UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.9/WG.II/WP.102
8 January 1999

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Working Group on
International Contract Practices
Thirtieth session
New York, 1 - 12 March 1999

RECEIVABLES FINANCING

Revised articles of draft Convention on Assignment in Receivables Financing: remarks and suggestions

Note by the Secretariat

CONTENTS

V.99-80081

INTRODUCTION

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

2. The Commission's decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York 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. 2/

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

---

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

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

(in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. 3/

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

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

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

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

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

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

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

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

6/ Ibid., para. 256.

9. At its thirty-first session (1998), the Commission had before it the reports 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 to the Commission for adoption at its thirty-third session (2000). 7/

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

11. In order to facilitate the considerations of the Working Group, this note sets forth remarks on a number of draft articles. Where necessary, suggestions for alternative or additional provisions are made for consideration by the Working Group. Remarks to draft articles 1 to 13 relate to those provisions as they appear in document A/CN.9/WG.II/WP.96 (to be read in light of the remarks contained herein but also in document A/CN.9/WG.II/WP.98); remarks to draft articles 14 to 16 and 18 to 22 relate to those provisions as they appear in the annex to document A/CN.9/447; remarks to draft articles 17 and 17*bis* relate to those provisions as they appear in document A/CN.9/WG.II/WP.98; and remarks to draft articles 5(g) to (j), 18(5*bis*), 23 to 33 and 41 to 50 relate to those provisions as they appear in the annex to document A/CN.9/455.

* * *

DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

PREAMBLE

The Working Group may wish to consider including in the preamble a reference to the principle of debtor-protection. Thus, the preamble would refer to both main principles of a modern assignment law, i.e. to the principle of facilitation of receivables financing and to the principle of debtor-protection. Language along the following lines may be considered: "*Also desiring* to ensure the adequate protection of the interests of the debtor in the case of an assignment of receivables"(as to the placement of draft article 7, see remarks to that article).

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

1. The issue of the meaning of the term "location" in draft article 1 remains pending. The Working Group has considered so far various suggestions, including the suggestion to refer to the place of incorporation or to the place of business with which the assignment is most closely

---

7/ Ibid., Fifty-third Session, Supplement No. 17 (A/53/17), para. 231.

connected (A/CN.9/455, para. 165; as to the location of the debtor, reference would need to be made to the place of business which is most closely connected to the original contract between the assignor and the debtor).

2. Assuming that the term "location" would have the same meaning for the purposes of both draft articles 1 and 3, an approach based on a combination of the place of incorporation and the relevant place of business, which would be meaningful only in the cases where the two places would not coincide, could result in bringing into the scope of the draft Convention purely domestic transactions (e.g., an assignment of receivables, where the assignor, the assignee and the debtor have their places of business in the same State, while the parent company of the assignee is incorporated in another State).

3. The main argument in favour of a place-of-incorporation approach is that, in view of the fact that it would result in reference being made to a single and easily determinable jurisdiction, it would provide certainty as to the application of the draft Convention, thus potentially having a beneficial impact on the availability and the cost of credit (A/CN.9/455, para. 27). While this approach was found to be acceptable in the context of draft articles 23 and 24, it has been objected to for the purpose of the scope provisions on the grounds that the place of incorporation is a fictitious place and referring to it in this context could inadvertently result in the application of the draft Convention to purely domestic transactions (A/CN.9/455, para. 164). An approach based on the place of incorporation could also lead to a situation in which the draft Convention would not apply to a clearly international transaction (e.g., an assignment of receivables from a branch office in country A to the parent corporation incorporated in country B, where also the assignor and the debtor are located).

4. In addition, it may be argued that use of the term "place of incorporation" may fail to promote its stated goal of achieving certainty, since this term is not universally understood in the same way and, unlike the place of business which normally appears on the letterhead of a corporation, is not readily available to third parties. Moreover, such an approach may inadvertently result in the non-application of the draft Convention to cases in which a corporation has its actual place of business in one or more places, while it is incorporated in a tax haven, which would typically not be a Contracting State. A reference to the place of incorporation, i.e. the nationality of a corporation, would also be inconsistent with the normal approach of focusing on the residence, not on the nationality, of persons (A/CN.9/WG.II/WP.99, part (3); see also para. 6 below).

5. In favour of a place-of-business approach it has been argued that it would provide sufficient certainty, since it is a well known term, used in a number of uniform laws and sufficiently explained in existing case law (A/CN.9/455, para. 164). Such an approach would also provide flexibility in that it would result in focusing in each case on the relevant place of business, i.e. the place of business which would be most closely connected with the relevant transaction (the assignment for the assignor and the assignee, and the original contract for the debtor). The main objection to this approach put forward so far is that it would be very difficult, in particular for third parties, to determine in each case where the relevant place of business would be, and that difficulty would have a negative impact on the availability and the cost of credit. In addition, it has been argued that, in order to avoid inconsistent results, the term "location", which was defined for the purpose of draft articles 23 and 24 by reference to the place of incorporation, should not be defined differently for the purpose of other provisions of the draft Convention (A/CN.9/455, para. 163). Moreover, it

may be argued that in a variety of service-related transactions, in which services are provided by various branch offices of a corporation, it would be difficult and unnecessary to refer to the place of business of the branch offices that were involved in the transaction, while it would be easier and more sensible from a practical point of view to refer to the place of incorporation of the parent company. Reference to the place of business with the closest relationship to the assignment may also inadvertently result in a situation in which the various assignments of the same receivables by the assignor may be subject to different legal regimes, simply because the various assignments may be most closely connected with different jurisdictions.

6. In seeking a generally acceptable solution, the Working Group may wish to take into account that, in some legal systems, a corporation has the nationality of the State in which it has been incorporated (there can be only one such place). In those legal systems, a corporation's residence is determined according to the place where it has its central control and management (there can be more than one according to the purpose for which residence needs to be determined). The Working Group may also wish to take into account that, in other legal systems, reference is made to the seat of a corporation rather than to its nationality, i.e. the place in which its central administration or management takes place. In those legal systems, if a corporation is not incorporated under the law of the jurisdiction in which its central administration takes place, it does not exist as a corporation and the partners are personally liable (in any case, local transactions of a branch office are not made international by the fact that the parent corporation is foreign).

7. Thus, in trying to reach a generally acceptable compromise, the Working Group may wish to focus on the place of central administration. In fact, the place of central administration (in other words, the chief executive office or the centre of main interests) has been used as a main point of reference in a number of uniform laws. The UNCITRAL Model Law on Cross-Border Insolvency, for example, refers to the centre of [the insolvent debtor's] main interests, while creating a rebuttable presumption in favour of the debtor's registered office, or habitual residence in the case of individuals (article 16(3)). The Convention on the Law Applicable to Contractual Obligations (Rome, 1980; hereinafter referred to as "the Rome Convention") refers to the place which is most closely connected to the contract, while creating a presumption in favour of the place where the relevant party has its central administration, in the case of a body corporate or unincorporate, or habitual residence, in the case of an individual (article 4(2)).

8. The Working Group may wish to consider the following approach: for the purpose of determining the location of the assignor and the assignee, reference could be made to the place of business with the closest relationship to the assignment; for the purpose of determining the location of the debtor, reference could be made to the place of business with the closest relationship to the original contract; and a rebuttable presumption in favour of the place of the assignor's central administration could be created (see draft article 5(k) below).

9. Such a provision would combine certainty with flexibility in that it would provide a presumption as to the meaning of the main point of reference (i.e. the relevant place of business), while allowing parties to rebut the presumption by showing that the transaction is most closely connected with another State. If the proposed provision were found to be acceptable, the Working Group may wish to consider whether its application should be extended to the draft Convention as a whole, i.e. to draft articles 9, 17*bis*, 19(2) (if reference is made to the law of the debtor's location; see remarks to draft article 19 below), 20(1), 22 to 24, 29 to 33 and 46(3) as well.

10. The Working Group may also wish to consider the question whether parties to the assignment should be given a right to opt into the draft Convention. Such an opt-in approach, which would be in line with the principle of party autonomy (A/CN.9/WG.II/WP.98 draft article 1, remark 2), may not be appropriate when the rights of third parties are at stake. In line with this thinking, draft article 29 allows the assignor and the assignee to choose the law applicable to their relationship. Draft article 30 is also based on the assumption that, at least in the case of contractual receivables, the assignor and the debtor may choose the law governing their relationship (which may affect the assignee as the new creditor). Unlike draft articles 29 and 30, draft article 31 does not allow a choice of law with regard to issues of priority, since it would not be appropriate for the assignor and the assignee to affect with their agreement the rights of third parties. In addition, as a practical matter, it may not be easy for third parties to know whether the assignor has opted in or out of the draft Convention. Moreover, an opt-in or an opt-out approach could produce inconsistent results in the case of a chain of assignments, some of which may be subject to the draft Convention, while other assignments may be subject to different laws. Thus, if the assignor and the assignee were given a right to opt in or out of the draft Convention, such an opt-in or opt-out could have effects only as between themselves. This is the intended effect of draft article 6.

11. One way to allow the parties to opt in or out of the draft Convention may be a rule defining the term "location" as the place chosen by the parties. Such an approach, however, could still affect the rights of third parties. As to the assignor, this is obvious as the location of the assignor is decisive for the application of the draft Convention and for the determination of the law governing priority issues. The result would be the same even in the case of an opt-in or opt-out by the assignee and the debtor to the extent that, in view of draft article 3, a choice of location by the assignee may make international a purely domestic transaction and a choice of location by the debtor could make domestic an international transaction.

12. One way in which the Working Group may provide a degree of flexibility without undermining certainty in the application of the draft Convention could be to allow States to apply the draft Convention to additional practices (and/or to exclude in draft article 4 some of the practices covered in draft article 2; see draft article 1(7) and draft article 4, remark 4 below). However, an approach based on declarations by States may not be the most appropriate approach to law unification, since the draft Convention would have a different scope for different States. In addition, such an approach may not promote certainty in the application of the draft Convention, if the declarations are formulated in ambiguous terms (however, currently, the following draft articles provide for declarations: 42; 1(4) and 42*bis*; 1(7) and 42*ter*; 4(2) and 42*quater*; 1(5) and 43; and 24(5) and 44; see also draft article 9, remark 6 and draft article 12, remark 11).

13. The Working Group may also wish to address the question whether, for the draft Convention to apply in the case of multiple assignors or multiple debtors, all of them need to be located in a Contracting State (A/CN.9/WG.II/WP.98, draft article 3, remark 5).

14. Multiple assignors may be involved, for example, in an assignment by a consortium of contractors in a project financing context, or in an assignment by a limited partnership where the partners act as individuals. It may be that those situations could be better addressed by a rule which would refer to the location of the agent or trustee acting on behalf of the multiple assignors (A/CN.9/WG.II/WP.98, draft article 3, remark 6). The provision would apply only if, under the law applicable to the authority of the agent or trustee, the agent or trustee would be properly

authorized to act on behalf of the multiple assignors (i.e. if the agent or trustee would be authorized to do more than to provide administrative services). This point could be usefully clarified in the commentary to the draft Convention.

15. Multiple assignors may be also involved in the case of one receivable owned partly or jointly and severally be several persons. However, in this case no special rule may be needed, if the Working Group agrees that each assignment of a part of a receivable or of a whole receivable jointly owned by several persons is a separate assignment which should meet the requirements of draft article 1(1) and (2).

16. Multiple debtors may be involved in the case of more than one receivable owed by several debtors, as well as in the case of one receivable owed partly or jointly and severally by several debtors. Cases involving several debtors of a single receivable may not need to be covered by a special rule to the extent that the part of a receivable or a whole receivable owed jointly and severally by several debtors would be a separate receivable in itself and the rule in draft article 1(2) would appropriately address it with the result that each debtor would need to be located in a Contracting State (as the issue of multiple parties arises also in the context draft article 3, it may be dealt by way of a provision that would apply to draft article 3 as well; see remarks to draft article 3 below).

17. The question of the scope or the purpose of the private international law rules of the draft Convention (Chapter VI), and the question of the relationship between the private international law priority provisions (draft articles 23 and 24) and the substantive law priority provisions (Chapter VII) also remain to be discussed.

18. Under paragraph (3), if the bracketed language is deleted, the private international law rules of the draft Convention would apply irrespective of whether the assignor or the debtor would be located in a Contracting State, or whether the law governing the receivable would be the law of a Contracting State. In addition, if the bracketed language is deleted, the private international law provisions of the draft Convention should apply independently of the other scope provisions contained in Chapter I, in particular of the definition of internationality contained in draft article 3 (see second set of bracketed language in draft article 1(4) below). The Working Group may also wish to consider moving this provision to Chapter VI and further elaborating on this matter in the commentary to the draft Convention.

19. In addition, the Working Group may wish to consider the possibility of allowing States to adopt only Chapter VI. It would appear that Chapter VI would be to a large extent compatible with existing international instruments dealing with related matters and, in addition, could be regarded as a welcome opportunity of resolving issues that are left unaddressed or are not fully addressed in such other instruments. Moreover, the Working Group may wish to consider the question of the hierarchy between the substantive and the private international law provisions of the draft Convention in the case of a Contracting State which has not made a reservation as to Chapter VI. The Working Group may wish to ensure that the application of the substantive law provisions of the draft Convention is considered before a Contracting State resorts to the application of the private international law provisions of the draft Convention.

20. At its twenty-ninth session, the Working Group agreed that Chapter VI should be subject to a reservation by States (A/CN.9/455, para. 72 and draft article 1(4) below). It would appear, however, that this opt-out option should be limited to draft articles 29 to 31, since draft articles 32 and 33 should, for consistency reasons, apply to the private international law provisions that are outside Chapter VI (i.e. draft articles 1(2), 9, 17*bis*, 19(2) and 23 to 24; see also remarks to draft article 24(3), 32 to 33 and 42*bis*). In order to avoid that such an approach may be interpreted as subjecting the substantive law provisions of the draft Convention to rules of mandatory law or rules reflecting public policy of the forum State, thus undermining the certainty achieved by the draft Convention, the matter could be further explained in the commentary (on this matter, see also document A/CN.9/WG.II/WP.98, draft article 22).

21. In paragraph (4), a reference should be included to the right of Contracting States to opt into Chapter VII (A/CN.9/445, paras. 26 and 27 and A/CN.9/455, para. 120). The second sentence of paragraph (4) may be deleted. A Contracting State opting into Chapter VII could still benefit from the private international law priority rules contained in draft articles 23 and 24. In addition, once it has considered its content, the Working Group may wish to consider the question of the appropriate place of Chapter VII in the text of the draft Convention (see remarks to Chapter VII below).

22. The Working Group may also wish to consider the question whether draft article 25, which deals with the scope of application of the draft Convention with regard to subsequent assignments, should be placed in the context of draft article 1 (A/CN.9/455, para. 54). Paragraph (2) of draft article 25 may need to be revised so as to ensure that the subsequent assignee, who assigns the receivables assigned to him further is treated as the initial assignor, while the subsequent assignee, who receives the receivables previously assigned, is treated as the initial assignee.

23. Thus the Working Group may wish to consider the following reformulated version of draft article 1:

"(1) This Convention applies to:

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

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

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

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

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

"[(4) The provisions of articles 29 to 33 apply [to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs (1) and (3) of this article] [independently of the provisions of this chapter]. However, the provisions of articles 29 to 31 do not apply if a State makes a declaration under article 42*bis*.]

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

"(6) [In the case of an assignment of more than one receivable by more than one assignor, this Convention applies if any assignor is located in a Contracting State.] 8/ In the case of an assignment of more than one receivable owed by more than one debtor, this Convention does not affect the rights and obligations of any debtor unless that debtor is located in a Contracting State or the law governing the receivable owed by that debtor is the law of a Contracting State.

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

* * *

Article 2. Assignment of receivables

1. In addition to the questions identified in the remarks to draft article 2 contained in document A/CN.9/WG.II/WP.98, the Working Group may wish to consider the following questions: whether the definition of the term "assignment" also covers the agreement to assign; and whether the reference to consideration contained in the definition should be retained.

2. It should be recalled that at its twenty-seventh session the Working Group thought that "the formulation of paragraph (1) clarified sufficiently that both the contract of assignment and the resulting transfer of receivables were covered by the definition of 'assignment'" (A/CN.9/445, para. 149). In reaching that conclusion, the Working Group had noted that, while in some legal systems the invalidity of the agreement to assign may invalidate the transfer, in other legal systems the invalidity of the agreement to assign may give rise to a claim against the assignee based on the principles of unjust enrichment (A/CN.9/WG.II/WP.93, draft article 2, remark 2).

3. Should the Working Group confirm the understanding that the definition contained in paragraph (1) covers the assignment as well as the agreement to assign, a number of provisions of the draft Convention should be reviewed in order to ensure that their application would produce the desired results if the agreement to assign and the assignment would not be concluded at the same time. For example, in its current formulation draft article 10 may not make it sufficiently clear that the assignment and not the agreement to assign produces the prescribed results, i.e., the transfer of property rights in the receivables. The text of the draft Convention would not need to be revised if the Working Group agrees that the reference to "transfer by agreement", which is intended to ensure

---

8/ For alternative wording, see draft article 5(k) below.

that only voluntary assignments (not assignments by operation of law) are covered, makes it sufficiently clear that the assignment is the main focus of the draft Convention. The commentary could explain that the draft Convention does not apply to agreements to assign, except where it expressly provides otherwise (e.g., draft articles 14-17).

4. The reference to consideration was originally intended to ensure that the draft Convention would not apply to gratuitous assignments. However, in view of the fact that the draft Convention deals only in exceptional cases with the financing contract or the agreement to assign, the reference to consideration may not be necessary in the definition of "assignment". If this reference is deleted, in line with the goals of the draft Convention set out in the preamble, gratuitous assignments could be excluded in draft article 4.

5. In addition, the Working Group may wish to consider the question whether the draft Convention should apply not only to the assignment of rights to payment of money but also to the assignment of other contractual rights or even to the assignment of contracts (i.e the assignment of rights and the delegation of obligations). In practice, often all rights arising under a contract are assigned, even though the assignee may be interested more in the rights to payment, including the rights to payment of damages for breach of contract, than in other rights. Covering the assignment of rights other than rights to payment would not interfere with the right of the assignee to exclude those rights from the assignment so as to avoid additional risks and costs (e.g., the right to receive goods may entail product liability and maintenance or insurance costs). In addition, such an approach would result in a more comprehensive legal regime dealing with assignment. On the other hand, such an extension of the scope of the draft Convention may make it less acceptable to States. In any case, assignments of contractual rights should be clearly distinguished from assignments of contracts which involve not only the assignment of rights but also the delegation of obligations. Delegation of obligations may be regarded as a separate transaction, and leaving it outside the scope of the draft Convention may not negatively affect any financing practice (e.g., in the case of assignments of loans, it would seem that normally only the right of the assignor to receive payment of the amount lent to the borrower is assigned and not any obligation of the assignor to provide further credit).

6. The following reformulated version of draft article 2 may be considered:

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

7. The Working Group may wish to address the question whether an explicit reference should be included in draft article 2 to conditional transfers of receivables. Normally, a conditional transfer would be regarded as a sale or a security device, depending, e.g., on whether the receivables are retransferred automatically to the seller in the case of debtor-default. However, in some legal systems conditional transfers are invalidated. Thus, their express recognition in the draft Convention may have a beneficial effect on those practices that take the form of a conditional transfer of receivables.

* * *

Article 3. Internationality

1. The Working Group may wish to consider the question of the potential uncertainty as to the application of the draft Convention in the case of an assignment which relates to future receivables, resulting from the fact that their internationality would be determined under draft article 3 only at the time they arise (A/CN.9/455, para. 162).

2. In addition, the Working Group may wish to address the question of a multiplicity of assignors, assignees or debtors in the context of draft article 3 (A/CN.9/WG.II/WP.98, draft article 3, remarks 2-4) on the basis of the following provision:

"(2) [In the case of an assignment of more than one receivable by more than one assignor, the assignment is international if any assignor and the assignee are located in different States. In the case of an assignment of more than one receivable to more than one assignee, the assignment is international if the assignor and any assignee are located in different States.

"(3) In the case of an assignment of more than one receivable owed to more than one creditor, the receivable is international if any assignor and the debtor are located in different States.] 9/ In the case of an assignment of more than one receivable owed by more than one debtor, only that receivable is international in which the assignor and the debtor are located in different States."

3. Alternatively, the issue of the location of multiple assignors and assignees may be dealt with by way of a provision that would refer to the location of their authorized agent or trustee and deal with the issue of location in general along the following lines (this provision would replace only the bracketed language in draft articles 1(7) and 3(2) and (3) above; it is tentatively formulated as subparagraph (k) of draft article 5):

"(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;

9/ For wording alternative to the bracketed wording in draft articles 3(2) and (3), see draft article 5(k) below.

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

4. It should be noted that this provision is intended to apply in the case of an assignment of more than one receivable. The commentary may explain that each assignment of a parts of one receivable or of a receivable jointly and severally owned by several persons is a separate assignment (see also draft article 1, remarks 15 and 16 above).

5. The Working Group may wish to consider whether a single definition of the term "location" would be preferable to one definition for the purposes of draft articles 23 and 24 and a different definition for the purposes of draft articles 1 and 3 (for arguments in favour of one definition, see A/CN.9/455, para. 163). The meaning of the term "location" would need to be considered for the purposes of draft articles 9, 17*bis*, 19(2), 20(1), 22, 29 to 31 and 46(3) as well. In any case, the Working Group may wish to determine whether reference should be made to "the chief executive office" (as in draft article 5(j)), or to the "place of central administration" (as in new draft article 5(k) below).

* * *

Article 4. Exclusions

1. Depending on the decision of the Working Group as to the deletion of the reference to consideration in draft article 2, assignments made "without value, credit or related services being given or promised by the assignee" may need to be added to the list contained in draft article 4. In addition, subparagraph (c) may need to be revised along the following lines: "to the extent made by endorsement and delivery or only by delivery of a negotiable instrument ". Such a revision would reflect the fact that, with the exception of bearer instruments, which are transferred by delivery, negotiable instruments are transferred by endorsement and delivery (not "or", as mentioned in subparagraph (c)) .

2. The commentary may refer to the reason for this exclusion, i.e. to avoid conflicts with the law applicable to negotiable instruments, such as bills of exchange, promissory notes and cheques, and in particular to avoid interfering with the priority scheme prevailing under both national and international negotiable-instrument law. For the same reason, certain other documents that may be regarded as payment instruments may also need to be excluded (e.g., bonds or preference shares under which there is an obligation for payment of regular dividends). Independent guarantees and stand-by letters of credit ("independent undertakings"; see article 3 of the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit, hereinafter referred to as "the Guarantee and Standby Convention") may not need to be excluded altogether, as long as it is ensured that the guarantor/issuer, counter-guarantor or confirmer does not have to pay the assignee, unless it has consented to do so. Thus, this matter may be more appropriately addressed by way of a rule in draft article 12, which deals with contractual assignability of receivables, allowing the guarantor/issuer of an independent undertaking to discharge its obligation by paying the beneficiary (assignor). Such a rule would not interfere with statutory non-assignability of an independent undertaking, since statutory assignability is not addressed by the substantive law provisions of the draft Convention. Only draft article 30 provides for the law applicable to contractual and statutory assignability, on the understanding that application of the law governing the receivable may be

refused by a court, if that law runs contrary to mandatory rules or rules reflecting public policy of the forum State.

3. As to the question whether the assignment of receivables from the buyer of a business to the institution financing the sale is excluded or not (A/CN.9/WG.II/WP.98, draft article 4, remark 3), it may be sufficient to clarify in the commentary that, in the case of a sale of a business, only the assignment from the old to the new owner is excluded and not the assignment by the new owner to an institution financing the sale. In addition, the commentary may clarify that only the assignment of *receivables* is covered (e.g., the right to payment under a share) and not the assignment of other rights (e.g., voting rights flowing from a share).

4. Depending on the decision of the Working Group on the scope of the draft Convention in the context of draft article 2, the Working Group may wish to consider allowing States to exclude or include additional practices (see draft article 1(7) above and draft article 4(2) below). While, as already mentioned, such an approach might not be the most appropriate approach to law unification, it might make the draft Convention more acceptable to States and facilitate a decision by the Working Group to cover only contractual receivables, thus simplifying the text of the draft Convention (a number of provisions, e.g., draft articles 15 and 20, could not apply to assignments of tort receivables). Language along the following lines could be considered:

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

* * *

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

1. In view of the divergences existing among the various legal systems, subparagraph (b) is intended to provide a uniform rule as to the time when a receivable is deemed to arise. The time when a receivable arises is important in particular for draft articles 10 and 11 dealing with the effect of assignment and the time of transfer of receivables. The benefit of subparagraph (b) may be limited to the extent that it does not (and cannot) specify the time when the original contract is deemed to be concluded.

2. In its current formulation, subparagraph (c) may inadvertently result in receivables that exist at the time of the conclusion of the contract of assignment (i.e. those that arise under contracts existing at that time) being considered future receivables. This result would be avoided if subparagraph (c) were to be reformulated along the following lines: "'Future receivable' means a receivable that arises after the time of the assignment".

3. The Working Group may wish to determine whether subparagraph (d) is needed in view of the fact that it defines a term which does not appear in the text of the draft Convention (it appears only in the title, the preamble and, indirectly, in draft article 14(3)).

4. Subparagraph (e) defines the term "writing" by combining the definitions of "writing"and "signature" contained in articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce. Under the draft Convention, a signed writing is required for the assignment and for the notification of the assignment.

5. Whether a notification that does not identify the payee could freeze the rights of set-off of the debtor (draft article 19) or limit the debtor's right to modify the original contract without the consent of the assignee (draft article 21) remains an open question in view of the bracketed language in draft articles 19(2) and 21(4). This matter is the subject of document A/CN.9/WG.II/WP.100, which is discussed in the context of the remarks to draft article 16 below. However, if a notification is to be ineffective unless it meets the requirements of the draft Convention (whatever those requirements might be), draft article 16(3) should be moved to the definition of notification contained in subparagraph (f). Thus, subparagraph (f) would read as follows:

> "(f) 'Notification of the assignment' means a communication in writing which reasonably identifies the assigned receivables, the assignee and the person to whom or for whose account or the address to which the debtor is required to make payment."

6. It should be noted that, in view of draft article 18(5), the fact that a notification is ineffective under the draft Convention does not preclude it from being effective under other law thereby enabling the debtor to be discharged by paying the person identified in that notification (provided that the debtor pays the right person).

7. Subparagraph (g), which is drawn from paragraph (d) of article 2 of the UNCITRAL Model Law on Cross-Border Insolvency, covers both voluntary and compulsory reorganization or liquidation of the assignor's assets. It may be noted that, in some systems, in the case of a voluntary reorganization of its assets the insolvent debtor may remain in control of the assets and there may not be an insolvency administrator. Thus, the Working Group may wish to consider revising draft article 24(2) so as to cover situations in which conflicts of priority may arise in the context of an insolvency proceeding in which there is no insolvency administrator (see draft article 24, remark 1).

8. The reference at the end of subparagraph (j) to "any other person" may need to be revised, since the reference to individuals, corporations and legal persons other than corporations covers every possible person. In order to cover legal persons other than corporations that do not have a constitutive document filed (e.g., partnerships), language along the following lines may be considered:

> "...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."

9. As already mentioned, the Working Group may wish to consider adopting one definition of the term "location" for the purposes of the draft Convention as a whole (see draft article 3, remark 4 above).

10. The Working Group may wish to consider the following reformulated version of subparagraph (k) in document A/CN.9/WG.II/WP.96:

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

11. The Working Group may wish to consider the question whether the freedom of the parties to specify by agreement the time of the assignment should be limited (for a brief discussion of a previous version of this subparagraph, see A/CN.9/447, para. 30). The term "time of assignment" appears in draft articles 1(1), 9(1), 11(1) and 34.

* * *

Article 6. Party autonomy

1. The Working Group may wish to consider the following alternative formulation of draft article 6:

"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."

2. In the context of an agreement between the assignor and the assignee, "third parties" are the debtor, the assignor's creditors and the insolvency administrator. In the context of an agreement between the assignor and the debtor, "third parties" are the assignee, the assignor's creditors and the insolvency administrator. Agreements between the assignee and the debtor are not covered by the draft Convention.

* * *

Article 7. Debtor's protection

1. The Working Group may wish to consider including in the preamble a general reference to debtor-protection and to place draft article 7 at the beginning of Section II of Chapter III dealing with debtor-protection (see new draft article 17*ter* below).

2. The intended effect of paragraph (1) is that, with the exception of certain debtor-related matters expressly settled in the draft Convention (i.e. in draft articles 9-12 and 16-22), the rights and obligations of the debtor are left to the contract between the assignor and the debtor and the law governing this contract.

3. In order to align paragraph (2) with draft article 16(3) and to avoid an interpretation a contrario of paragraph (2) that, apart from the country and the currency of payment, the assignee may change any other payment terms contained in the original contract, the Working Group may wish to revise paragraph (2) (see new draft article 17*ter* below).

4. The commentary may further clarify that no provision of the draft Convention is intended to address the question whether the debtor has an obligation to pay (capital or interest). The commentary could mention, for example, that notification in itself does not trigger the obligation of

the debtor to pay, if payment is not yet due under the original contract. This matter remains an issue of the original contract even after notification of the assignment. The debtor may agree with the assignee to modify the payment obligation, but this matter is not covered by the draft Convention.

* * *

Article 8. Principles of interpretation

1. Paragraph (1) refers to the principle of good faith as an element to be taken into account in the interpretation of the draft Convention, but not of the contractual relationships of the parties involved in an assignment. While the principle of party autonomy would appropriately be applied to the contractual relationship between the assignor and the assignee or the assignor and the debtor, it could undermine the certainty achieved by the draft Convention if applied to the assignee-debtor or the assignee-third party relationship. For example, if the principle of good faith prevailing in the forum State were to apply to the assignee-debtor or the assignee-third party relationship: the debtor, who might have paid the assignee after notification, may have to pay again if, e.g., the debtor knew about a previous assignment; and the law applicable under draft article 24 might be disregarded if it does not respect the principle of good faith as it may be understood in the forum State.

2. As to the question whether the reference to general principles underlying the draft Convention relates to substantive or to private international law principles, the Working Group may wish to consider whether this question could be settled by way of an explanation to be included in the commentary. The commentary could explain, for example, that draft article 8 applies only to the substantive provisions of the draft Convention and thus the reference to general principles should be understood as a reference to the substantive law principles underlying the draft Convention. In order to avoid any uncertainty, reference could be made, either in draft article 8 or in the commentary to the general principles embodied in the preamble.

3. If draft article 8 were to apply for filling gaps in the private international law provisions of the draft Convention, language along the following lines could be considered for addition to draft article 8:

"(2) ... by virtue of the private international law provisions of this Convention.

"(3) Questions concerning matters governed by articles 9, 17*bis*, 19(2), 23 to 24 and 29 to 33 which are not expressly settled in those articles are to be settled in conformity with the general principles on which they are based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law of the forum State."

4. The commentary could refer to a few principles underlying the private international law provisions of the draft Convention, such as the principle of party autonomy in the relationship between the assignor and the assignee (draft article 29), the principle of debtor-protection in the relationship between the assignee and the debtor (draft article 30) and the principle of certainty as to the rights of third parties (draft article 31).

* * *

CHAPTER III. FORM AND EFFECTS OF ASSIGNMENT

Article 9. Form of assignment

1. Three different versions of paragraph (1) are set forth in document A/CN.9/WG.II/WP.96. Variant A has the advantage that it ensures adequate protection of third parties against the risk of the assignor acting in collusion with the assignee or any other person and affecting the order of priority. Another advantage of Variant A is that it requires a writing for the master agreement, not the assignment itself, thus avoiding to raise the question of stamp duties, which are normally payable for the assignment, not the master agreement.

2. Yet another advantage of Variant A, as well as Variant B, is that it is formulated in a negative way, since it is intended to deal only with situations in which less than a written assignment, i.e. an oral assignment, is involved. If it were formulated in a positive way (e.g., "an assignment in writing is effective ..."), it could supplant national law requiring more than a written assignment (e.g., a notarized agreement, notification of the debtor or registration in a public registry). In such a case, the rights of third parties under national law requiring more than a written agreement would probably need to be preserved by including in draft article 9 language along the lines of the opening words of draft articles 10 and 11 (i.e. "subject to draft articles 23 and 24"). The only possible disadvantage of Variant A is that it may invalidate national practices in which no writing is necessary for the assignment to be effective. This disadvantage may be set aside by a rule along the lines of Variant B.

3. The scope of Variant C is different in that it deals with form in general (i.e. written form, notarial form, notification of the debtor or registration), leaving it to the law of the assignor's location whether less or more than a written agreement would be required for an assignment to be effective. To the extent that Variant C covers the effectiveness of an assignment as against third parties, it appears overlapping with draft articles 23 and 24 (although it is consistent with those provisions).

4. The Working Group may thus wish to consider the following formulation of draft article 9, which combines Variants A and B:

> "(1) An assignment in a form other than in writing is not effective [as against third parties], unless:
>
> > "(a) it is effected pursuant to a contract between the assignor and the assignee which is evidenced by a writing describing the receivables to which it relates; or
> >
> > "(b) the law of the State in which the assignor is located at the time of the assignment provides otherwise."
>
> "(2) Unless otherwise agreed, an assignment of one or more future receivables is effective without a new writing being required for each receivable when it arises."

5. Thus, oral assignments would be effective if covered by a written master agreement or, in the absence of such a written agreement, if they would be effective under the law of the assignor's

location. The inclusion of the bracketed language in the opening words of paragraph (1) is intended to raise the question of the purpose of written form requirements. Written form may not be needed for the purpose of protecting the interests of the assignor and the assignee, since they can be left to take care of their own interests. Written form may not be needed for the purpose of debtor-protection either, since the draft Convention provides that, in the absence of a written notification, the debtor's rights (i.e. the way in which the debtor can discharge its obligation, its defences and rights of set-off and its right to modify the original contract) are not affected. Written form, however, would be needed for the purpose of protecting the interests of third parties to the extent that it would preclude situations in which the assignor acting in collusion with the assignee or any other party could affect the order of priority.

6. Variants B and C, as well as the version mentioned above, are all intended to address the concern that a rule along the lines of Variant A would invalidate certain practices for which no writing is required under national law. The ultimate way to address this concern might be to adopt a rule along the lines of Variant A and to allow States to enter a reservation in order to preserve practices based on oral assignments (see, however, draft article 1, remark 13).

* * *

Article 10. Effect of assignment

1. The opening words of draft articles 10 and 11 are intended to ensure that the rules as to the effectiveness of an assignment and the time of transfer of receivables do not unduly affect the rights of third parties (a reference to the provision dealing with priority in proceeds would need to be added). Without those words, draft article 10 could be read as validating the first assignment and invalidating any further assignment of the same receivables by the same assignor; and draft article 11 could be read as setting a rule for effectiveness of the assignment as against third parties, including the administrator in the insolvency of the assignor (e.g., receivables arising after the opening of an insolvency proceeding could be taken out of the insolvency estate or be subject to a security right, if the assignment had taken place before the opening of the insolvency proceeding).

2. However, the opening words may inadvertently result in the effectiveness of the assignment of future receivables or of bulk assignments being left altogether to the law applicable under draft articles 23 and 24. In order to avoid this unintended result, the Working Group may wish to consider including in the context of draft articles 23 and 24 a provision along the following lines: "Nothing in this Convention invalidates an assignment on the sole ground that it is an assignment of future receivables or receivables not specified individually or parts or undivided interests in receivables" (on this point, see also draft article 12, remark 8). As a result, the draft Convention would validate such assignments, as a matter of civil or commercial law, while leaving to other law specific challenges to their validity (e.g., the invalidation of an assignment made within the suspect period before the opening of an insolvency proceeding as a fraudulent or preferential transfer). Alternatively, the words "subject to articles 23 and 24" in draft articles 10 and 11 could be replaced by wording spelling out in detail their intended effect, or further explained in the commentary. The commentary may mention in particular that, as a result of those words, an effective first assignment does not invalidate any further assignment.

3. On the understanding that the definition of "assignment" contained in draft article 2 covers only the assignment (i.e. not the agreement to assign), draft article 10 does not need to be revised in order to ensure that only the assignment has the effect of transferring property rights in the receivables (on this matter, see draft article 2, remark 3). The words "to transfer" have been replaced by the words "to assign" in order to ensure that, in addition to outright transfers, draft article 10 includes the creation of security rights in receivables (the definition of "assignment" includes assignments by way of security). However, in view of the fact that the use of the words "to assign" is tautological ("an assignment ... assigns"), the Working Group may wish to delete the words "to assign the receivables to which it relates", on the understanding that the definition of assignment is sufficient to clarify the legal consequences of an effective assignment (i.e. the outright transfer of and the creation of security rights in receivables). The commentary could expressly refer to that understanding.

4. The Working Group may wish to consider reversing the order of paragraphs (1) and (2), in order to deal first with the effectiveness of assignments of future receivables and then with the effectiveness of bulk assignments.

5. Thus, the Working Group may wish to consider the following reformulated version of draft article 10:

> "Subject to articles 23 and 24, an assignment of existing or future, one or more, receivables, and parts of, or undivided interests in, receivables is effective, if
>
> > "(a) the receivables are specified individually as receivables to which the assignment relates; or
> >
> > "(b) the receivables can be identified as receivables to which the assignment relates, at the time agreed upon by the assignor and the assignee and, in the absence of such agreement, at the time when the receivables arise".

* * *

Article 11. Time of transfer of receivables

1. In view of the fact that only paragraph (1)(b) refers to party autonomy, paragraph (1)(a) may be read as precluding the assignor and the assignee from specifying the time of transfer of existing receivables. Such an interpretation would be inconsistent with draft article 6 and paragraph (1)(b). Draft article 6 may be sufficient in ensuring that parties may set the time of transfer of the receivables as long as they do not affect the rights of third parties and party autonomy in this regard may not need to be limited. Thus, it may not be necessary to refer to party autonomy in draft article 11.

2. If the new subparagraph (l) of draft article 5 (see draft article 5, remark 10 above) is retained and the scope of the draft Convention is limited to contractual receivables, the Working Group may wish to consider the following reformulated version of paragraph (1) of draft article 11:

"(1) Subject to articles 23 and 24,

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

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

3. If new subparagraph (l) of draft article 5 is deleted, reference should be made in draft article 11 to the time of the conclusion of the contract of assignment.

* * *

Article 12. Contractual limitations to assignment

1. Draft article 12 overrides anti-assignment clauses and enables the assignee to collect directly from the debtor. The underlying policy is that it is more beneficial for everyone to reduce the transaction cost of examining contracts in order to ensure that they do not contain anti-assignment clauses rather than to protect the debtor from paying someone else.

2. However, in certain cases, there may be other policies or practices that may need to be preserved, e.g., the policy of Governments not to deal with certain parties or not to give up rights of set-off they may have against their suppliers of goods or services. It is also a generally accepted rule of independent-guarantee or standby-practice that the guarantor/issuer of an independent undertaking should not have to pay against its will a person other than the beneficiary (see, e.g., articles 10 and 11 of the Guarantee and Standby Convention). In addition, in loan-syndication practice an assignment is possible only if the terms of the loan agreement permit it. Moreover, in the case of securitization of mortgage loans, an assignment against the consumer-debtor may materially increase the burden of risk imposed on the consumer-debtor (if, e.g., the mortgage loan is assigned by the friendly local savings and loans bank to a foreign lender, who may be more aggressive in the collection of the outstanding amounts of the loan or in handling any variable interest rate).

3. Thus, the Working Group may wish to consider introducing certain exceptions to the rule contained in draft article 12 for assignments of receivables arising from deposit accounts, independent guarantees or stand-by letters of credit, transactions made for personal, household or family purposes, loan agreements or public procurement contracts (see also A/CN.9/WG.II/WP.98, draft article 12, remark 1).

4. The effect of such exceptions would be that, in the case of an assignment made in violation of an anti-assignment clause, certain categories of debtors could discharge their obligations by paying the assignor, while a notification would not cut off their rights of set-off and would not limit their ability to modify the original contract without the consent of the assignee. Under such an approach, if the assignor is solvent, the assignee will be able to recover from the assignor in the case of debtor-default, while, if the assignor becomes insolvent, the assignee will have priority as against the insolvency administrator and the assignor's creditors (for a brief discussion of this approach with regard to consumer-debtors, see A/CN.9/445, para. 229 and A/CN.9/432, para. 125).

5. On the other hand, while an approach based on a rule with certain exceptions may make the draft Convention more acceptable to States, once the approach taken in draft article 12 is accepted as the appropriate one, there would seem to be no substantive reason why powerful debtors, such as Governments and banks, should be exempted. The alternative would be to either retain the rule set forth in draft article 12 without making exceptions, at least for powerful debtors, or to treat an assignment made in violation of an anti-assignment clause as ineffective as against any debtor and effective only as against the assignor and third parties other than the debtor. The latter approach may establish an appropriate balance between the need to facilitate receivables financing and the need to protect the interests of the debtor.

6. However, if such an approach were to be followed, the assignee would be deprived of the right to claim payment from the debtor. Such an approach, while suitable for some financing practices, would be inappropriate for other practices, such as factoring and asset-based lending, where the lender may structure the entire financing on the basis of collection from the debtors. In addition, in many legal systems, if payment is made to the assignor, the assignee would not always be entitled to be paid before unsecured creditors. For example, if the debtor pays the assignor before the opening of the insolvency proceeding, the assignee would have only a right ad personam. Only if payment is made after the opening of the insolvency proceeding, the assignee would have a right to be paid before unsecured creditors.

7. On the other hand, such an approach may be considered for the purpose of validating an assignment which may on its face be contrary to statutory prohibitions or, at least, to statutory prohibitions that do not constitute mandatory law (i.e. loi de police). Allowing the assignor to assign the proceeds of payment made by the debtor to the assignor would not be inconsistent with the policy of protecting the debtor. However, such an approach may be inconsistent not with statutory prohibitions that are designed to protect the debtor (e.g., prohibitions relating to receivables owed by a Government), but with statutory prohibitions that are designed to protect the assignor (e.g., prohibition of the assignment of wages or pensions). For the purpose of a rule to be included in the draft Convention, there may be no way to determine whether a statutory prohibition is aimed at protecting the debtor or the assignor.

8. Unlike draft articles 10 and 11, draft article 12 is not subject to draft articles 23 and 24. As a result, an assignment made despite an anti-assignment clause is effective as against other assignees, the assignor's creditors and the administrator in the insolvency of the assignor. The fact that the law governing priority under draft article 23 and 24 cannot invalidate an assignment made in violation of an anti-assignment clause, may need to be clarified in the commentary or in the context of draft articles 23 and 24 by way of a provision along the following lines: "Nothing in this Convention invalidates an assignment on the sole ground that it is made despite an agreement between the assignor and the debtor limiting in any way the assignor's right to assign its receivables" (on this matter, see also draft article 10, remark 2).

9. The Working Group may also wish to consider the question whether draft article 26, which deals with agreements limiting assignments in the context of subsequent assignments, should be placed in the context of draft article 12 (A/CN.9/455, para. 54).

10. Thus, the Working Group may wish to consider the following reformulated version of draft article 12:

"(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor, or, in the case of any subsequent assignment, between the initial or any subsequent assignor and the debtor or any subsequent assignee, limiting in any way the assignor's right to assign its receivables.

"(2) Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement. A person who is not party to such an agreement is not liable under that agreement for its breach. 10/

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

11. As an alternative to paragraph (3), the Working Group may wish to consider making no exceptions to the rule contained in draft article 12 and allowing States to make a reservation. Under such an approach, each State would determine if and how it might wish to protect debtors in general or certain categories of debtors only.

12. In any case, draft article 12 in its present formulation would not address: the risk of cancellation of the original contract by the debtor for breach of an anti-assignment clause by the assignor; the risk that the assignee may be exposed to tortious liability; and the risk that an assignment may be set aside if, under notions of national law, it "would materially change the duty of the other party [the debtor], or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance" (art. 2-210 of the United States Uniform Commercial Code). While a rule invalidating anti-assignment clauses could resolve those problems, it might limit party autonomy with regard to the debtor to an unacceptable degree.

* * *

Article 13. Transfer of security rights

1. The thrust of this provision is that accessory security rights, whether personal or proprietary, follow the receivable which they secure. This is a generally accepted principle and one that is often of significant importance, since the value relied on by the lender extending credit to the assignor may be often not in the receivable but in the right securing the receivable.

2. The words "unless otherwise provided by law or by agreement between the assignor and the assignee" are intended to ensure that: if by law a security right is independent, it would not follow the assigned receivables; and parties may agree that an accessory security right would not follow automatically the assigned receivable and would be extinguished (e.g., a retention of title in goods or a mortgage would not follow the receivables, since the assignee may not wish to be exposed to product liability, in the case of goods, or to the cost of insuring and preserving the building, in the

---

10/ Draft article 12(2) has been aligned with draft article 26(2) (A/CN.9/455, para. 51).

case of a mortgage). However, these words may not be sufficient in reflecting the intended meaning. Thus, the Working Group may wish to consider the formulation offered below, which attempts to further elaborate on the intended meaning of paragraph (1).

3. The reference to party autonomy may be deleted on the understanding that it is sufficiently dealt with in draft article 6. However, some reference to other law would need to be retained in order to address independent undertakings. As to such undertakings, the draft Convention could introduce an obligation of the assignor to transfer their proceeds to the assignee, on the assumption that such proceeds are transferable without the consent of the person obliged to pay. The value of a provision along those lines would be in the cause of action which the assignee would not otherwise have against the assignor. The commentary could explain that, according to draft article 6, the assignor and the assignee could agree otherwise. Such an obligation could not be imposed on the assignor with regard to the right to demand payment under an independent undertaking, since normally the transfer of such a right would be subject to the consent of the person obligated to make payment.

4. In line with draft article 12, paragraphs (2) and (3) are intended to ensure that an agreement limiting the assignor's right to transfer any security right does not invalidate their transfer. Such an agreement would in effect result in the case of an accessory security right in the right being extinguished, while, in the case of an independent security right, it would result in the right being not assignable. Paragraphs (2) and (3) are of importance, since, as already mentioned, in some practices the lender may be relying more on the security right rather than on the receivable.

5. The Working Group may wish to consider the following formulation of draft article 13:

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

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

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

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

* * *

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 16. Right to notify the debtor

1. Paragraph (1) provides that the assignor or the assignee or both may notify the debtor and request payment. However, after notification is given, the assignor is no longer the owner of the receivables, even if the assignor is still the payee. For that reason, after notification is received by the debtor, only the assignee should be able to notify the debtor and change or correct the instructions given to the debtor with the first notification. A rule along those lines, inserted in draft article 16(1) (see draft article 16 below), would appropriately supplement the rule proposed for draft article 18(4) (see draft article 18, remark 3 below, according to which in the case of several notifications relating to the same assignment, the debtor is discharged by paying the person or to the address identified in the last notification.

2. At its twenty-eighth session, the Working Group adopted the substance of draft article 16 without drawing a distinction between a notification and a request for payment. While some support was expressed at that session in favour of drawing such a distinction, that approach was objected to on a number of grounds, including the following: it unnecessarily formalized a distinction that eventually had practical importance in exceptional situations only, since assignees notifying debtors could not afford leaving any uncertainty as to whom the debtor should pay; it could inadvertently raise the cost of credit, if seen as encouraging parties to serve two "notifications", one without and one with payment instructions; and would complicate the discharge of the debtor, since the debtor would have to know the legal consequences of each type of notification (A/CN.9/447, paras. 75-78).

3. However, the matter came up again in the context of draft articles 18(3) (in the context of a discussion as to whether the assignee could change or correct the payment instructions given to the debtor with the notification), 19(2) and 21(4) (in the context of a discussion as to whether a notification which does not identify the payee should bring about the legal consequences described in those draft articles). The lack of consensus as to the question whether a distinction should be drawn between different types of notifications (or, in other words, between a notification and a request for payment) for the purpose of attributing different legal consequences to them resulted in the addition of the bracketed language in draft articles 19(2) and 21(4) (A/CN.9/447, paras. 46, 74-76, 82-83, 99-100 and 135).

4. The "Proposal by the United States of America" (A/CN.9/WG.II/WP.100; hereinafter referred to as "the U.S. Proposal") addresses this matter by drawing a distinction between different types of communications (i.e. a notification and a request for payment) and by attributing different legal consequences to each of those communications. Under the U.S. Proposal, unlike draft article 16(3) (now moved to draft article 5(f)), a notification does not need to identify the payee. As a result, a notification would not trigger a change in the way in which the debtor could discharge its obligation (draft article 18 as revised in the U.S. Proposal). It would, however, result in freezing the rights of set-off of the debtor and in limiting the right of the debtor to modify the original contract (if the U.S. Proposal were to be adopted, the bracketed language in draft articles 19(2) and 21(4) would not be necessary in order to achieve this result). In line with the approach of the U.S. Proposal to

provide for different legal consequences, draft article 16(2) of the U.S. Proposal provides that a notification or a payment instruction given to the debtor in breach of an agreement between the assignor and the assignee "is not ineffective for the purposes of article 18 by reason of the breach", which means, a contrario, that it is ineffective for the purposes of articles 19 and 21.

5. In deciding whether a distinction should be drawn between a notification and a payment instruction with a view to attributing different legal consequences to each of those communications, the Working Group may wish to determine whether the practices in which a bare notification is given without any payment instructions whatsoever, are sufficiently significant so as to dictate the rule for all cases. If the Working Group determines that in most practices some sort of payment instructions to the debtor (i.e. to pay the assignee or a third person, or to continue paying the assignor), would be an essential element of a notification, the Working Group may wish to determine whether: a special rule should be included in the draft Convention (essentially along the lines of the bracketed language in draft articles 19(2) and 21(4)) so as to accommodate certain exceptional practices where the notification does not contain any payment instruction; or whether such practices could be left outside the scope of the draft Convention.

6. In addition, the Working Group may wish to split draft article 16 into two provisions, one comprising paragraphs (1) and (2), which would deal with the right to notify the debtor and as such would be appropriately retained in Section I (rights and obligations of the assignor and the assignee), and another comprising paragraphs (4) and (5), which would deal with the rights of the debtor and should be placed in Section II (rights and obligations of the debtor). The Working Group may also wish to consider the question whether draft article 28 dealing with notification of subsequent assignments should be placed in the context of draft article 16 (A/CN.9/455, para. 54). Thus, the Working Group might wish to consider a reformulated version of draft article 16 and a new article 17*quater* that would read along the following lines:

"(1) Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and request that payment be made to the person or to the address identified in the notification. However, after notification is received by the debtor only the assignee may notify the debtor and request that payment be made to another person or address.

"(2) Notification of the assignment or request for payment made by the assignor or the assignee is not ineffective for the sole reason that it is in breach of an agreement referred to in paragraph (1) of this article. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach."

* * *

Section II. Debtor

Article 17*ter*. Principle of debtor-protection

Paragraph (1) originates from paragraph (1) of draft article 7, while paragraph (2) is a new provision (see remarks to the preamble and to draft article 7).

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

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

* * *

Article 17*quater*. Notification of the debtor

In order to avoid leaving any doubt as to the time the notification becomes effective, paragraph (1) restates the "receipt rule", which is already embodied in other provisions of the draft Convention (e.g., in draft article 18).

"(1) Notification of the assignment is effective when received by the debtor, if it is in any language that is reasonably designed to inform the debtor about the content of the notification. It shall be sufficient if notification of the assignment is in the language of the original contract.

"(2) Notification of the assignment may relate to receivables arising after notification.

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

* * *

Article 18. Debtor's discharge by payment

1. In paragraph (1), the word "assignor" should be replaced by the words "in accordance with the original contract", since the original contract may specify that payment should be made to a third person or to a bank account or post office box without any identification of the owner of the account or the post office box.

2. In order to align paragraph (3), dealing with several notifications relating to different assignments, with draft article 16(3) (moved to draft article 5(f)), the words "or to the account" should be deleted. The commentary could explain that the word "address" means a street address, account, post office box or the like (A/CN.9/434, paras. 184-185).

3. As paragraph (3) does not deal with changes or corrections of the notification (i.e. with several notifications relating to one and the same assignment), an additional provision would be needed. On the understanding that after the first notification is received by the debtor, only the assignee may give a second notification (draft article 16(1), second sentence), such a provision should provide that the debtor could be discharged only by paying the person identified in the last notification before payment (see draft article 18(4) below).

4. As to the question how the debtor receiving several notifications would know whether to pay the person identified in the first or in the last notification, it should be noted that reasonable debtors, if

in doubt, would normally request from any assignee sufficient proof of the assignment (see draft article 18(6) below). Reasonable assignees would provide sufficient information to the debtor anyway. If such proof is not given, the debtor could be discharged by paying the assignor (for a discussion of this matter, see A/CN.9/455, paras. 63-66).

5. It would seem that the result aimed at in the U.S. Proposal would also be achieved if the language added in new draft article 16(1) is retained, new paragraph (4) is added in draft article 18 and the bracketed language in draft article 19(2) and 21(4) is also retained.

6. In addition, the Working Group may wish to consider whether paragraph (8), which appears within square brackets, should be retained. Paragraph (8) is intended to clarify that the draft Convention does not address the question whether the debtor may be discharged by paying a person who has received an invalid assignment (A/CN.9/455, paras. 55-58). If the Working Group decides to retain paragraph (8), it may wish to consider whether it is sufficient to cover the situation where it is not the assignment to the last assignee that is invalid, but a previous assignment.

7. The Working Group may also wish to consider the question whether draft article 27 dealing with multiple notifications in subsequent assignments should be placed in the context of draft article 18 (see draft article 18(5) below). Thus, the Working Group may wish to consider draft article 18 on the basis of the following formulation:

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

"(2) After the debtor receives notification of the assignment, subject to paragraphs (3) to (8) of this article, it is discharged only by paying the person or to the address identified in such notification.

"(3) If the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying the person or to the address identified in the first notification received.

"(4) If the debtor receives more than one notification relating to a single assignment of the same receivables by the same assignor, the debtor is discharged by paying the person or to the address identified in the last notification received before payment.

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

"(6) If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment has been made and, unless the assignee does so, the debtor is discharged by paying the assignor. Adequate proof includes, but is not limited to, any writing emanating from the assignor and indicating that the assignment has taken place.

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

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

* * *

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

1. The Working Group may wish to consider the law applicable to the question when a right of set-off would be considered as being "available" (this matter was left open at the two previous sessions of the Working Group, see A/CN.9/447, paras. 97-98 and A/CN.9/455, paras. 98-100). The main difficulty with determining the law applicable to matters relating to set-off is that they may be classified as procedural matters and subjected to the lex fori. This difficulty may be addressed to a large extent if reference were made to the law of the State of the debtor's location, since the assignor or the assignee would normally initiate proceedings against the debtor in that State. However, if a dispute is brought before a court in a State other than the State of the debtor's location (e.g., the State in which the debtor may have assets), a reference to the law of the State of the debtor's location would not be helpful, since the court could classify the matter as a procedural one and apply its own law.

2. The Working Group may also wish to consider whether the bracketed language contained in paragraph (2) should be retained. The intention of the bracketed language is to ensure that a notification which does not identify the payee has the result of freezing the rights of set-off of the debtor (A/CN.9/447, para. 100). As already mentioned, if the Working Group were to adopt the U.S. Proposal with regard to draft article 16(3), the bracketed language could be deleted, since a notification would be a "notification" under the draft Convention even if it does not identify the payee.

* * *

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

In order to avoid any uncertainty that might result from the use of the term "consumer" in draft articles 20 and 22, reference may be made to "the law governing the protection of the debtor in transactions made for personal, family or household purposes". The Working Group may wish to consider whether paragraph (2)(c), which is drawn from article 30(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes and appears within square brackets, should be retained (for a discussion of this matter, see A/CN.9/447, paras. 110-119).

* * *

Article 21. Modification of the original contract

The Working Group may wish to decide whether paragraph (4), which appears within square brackets, should be retained. The bracketed wording is intended to ensure that a notification that does not identify the payee may limit the debtor's right to modify the original contract without the consent of the assignee. As in draft article 19(2), this bracketed wording would not be needed, if the U.S. Proposal as to the minimum content of a notification were to be adopted by the Working Group, since in such a case a notification which would not identify the payee would be an effective notification for the purposes of draft articles 19 and 21.

* * *

Section III. Other parties

The title of this section may need to be changed to "other third parties" or "other parties", since the debtor too is a third party to the assignment (the debtor is a party to the original contract with the assignor, but the draft Convention is not intended to cover this contract).

Article 23. Competing rights of several assignees

The Working Group may wish to decide whether the bracketed language contained in paragraph (2) should be retained. If the bracketed language is deleted, the fact that subordination may take the form of a unilateral act or an agreement may be clarified in the commentary.

* * *

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

1. Paragraph (2) refers to priority between an assignee and the insolvency administrator. While such a formulation is known in those legal systems in which the insolvency administrator becomes the holder of the rights of the creditors, it may not be as appropriate for those legal systems in which the insolvency administrator merely exercises the rights of the creditors. In addition, in some reorganization proceedings, there may be no insolvency administrator. Thus, paragraph (2) may be reformulated along the following lines: "In an insolvency proceeding relating to the assets of the assignor, priority between the assignee and the assignor's creditors is governed by the law of the State in which the assignor is located". Reference to the rights of the insolvency administrator is also made in paragraph (4). However, in this context the insolvency administrator may well be considered as having procedural rights separate from the substantive rights of the assignor's creditors.

2. Draft article 24(3) would not be necessary if draft articles 32 and 33 were made applicable to the private international law provisions of the draft Convention that are outside Chapter VI (i.e. draft articles 1(2), 9, 17*bis*, 19(2) and 23 to 24; see also draft article 1, remark 20, Chapter VI, remark 2 and draft article 42*bis* below).

3. The Working Group may wish to consider the question whether, in order to ensure that draft article 24(2) does not override national rules creating super-priority rights, e.g., in favour of the State for taxes, a separate provision along the lines of paragraph (5) is required, or whether the matter is either already covered in paragraphs (3) and (4) or may be better addressed in the context of draft article 44.

4. In any case, requiring States to enumerate in a declaration non-consensual rights that would take precedence over the rights of an assignee might reduce the acceptability of the draft Convention to States, since any oversight or error in the declaration would result in such rights becoming subject to the rights of an assignee. In addition, certainty might not be served if, contrary to the expectations on which paragraph (5) is based, declarations are not sufficiently clear. Thus, if paragraph (5) is retained, the Working Group may wish to consider deleting the words "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". The commentary could explain that paragraph (5) is intended to preserve non-consensual rights or interests with priority under the law of the forum State.

* * *

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Should the Working Group decide to incorporate draft articles 25 to 28 in the provisions of the draft Convention dealing with the relevant issues in the context of an initial assignment (i.e. draft articles 1, 12, 18 and 17*quater* respectively), draft articles 25 to 28 may be deleted.

* * *

CHAPTER VI. CONFLICT OF LAWS

1. If Chapter VI were to apply to the transactions to which the draft Convention is to apply under Chapter I, it could only serve to supplement the substantive provisions of the draft Convention by addressing matters that are governed but are not expressly settled in the draft Convention. In such a case, draft article 31 would need to be deleted, since it would be duplicating draft articles 23 and 24. On the other hand, if Chapter VI were to provide a second layer of harmonization with regard to transactions left to the law applicable outside the draft Convention, the opening words of draft articles 29 and 30 should be deleted, while draft article 31 should be retained without the opening words (see also draft article 1(3), remarks 17-19).

2. A reference should be included in draft articles 32 and 33 to those private international law provisions of the draft Convention that are outside Chapter VI (i.e. draft articles 1(2), 9, 17*bis*, 19(2) and 23 to 24; see draft article 1, remark 20, draft article 24, remark 2 above and draft article 42*bis* below).

* * *

CHAPTER VII. ALTERNATIVE PRIORITY RULES

The Working Group may wish to consider the contents as well as the placement of Chapter VII in the draft Convention. If Chapter VII is intended to operate as an autonomous model law, suggested to be incorporated by States in their domestic legislation, it may be more appropriate to be placed in an annex to the draft Convention. However, in such a case Chapter VII may need to be expanded. If, on the other hand, Chapter VII is intended to supplement or amend the draft Convention, it may be better placed in a protocol to the draft Convention. Alternatively, if it simply contains a provision describing the procedure for the amendment of the draft Convention, it could be placed in the chapter dealing with final provisions (as to the purpose of Chapter VII, see remarks to draft article 43 below).

* * *

CHAPTER VIII. FINAL PROVISIONS

Article 42. Conflicts with international agreements

Draft article 42 takes an approach that is different from the approach taken in other conventions prepared by UNCITRAL in that, instead of giving precedence to other conventions dealing with matters covered in the draft Convention, it allows States to decide to which convention to give precedence. In the absence of a declaration, the draft Convention prevails. This approach is intended to address negative conflict situations, namely situations in which different conventions dealing with the same matters give way to each other and, as a result, uncertainty is created as to which text applies. Conventions that deal with matters covered by the draft Convention include the Ottawa Convention and the Rome Convention.

* * *

Article 42*bis*. Application of chapter VI

For the reasons already stated (see draft article 1, remark 20; draft article 24, remark 2; and Chapter VI, remark 2 above), draft article 42*bis* should be revised as follows: "A State may declare at any time that it will not be bound by articles 29 to 31."

* * *

Article 42*ter*. Additional assignments covered by the Convention

If the Working Group considers that States may wish to apply the draft Convention to additional practices or to exclude certain practices (see draft articles 1(7) and 4(2) and remarks to those provisions), language along the following lines may be considered: "A State may declare at any time that it will apply this Convention to additional practices listed in a declaration."

* * *

Article 42*quater*. Other exclusions

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

* * *

Article 43. Application of Chapter VII

The Working Group may wish to consider the question of the purpose of Chapter VII. It may be noted that Chapter VII may be used in one of the following ways: a State could apply its domestic priority rules based on registration, but use the registration system foreseen by the draft Convention; a State could apply the priority rules of Section I, but use its own registration system; a State could opt into both Sections I and II but only with regard to assignments within the scope of the draft Convention; and a State might introduce domestic rules based on Sections I and II, to which draft articles 23 or 24 would point, and apply them with regard to all assignments, within or outside the scope of the draft Convention (A/CN.9/455, para. 122).

* * *

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

1. The Working Group may wish to consider whether draft article 44 should be retained. Draft article 24(3) may be sufficient in dealing with the matter. Under draft article 24(3), the application of the law applicable to priority issues may be refused by a court or other competent authority if it is manifestly contrary to the public policy of the forum State (A/CN.9/455, paras. 136-140).

2. In addition, while a generally formulated declaration would fail to introduce the desired level of certainty as to the application of the draft Convention, a requirement for a specific declaration enumerating the substantive or procedural rules of national insolvency law not affected by the draft Convention may negatively affect the acceptability of the draft Convention to States (A/CN.9/455, para. 135).

* * *

Article 46. Application to territorial units

The Working Group may wish to consider the question of the meaning of the term "location" in the context of paragraph (3). If "location" were to be given the same meaning as in draft articles 23 and 24, the draft Convention could apply in the case of a federally incorporated business, whether or not it had any link (e.g., a place of business) with a territorial unit to which the draft Convention applied. It may, therefore, be more appropriate to refer to the place of business so that the draft Convention would apply to a federally incorporated business with a place of business in a territorial unit to which the draft Convention would apply.

* * *

Article 47. Effect of declaration

Declarations may negatively affect the rights of third parties extending credit on the basis of a certain legal regime, particularly in the case of assignments of future receivables. In order to protect the reasonable expectations of third parties, a new paragraph (5) may be added that would read: "A declaration or its withdrawal does not affect the rights of parties with respect to assignments made before the date at which the declaration or its withdrawal takes effect."

* * *

Article 48. Reservations

Draft article 48 does not appear within square brackets, since its formulation would not change even if additional reservations were allowed in the draft Convention.

* * *

Article 50. Denunciation

For the same reasons mentioned under draft article 47 above, a new paragraph (3) should be added that would read along the lines of article 90 of the United Nations Convention on International Bills of Exchange and International Promissory Notes: "The Convention remains applicable to assignments made before the date at which the denunciation takes effect."

* * *