicable under article 12 (i.e. the law chosen by the parties or the law governing the receivable) was appropriate. It was also noted that no conflicts arose with the draft EU Insolvency Convention (which was likely to be issued as an EU regulation). The notion of central administration was almost identical with the centre of main interests used in the draft EU Insolvency Convention and that draft Convention did not affect rights *in rem* in a main insolvency proceeding. While it was noted that the draft EU Insolvency Convention might affect rights *in rem* in a secondary insolvency proceeding (articles 2 (g), 4, and 28), draft article 25 would be sufficient to preserve, for example, super-priority rights, and priority under the draft Convention was not intended to affect the rights of the assignor's creditors and the insolvency administrator to invalidate the assignment as a fraudulent or preferential transfer.

194. It was stated that, according to general principles of treaty law, the draft Convention would not

prevail over the Ottawa Convention on the grounds that the Ottawa Convention was a more specific convention. It was also observed that, according to the same principles, the draft Convention would not prevail over the draft EU Insolvency Convention, the draft Convention on International Interests in Mobile Equipment, the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit or the Convention on the International Recognition of Rights in Aircraft. On the other hand, it was stated that the draft Convention would prevail over the Rome Convention or the Inter-American Convention, since substantive law conventions prevailed over private international law conventions.

195. It was widely felt, however, that draft article 33 departed from generally acceptable principles as to conflicts among international texts, in particular in that it would result in the draft Convention superseding even future conventions. It was, therefore, agreed that a provision along the lines of article 90 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; "the United Nations Sales Convention") which gave precedence to other texts, properly adjusted as to territorial connection, would be more appropriate. As a result of that decision, the Working Group agreed that paragraph (2) and new paragraph (3) (see paras. 88-91) were unnecessary and should be deleted.

Article 34. Application of chapter V

196. The text of draft article 34 as considered by the Working Group was as follows:

> "A State may declare at any time that it will not be bound by chapter V."

197. It was noted that the Working Group, at its twenty-ninth session, had adopted the working assumption that chapter V would be subject to a reservation by States (A/CN.9/455, paras. 72 and 148). The Working Group recalled the suggestions made at the current session that chapter V should be rather subject to an opt-in clause and decided that that matter should be left to the Commission.

Article 35. Other exclusions

198. The text of draft article 35 as considered by the Working Group was as follows:

> "[A State may declare at any time that it will not apply the Convention to certain practices listed in a declaration.]

199. It was stated that allowing States to exclude further practices would make the draft Convention more acceptable to States that might be concerned with the application of the draft Convention to certain practices. It was also observed that the Working Group made significant progress in addressing such concerns by allowing States to make a reservation with regard to Government receivables. However, it was pointed out that the question whether draft article 35 would be necessary could not be answered before the final determination of the scope of the draft Convention and in particular before a final decision had been reached on the treatment of the assignment of financial receivables. On the other hand, it was observed that an approach based on declarations would detract from the certainty achieved by the draft

Convention, since its scope of application could be different from State to State, a matter that might not be easy to determine in each particular case.

200. In the discussion, a number of suggestions were made. One suggestion was made that the term "specific" should be substituted for the term "certain" practices. Another suggestion was that reference should be made to the debtor's location with respect to the application of those provisions of the draft Convention that affected the debtor's rights and obligations. Yet another suggestion was that the exception as to sovereign receivables should be placed right after draft article 35.

201. After discussion, the Working Group decided that draft article 35 should be retained within square brackets and referred it to the drafting group.

Article 36. Application of the annex

202. The text of draft article 36 as considered by the Working Group was as follows:

> "A State may declare at any time that it will be bound either by [sections I and II or by section III] of the annex to this Convention."

203. It was agreed that draft article 36 should be aligned with the new article proposed to describe the options that States would have in making a declaration with respect to the annex and the effect of such declarations (see paras. 188-191). In view of the fact that the Working Group did not have the time to discuss the proposed new article dealing with that matter, it was also agreed that the options should be retained within square brackets. With that understanding, the Working Group referred draft article 36 to the drafting group.

Article 37. Insolvency rules or procedures not affected by this Convention

204. The text of draft article 37 as considered by the Working Group was as follows:

> "[A State may declare at any time that other rules or procedures governing the insolvency of the assignor shall not be affected by this Convention.]"

205. It was noted that draft article 37 related to matters addressed in draft article 25 (4). The Working Group recalled its decision to delete that provision and decided that draft article 37 also should be deleted.

Provisions for the transitional application of the draft Convention

206. The Working Group agreed that draft articles 40 (5), 42 (3) and 43 (3), which dealt with the effects of declarations, of the entry into force and of the denunciation of the draft Convention on rights of third parties, on transactions existing before the entry into force of the draft Convention and on transactions existing before denunciation respectively should be retained within square brackets for States to consider in their preparation for the next Commission session. As to draft article 42 (3), the concern was expressed that it might inappropriately restrict the sovereign right of States to denounce the draft

Convention. In response, it was stated that draft article 42 (3) stated an important principle and, in the absence of a provision along the lines of draft article 42 (3), parties would be reluctant to enter into such transactions, a result that was said to be inconsistent with the main goal of the draft Convention.

Revision and amendment

207. The Working Group considered a provision dealing with revision and amendment of the draft Convention, which had been prepared by the Secretariat and was as follows:

"Article X. Revision and amendment

"1. At the request of not less than one third of the Contracting States to this Convention, the depositary shall convene a conference of the Contracting States for revising or amending it.

"2. Any instrument of ratification, acceptance, approval or accession deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended."

208. It was noted that the provision was based on article 32 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). It was stated, however, that, in view of the budgetary restrictions under which the Secretariat had to operate, the holding of a diplomatic conference should be left to the discretion of the depositary. It was, therefore, suggested that the words "may within existing resources" should be substituted for the word "shall". That suggestion was objected to on the grounds that, in its current formulation, draft article X reflected normal practice. In view of the lack of sufficient time to discuss that matter, the Working Group decided that draft article X should not be included in the text of the draft Convention, leaving that matter to the Commission.

VI. REPORT OF THE DRAFTING GROUP

209. The Working Group requested a drafting group established by the Secretariat to review draft articles 1 (3), 2 to 5, 8, 10 to 12, 16, 19 to 29 and 33 to 42 of the draft Convention, as well as draft articles 1 to 7 of the annex to the draft Convention, with a view to ensuring consistency between the various language versions.

210. At the close of its deliberations, the Working Group considered the report of the drafting group and adopted draft articles 1(3), 2 to 5, 8, 10 to 12, 16, 19 to 29, 33 to 42 of the draft Convention and draft articles 1 to 7 of the annex to the draft Convention, as revised by the drafting group, as well as the rest of the draft articles of the draft Convention. The consolidated text of the draft Convention, as adopted by the Working Group, is reproduced in the annex to the present report.

211. Given that the new provision dealing with conflicts with other international agreements remained in brackets, it was agreed that paragraph (2) of draft article 4 also should remain in brackets. It was suggested that the title to draft article 5 should be revised to read only "definitions" as principles of interpretation were to be found elsewhere in the draft Convention. In response, it was noted that the title of draft article 5 had been adopted at the previous session of the Working Group and had not been considered by the drafting group at the current session. It was agreed that the bracketed text in variant B of subparagraph (j) (ii) of draft article 5 (see paras. 96-97) should be deleted. It was also agreed that, throughout subparagraphs (a) to (c) of draft article 16 (1), the appropriate term should be "in respect of". Furthermore, it was agreed that in draft article 19 the term "receivables" should be changed to "receivable" in the singular, for the sake of consistency. Concerning draft article 20, it was agreed that in paragraph (1) the reference should be to any other contract that "was" part of the same transaction, and that paragraph (3) should refer to defences and rights of set-off that the debtor "may raise". As to draft article 21, the reference in paragraph (1) was changed to "a writing signed by the debtor" for consistency with paragraph (3).

212. The concern was expressed that draft article 24 went beyond covering priority in receivables and proceeds and was, therefore, inconsistent with the policy decision of the Working Group. In response, it was noted that, while it was true that the issue of the extent and existence of an assignee's, as well as an inventory financier's, right in receivables and proceeds had not been discussed in any detail, it had been mentioned in the discussion. It was also noted that, responding to a query by the Secretariat, the Working Group had confirmed that those matters should be covered, although they had not been discussed. As to draft article 24, it was suggested that the title should read "Law applicable to competing rights of other parties".

213. With regard to paragraph (2) of new draft article 26, it was agreed that it was necessary to specify that the assignee's "right" had priority over the right in the assigned receivable. The view was expressed that the whole of Chapter V of the draft Convention should be retained in brackets. It was felt, however, that the report of the Working Group would adequately reflect the discussions that had been held concerning this Chapter. As to draft article 27, the reference in paragraph (2) was changed to the habitual residence "of the assignor", and the language in paragraph (3) was changed to refer "to the extent" that law cannot be derogated from by contract. In line with its decision made after the preparation of the report of the drafting group (see para. 195), the Working Group agreed that new paragraph (3) of draft article 33 (see paras. 88-91) should be deleted and paragraphs (1) and (2) should be revised to conform with the standard provisions for resolving conflicts with other international agreements that would be found in other international conventions, such as the United Nations Sales Convention. In response to a question raised, it was noted that the matter of the use of the term "data" or some other term in draft article 1 of the annex had been left to the drafting group, on the understanding that any term used should reflect the policy decision of the Working Group in favour of a notice-filing rather than a document-filing system. In respect of draft article 4 of the annex, it was suggested that: in paragraph (1), the term "assigned" should be replaced with "covered" to ensure that the description referred also to future receivables; in subparagraph (2) (b), reference should be to an assignment "not yet concluded"; in paragraph (3), reference should be to a registration having been "extended", rather than "renewed"; and in paragraph (4), reference should be to the "correct" identification of the assignor. Those suggestions were objected to. It was widely felt that the language as prepared by the drafting group was satisfactory.

214. It was agreed that the latter part of new draft article 36 (see annex to this report), starting with the word "provided", should be placed within square brackets, so as to indicate that the matter addressed therein would need to be discussed further. It was also agreed that new draft articles 40 (3), 41 (5) and 43 (3) (see annex to this report) should be placed within square brackets so as to indicate that the issues addressed therein would need to be examined carefully and discussed further.

VII. FUTURE WORK

215. The Working Group noted that issues, such as the meaning of "location", the special regime with regard to financial receivables and the scope of the private international law provisions of the draft Convention, remained pending. However, on the understanding that such issues could only be resolved by the Commission, the Working Group decided to complete its work with the adoption of the draft Convention as a whole and to submit it to the Commission at its next session for final review and adoption (New York, 12 June to 7 July 2000). It was noted that the text of the draft Convention, as adopted by the Working Group, would be distributed to all States and interested international organizations for comments and that the Secretariat would prepare an analytical compilation of those comments. It was also noted that the Secretariat would finalize and distribute the commentary to the draft

Convention. It was expected that the compilation of comments and the commentary would assist delegates at the Commission session in their deliberations and allow the Commission to finalize and adopt the draft Convention.

ANNEX I

Consolidated text of the draft Convention:

DRAFT CONVENTION ON ASSIGNMENT [IN RECEIVABLES FINANCING] [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 chapter V 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. However, those provisions do not apply if a State makes a declaration under article 37.]

(4) The annex to this Convention applies in a Contracting State which has made a declaration under article 36.

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 of the conclusion of the original contract, 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 to an individual for his or her 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 article 39 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.]

[Article 5. Limitations on receivables other than trade receivables

Variant A

(1) Articles 17, 18, 19, 20 and 22 do not affect the rights and obligations of the debtor in respect of a receivable other than a trade receivable except to the extent the debtor consents.

(2) Notwithstanding articles 11 (2) and 12 (3), an assignor who assigns a receivable other than a trade receivable is not liable to the debtor for breach of a limitation on assignment described in articles 11 (1) and 12 (2), and the breach shall have no effect.

Variant B

Articles 11 and 12 and section II of chapter IV apply only to assignments of trade receivables. With respect to assignments of receivables other than trade receivables, the matters addressed by these articles are to be settled in conformity with the law applicable by virtue of the rules of private international law.]

CHAPTER II. GENERAL PROVISIONS

Article 6. 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) "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;

[(c) "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;]

(d) "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;

(e) “notification of the assignment” means a communication in writing which reasonably identifies the assigned receivables and the assignee;

(f) “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;

(g) “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;

(h) “priority” means the right of a party in preference to another party;

(i) (i) a person is located in the State in which it has its place of business;

(ii) if the assignor or the assignee has more than one place of business, the place of business is that place where its central administration is exercised;

(iii) if the debtor has more than one place of business, the place of business is that which has the closest relationship to the original contract;

(iv) if a person does not have a place of business, reference is to be made to the habitual residence of that person;

(j) “law” means the law in force in a State other than its rules of private international law;

(k) “proceeds” means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;

[(l) “trade receivable” means a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services.]

Article 7. 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 8. Principles of interpretation

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER III. EFFECTS OF ASSIGNMENT

Article 9. 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 of the assignment or, in the case of future receivables, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates.

(2) Unless otherwise agreed, an assignment of one or more future receivables is effective at the time of the conclusion of the original contract without a new act of transfer being required to assign each receivable.

Article 10. 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 11. 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 on the sole ground that it had knowledge of the agreement.

Article 12. 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) of this article 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) of this article. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

(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.

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) As between the assignor and the assignee, unless otherwise agreed, and whether or not a notification of the assignment has been sent:

(a) if payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;

(b) if payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to the assignor in respect of the assigned receivable; and

(c) if payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and is also entitled to goods returned to such person in respect of the assigned receivable.

(2) 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 be discharged by paying in accordance with the original contract. After the debtor receives notification of the assignment, subject to paragraphs (2) to (6) of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such instructions.

(2) If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.

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

(4) 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.

(5) 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.

(6) 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.

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, or any other contract that was part of the same transaction, 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) of this article, defences and rights of set-off that the debtor may raise pursuant to article 11 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 for personal, family or household purposes in the State in which the debtor is located, the debtor may agree with the assignor in a writing signed by the debtor 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 be modified only by an agreement in a writing signed by the debtor. 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 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.

Section III. Other parties

Article 24. Law applicable to competing rights of other parties

With the exception of matters which are settled elsewhere in this Convention, and subject to articles 25 and 26, the law of the State in which the assignor is located governs:

(a) the extent of the right of an assignee in the assigned receivable and the priority of the right of the assignee with respect to competing rights in the assigned receivable of:

(i) another assignee of the same receivable from the same assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

(ii) a creditor of the assignor; and

(iii) the insolvency administrator;

(b) the existence and extent of the right of the persons listed in paragraph (1) (a) (i) to (iii) in proceeds of the assigned receivable, and the priority of the right of the assignee in those proceeds with respect to competing rights of such persons; and

(c) whether, by operation of law, a creditor has a right in the assigned receivable as a result of its right in other property of the assignor, and the extent of any such right in the assigned receivable.

Article 25. Public policy and preferential rights

(1) 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.

(2) In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right which arises under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State has such priority notwithstanding article 24. A State may deposit at any time a declaration identifying those preferential rights.

Article 26. Special proceeds rules

(1) If proceeds of the assigned receivable are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over competing rights in the assigned receivable of the persons described in subparagraph (a) (i) to (iii) of article 24.

(2) If proceeds of the assigned receivable are received by the assignor, the right of the assignee in those proceeds has priority over competing rights in those proceeds of the persons described in subparagraph (a) (i) to (iii) of article 24 to the same extent as the assignee’s right had priority over the right in the assigned receivable of those persons if:

(a) the assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

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

Article 27. Subordination

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

CHAPTER V. CONFLICT OF LAWS

Article 28. Law applicable to the rights and obligations of the assignor and the assignee

(1) [With the exception of matters which are settled in this Convention,] the rights and obligations of the assignor and the assignee under the contract of assignment are governed by the law expressly chosen by the assignor and the assignee.

(2) In the absence of a choice of law by the assignor and the assignee, their rights and obligations under the contract of assignment are governed by the law of the State with which the contract of assignment is most closely connected. In the absence of proof to the contrary, the contract of assignment is presumed to be most closely connected with the State in which the assignor has its place of business. If the assignor has more than one place of business, reference is to be made to the place of business most closely connected to the contract. If the assignor does not have a place of business, reference is to be made to the habitual residence of the assignor.

(3) If the contract of assignment is connected with one State only, the fact that the assignor and the assignee have chosen the law of another State does not prejudice the application of the law of the State with which the assignment is connected to the extent that law cannot be derogated from by contract.

Article 29. Law applicable to the rights and obligations of the assignee and the debtor

[With the exception of matters which are settled in this Convention,] the law governing the receivable to which the assignment relates determines the enforceability of contractual limitations on assignment, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

[Article 30. Law applicable to competing rights of other parties

(1) The law of the State in which the assignor is located governs:

(a) the extent of the right of an assignee in the assigned receivable and the priority of the right of the assignee with respect to competing rights in the assigned receivable of:

(i) another assignee of the same receivable from the same assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment;

(ii) a creditor of the assignor; and

(iii) the insolvency administrator;

(b) the existence and extent of the right of the persons listed in paragraph (1) (a) (i) to (iii) in proceeds of the assigned receivable, and the priority of the right of the assignee in those proceeds with respect to competing rights of such persons; and

(c) whether, by operation of law, a creditor has a right in the assigned receivable as a result of its right in other property of the assignor, and the extent of any such right in the assigned receivable.

(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.

(3) In an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right which arises under the law of the forum State and is given priority status over the rights of an assignee in insolvency proceedings under the law of that State has such priority notwithstanding paragraph (1) of this article. A State may deposit at any time a declaration identifying those preferential rights.

Article 31. Mandatory rules

(1) Nothing in articles 28 and 29 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

(2) Nothing in articles 28 and 29 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

Article 32. Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter 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.]

CHAPTER VI. FINAL PROVISIONS

Article 33. Depositary

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

Article 34. Signature, ratification, acceptance, approval, accession

(1) This Convention is open for signature by all States at the Headquarters of the United Nations, New York, until ... .

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open to accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 35. Application to territorial units

(1) If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at any time, declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.

(2) These declarations are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which the Convention does not extend, this location is considered not to be in a Contracting State.

(4) If a State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

Article 36. Conflicts with other international agreements

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention[, provided that the assignor is located in a State party to such agreement or, with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, the debtor is located in a State party to such agreement].

Article 37. Application of chapter V

A State may declare at any time that it will not be bound by chapter V.

Article 38. Limitations relating to Governments and other public entities

A State may declare at any time that it will not be bound by articles 11 and 12 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of the conclusion of the original contract and is a Government, central or local, any subdivision thereof, or any public entity. If a State has made such a declaration, articles 11 and 12 do not affect the rights and obligations of that debtor or person.

[Article 39. Other exclusions

A State may declare at any time that it will not apply the Convention to specific practices listed in a declaration. In such a case, the Convention does not apply to such practices if the assignor is located in such a State or, with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, the debtor is located in such a State.]

Article 40. Application of the annex

(1) A Contracting State may at any time declare that [it will be bound either by sections I and/or II or by section III of the annex to this Convention.] [it:

(a) will be bound by the priority rules based on registration set out in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) will be bound by the priority rules based on registration set out in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules [as set forth in regulations promulgated pursuant to section II of the annex], in which case, for the purposes of section I of the annex, registration pursuant to such a system shall have the same effect as registration pursuant to section II of the annex; or

(c) will be bound by the priority rules based on the time of the contract of assignment set out in section III of the annex.

(2) For the purposes of article 24, the law of a Contracting State that has made a declaration pursuant to paragraph (1) (a) or (1) (b) of this article is the set of rules set forth in section I of the annex, and the law of a Contracting State that has made a declaration pursuant to paragraph (1) (c) of this article is the set of rules set forth in section III of the annex. The Contracting State may establish rules pursuant to which assignments made before the declaration takes effect shall, within a reasonable time, become subject to those rules.

(3) A Contracting State that has not made a declaration pursuant to paragraph (1) of this article may, pursuant to its domestic priority rules, utilize the registration system established pursuant to section II of the annex.]

Article 41. Effect of declaration

(1) Declarations made under articles 35 (1) and 37 to 40 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after

such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under articles 35 (1) and 37 to 40 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

[(5) A declaration or its withdrawal does not affect the rights of parties arising from assignments made before the date on which the declaration or its withdrawal takes effect.]

Article 42. Reservations

No reservations are permitted except those expressly authorized in this Convention.

Article 43. Entry into force

(1) This Convention enters into force on the first day of the month following the expiration of six months from the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession.

(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force on the first day of the month following the expiration of six months after the date of the deposit of the appropriate instrument on behalf of that State.

[(3) This Convention applies only to assignments made on or after the date when the Convention enters into force in respect of the Contracting State referred to in article 1 (1).]

Article 44. Denunciation

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

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

[(3) The Convention remains applicable to assignments made before the date on which the denunciation takes effect.]

ANNEX TO THE DRAFT CONVENTION

Section I. Priority rules based on registration

Article 1. Priority among several assignees

As between assignees of the same receivable from the same assignor, priority is determined by the order in which data about the assignment are registered under section II of this annex, regardless of the time of transfer of the receivable. If no such data are registered, priority is determined on the basis of the time of the assignment.

Article 2. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to article 25 of this Convention,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if the receivables were assigned, and data about the assignment were registered under section II of this annex, before the commencement of the insolvency proceeding or attachment.

Section II. Registration

Article 3. Establishment of a registration system

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

Article 4. Registration

(1) Any person authorized by the regulations may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall be identification of the assignor and the assignee, as provided in the regulations, and a brief description of the assigned receivables.

(2) A single registration may cover:

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

(b) an assignment not yet made;

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

(3) Registration, or its amendment, is effective from the time that the data referred to in paragraph (1) are available to searchers. The registering party may specify, from options provided in the regulations, a period of effectiveness for the registration. In the absence of such a specification, a registration is effective for a period of five years. Regulations will specify the manner in which registration may be

renewed, amended or discharged, and, consistent with this annex, such other matters as are necessary for the operation of the registration system.

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

Article 5. Registry searches

(1) Any person may search the records of the registry according to identification of the assignor, as provided in the regulations, and obtain a search result in writing.

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

(a) the date and time of registration; and

(b) the order of registration.

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

Article 6. Priority among several assignees

As between assignees of the same receivable from the same assignor, the right to the receivable is acquired by the assignee whose contract of assignment is of the earliest date.

Article 7. Priority between the assignee and the insolvency administrator or the creditors of the assignor

[Subject to article 25 of this Convention,] an assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if the receivables were assigned before the commencement of the insolvency proceeding or attachment.

ANNEX II

Renumbering of articles of the draft Convention *

Current article number (annex I to the present document)	Former article number (A/CN.9/WG.II/WP.104)
1	1
2	2
3	3
4	4
5	New article
6	5
7	6
8	7
9	8
10	9
11	10
12	11
13	13
14	14
15	15
16	16
17	17
18	18
19	19
20	20
21	21
22	22
23	23
24	24 (1), 25 (1) and (2) and 26 (3) and (4)
25	25 (3) and (5) and 26 (5)
26	26 (1) and (2)
27	24 (2)
28	27
29	28
30	29
31	30
32	31
33	32
34	38

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* The articles of the annex were not renumbered.

35	39
36	33
37	34
38	12
39	35
40	36
41	40
42	41
43	42
44	43

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