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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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STUDY GROUP FOR THE PREPARATION OF
UNIFORM RULES ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

REVISED DRAFT ARTICLES OF A FUTURE UNIDROIT CONVENTION ON INTERNATIONAL INTERESTS IN MOBILE EQUIPMENT

(as proposed by the Drafting Group at its fourth session, held in Würzburg
from 24 to 26 July 1997):

COMMENTS

(by members of the Study Group, advisers thereto and
the international Organisations, professional associations and
other bodies represented thereon by observers as also those persons
and bodies having participated from outside the Study Group in
the development of the project)

Rome, October 1997

INTRODUCTION

1. – The revised draft articles of a future Unidroit Convention on International Interests in Mobile Equipment as proposed by the Drafting Group of the Study Group at the conclusion of its fourth session, held in Würzburg from 24 to 26 July 1997 (Study LXXII-Doc.35), were subsequently circulated for comment among members of the Study Group, advisers thereto and those international Organisations, professional associations and other bodies represented thereon by observers. At the request of the Chairman of the Study Group, they were also circulated for comment among those having responded to Unidroit's initial questionnaire on an international regulation of aspects of security interests in mobile equipment (Study LXXII-Doc.2) as well as generally among those having demonstrated an interest in the Institute's work on this subject. As of 7 October 1997 the Unidroit Secretariat had received comments from Mr V.A. Kouvshinov, Professor C.W. Mooney, Jr. and Mr T.J. Whalen, members of the Study Group, the Department of State of the United States of America, Mr P.D. Nesgos, Professor D.S. Schechter and Mr S.H. Siegel, on behalf of the *Space Working Group*, Mr L. Dodero, Vice-President and General Counsel, on behalf of the *Multilateral Investment Guarantee Agency*, Mr M. Baert, Secretary-General, on behalf of *the European Federation of Equipment Leasing Company Associations (Leaseurope)*, Mr P. Griggs, President, on behalf of the *International Maritime Committee*, Dr N. Bouza i Vidal (Spain), Mr R.J. Britton, Secretary and Legal Adviser, on behalf of the *Civil Aviation Authority* (United Kingdom), Mr N. van Loggerenberg, General Manager, on behalf of the *Council of South African Banks* (COSAB) [(1)], Dr I. Davies (United Kingdom), Dr W.-P. Schiering, on behalf of *Deutsche Schiffsbank AG* (Germany), Professor I.H.Ph. Diederiks-Verschoor (Netherlands), Mr D. Lamethe, Head of Legal Services, on behalf of the International Department of *Electricité de France,* Ms H. Plattern, Head of Legal and Regulatory Affairs, on behalf of the *Finance and Leasing Association* (United Kingdom) [(2)], Mr C. Cornut, *Délégué Général Adjoint,* on behalf of the *French Association of Banks,* Ms E. Fura-Sandström and Ms S. Hervé (Sweden), Professor C. Kessedjian (Hague Conference on Private International Law) [(3)], Professor F.-E. Klein (Switzerland), Professor O. Lando (Denmark), Mr T. Laval (France), Ms M. Schulz (Germany), Mr R.M. Schwartz (United States of America), Mr H.J. Sommer (Germany), Professor J. Stoufflet (France) and Messrs G. Hennet and C.-A. Margelisch, on behalf of the *Swiss Bankers' Association*. This paper reproduces these comments hereunder. For ease of consultation, they have been arranged under either the provision or the group of provisions to which they relate or, where they are in the nature of general remarks, under the heading of general remarks. Comments relating to the relationship between the future Convention and the Protocols envisaged thereunder are grouped together under Article 2(2). In addition Professor C.W.Mooney, Jr, one of the representatives of the Department of State of the United States of America on the Study Group, has proposed that, in view of the similarity between the problems being faced by the Study Group and those faced by the United Nations Commission on International Trade Law Working Group on International Contract Practices, the latest version of the future international instrument being prepared by that Working Group should be laid before the Study Group. This text is reproduced in an appendix to this paper.

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(1) Mr van Loggerenberg's reply contained two separate replies from member banks of COSAB. These are referred to in this paper as COSAB-1 and COSAB-2 respectively.

(2) Ms Plattern's reply indicated that the issue had been of interest to only a restricted group of F.L.A. members and that the F.L.A.'s comments had been drawn up in association with Lloyds Leasing Ltd.

(3) Professor Kessedjian indicated that her comments were submitted in her personal capacity and in no way represented the view of the Permanent Bureau of the Hague Conference.

General introductory remarks

(Professor Mooney and Mr Whalen)

2. – (a) Underlying purposes and policies of the Convention

The preamble to the draft Convention should state explicitly the principles on which it is based. This is consistent with the approach envisioned by Article 6(2). We urge the Study Group to take up this matter early in its deliberations at the upcoming meeting. Agreement on a common set of goals will assist the Study Group's discussion of specific provisions. It also will be of great value to those who review the draft when it is submitted to Governments for their consideration.

The most important of our suggested preliminary recitals relate to (i) the relationship between the future Convention and national laws and (ii) the economic assumptions on which it is based and (iii) party autonomy.

There has been some criticism of the draft Convention based on its perceived inconsistency with the legal principles found in the national laws of some States. The authors of such criticism misunderstand the most basic aspect of the draft Convention. The Convention's preamble should clearly state that one of its principal goals is to provide a distinctly international interest and, where necessary, to override national laws and purely national interests.

The Convention's preamble should also embrace its basic economic assumptions (although we do not propose that the Study Group debate the specific details). In particular, the preamble should recognise that providing broad and certain rights for chargees, conditional sellers and lessors works primarily to the benefit of chargors, buyers and lessees, as well as those with whom they transact business (including equipment manufacturers and dealers), their employees and the national economies of which they are a part.

Finally, we believe that the preamble should stress the norm of party autonomy in sophisticated financing transactions. The ability of parties to vary and derogate from the rules of the Convention should be impaired only when the most fundamental rights and principles are implicated or when the rights of third parties are involved.

(b) Linkages between national registration systems and the international registry

We reiterate our view, previously expressed, that the Convention should permit Contracting States to link their local registries to the international registry so that a registration, recording or filing under local law will (when appropriate) also constitute an international registration. In like fashion, the international registry should be structured so that a search of the registry will uncover locally registered interests that constitute international registrations.

(Department of State of the United States of America)

3. – Unidroit has undertaken a most important initiative with respect to enhancing world trade by upgrading and harmonising commercial finance law with respect to equipment transactions. We expect to join many member States in support of this work, which hopefully will secure approval to proceed to the intergovernmental negotiation stage, after circulation of the next and final Study Group draft. This process has reached its current level of forward looking

provisions by virtue of the difficult work undertaken by the Study Group and full consideration of industry needs and the needs of modern commercial finance.

(Multilateral Investment Guarantee Agency)

4. – I read the draft articles of the Convention on international interests in mobile equipment with great interest and I congratulate the Drafting Group.

The Convention will constitute a much needed instrument in the investment arena. I believe that the Convention - when ratified by the host countries in which MIGA guarantees investments - will make it much easier for us to calculate claim compensation since the rights of the foreign investor to its mobile equipment will be precisely defined and legally secured.

(Dr Bouza i Vidal)

5. – My first impression is that the draft articles give a flexible solution to the main problems on international interests in mobile equipment. The Drafting Group has done an excellent work.

(COSAB-1)

6. – The revised draft articles of the Convention contain some Articles that would, if applied in South Africa, constitute a substantial departure from our common law and statutory law. Of particular importance is the potential effect on our credit and insolvency laws:

- Articles 10-12, dealing with the rights of termination by a seller or lessor on "any kind of default", may be problematic when applied in the South African context, as our statutory laws limit the rights of a seller or lessor to take possession or control in these circumstances. Article 12(1), providing that "any remedy ... shall be exercised in conformity with the procedural law of the place where the remedy is exercised", may alleviate this problem to a certain extent, but it would not be an easy task to draw a distinction between provisions classified as "procedural law" or substantive law.
- Article 26, which seems to be the subject of lively debate, is important as far as the ranking of securities on insolvency is concerned. Security or preference on moveable assets may in our law be created by pledge or Notarial Bonds, which are dealt with specifically in our Insolvency Act. An "additional" form of security would necessitate an amendment to our Insolvency Act, in particular as instalment sale agreements (containing a reservation of ownership) are dealt with in a fairly peculiar way in our Insolvency Act (with the passing of ownership to a trustee or liquidator, etc.).

Some of the solutions proposed by the drafters of the Convention, for instance dealing with the ranking of claims on an "order of their creation" or priority of registration basis, do not take into account the potential claims and rights of third parties, such as rights of lien, hypothec or retention.

The above comments notwithstanding, there is definitely a need to uniformly regulate international aspects of security interests in mobile equipment. It may, however, be advisable in the South African context to regulate and/or limit the extent to which this Convention will ultimately apply.

(Dr Davies)

7. – I would like to commend Unidroit for this valuable work. It is my view that a certain legal environment will stimulate the facilitation of credit where hitherto financiers may have been reluctant to provide finance for high cost mobile equipment moving between international frontiers.

(Professor Diederiks-Verschoor)

8. – In my opinion it is an excellent idea to establish a Convention on this topic. This will create more security, whereas the Convention of Geneva of 1948 on rights in aircraft leaves much to national rights. Moreover, there are great differences in Anglo-Saxon and Continental law in this respect. Also the Geneva Convention of 1948 recognises existing rights. I got the impression that the Unidroit Convention creates new rights. Perhaps this could give problems. The terms "chargor" and "chargee" sound strange to me.

(French Association of Banks)

9. – As with previous drafts, the revised draft articles invite on our part both comments which relate to the substance of the proposed text and other comments relating either to form or terminology. The comments which we wish to make on the substance of the proposed text are naturally the most important. These are four in number:

(1) First of all, the method of dealing in the same draft with both the *right of ownership* of a seller under a title reservation agreement and of a finance lessor and the *accessory right in rem over movables* (chattel mortgage, aircraft mortgage) granted by the owner of an asset in favour of a creditor and therefore, to a certain extent, of treating them in the same way is doubtless in line with the concepts of certain legal systems, and in particular the legal systems of Common law countries. This approach is, however, totally contrary to the principles of French law; it runs the risk of encountering difficulties at the level of bankruptcy law, regardless of the "reservations" left open to Contracting States (Article 12(3)-Article 35(1)).

(2) The superimposing of the new international interest on national interests in the same assets is likely to give rise to disputes and indeed litigation. Indeed, the new version (cf. Article 7) contains a sufficiently broad definition of the international interest to include national security interests, for example a chattel mortgage governed by French law: it would therefore appear to be possible to register such an interest in the international registry. However, such a registration could not be in lieu of that laid down by national rules, for example the registration of a chattel mortgage in the register of the commercial court in France. A chattel mortgagee would consequently find himself obliged to carry out two registrations, one "national", the other "international", in order to combat competing claims from holders of interests in the same asset.

Furthermore, there is a great risk that with time "international" interests, which might in some cases be nothing other than national interests registered in the international registry, will tend to supplant national systems for the giving of public notice in respect of security interests. While this risk may be acceptable for large companies, it is far less so for small and medium-sized firms.

(3) We note, and by the same token regret that a draft which is presented as being the last to be distributed before final approval fails to specify the drafting of the "provision on connection to a Contracting State" (cf. Article 3). This is a point which is even more important given that the subject-matter of the future Convention is mobile equipment.

(4) Chapter VII of the revised draft articles deals with assignments of international interests. Careful co-ordination would appear to be desirable with the work underway within UNCITRAL on the preparation of a Convention on the assignment of (international) receivables for financing purposes.

(Ms Fura-Sandström and Ms Hervé)

10. – After reviewing the revised draft articles of the future Unidroit Convention on International Interests in Mobile Equipment, it seems that this Convention fits quite well with the need of recognition and of efficiency of a foreign security interest in mobile equipment.

(Professor Klein)

11. – I confess that reading this text has not entirely removed the concerns that I raised earlier regarding the very idea of the project. The work carried out by the Study Group is undoubtedly considerable and is deserving of the greatest respect. However, I find myself continuing to ask myself whether the task with which the experts were entrusted was capable of being usefully carried out or, in other words, of resulting in a text meeting the needs of practice. This Convention taken together with its annexed texts seem to me in fact much too complicated for one ever to expect them to be applied in regular practice. But how could it ever have been otherwise?

That having been said, certain points could, in my view, do with being made clearer: relations between the secured obligation and the international interest proper; relations between said interest and rights *in rem* available under national law and, finally, the effects of said interest in bankruptcy, winding up proceedings and the like; Articles 27 and 35 seem somewhat elliptic to me.

(Professor Lando)

12. – I am impressed by the scholarly work done by the Study Group.

(Mr Sommer)

13. – I remarked at a very early time of the discussion that the new principles for securing cross-border rights in movable equipment should be very easy to handle. My impression is that the new system is very complicated. Therefore I guess that Governments will hesitate to introduce this new Convention having in mind the problems with the introducing of the Ottawa Conventions into national law.

(Professor Stoufflet)

14. – I should first of all like to offer my congratulations to all who have taken part in the preparation of this text which appears to me to have been well thought out, to be coherent and certainly to correspond to the needs of practice.

Shortage of time preventing me from commenting in detail on all the provisions of the draft, I shall limit my comments to those points which have the potential, to my eyes, to raise difficulties when the question arises as to whether France should sign the Convention.

(Swiss Bankers' Association)

15. – We are pleased to inform you of the conclusions which our experts have reached on the subject of the revised draft articles. Our experts give a favourable welcome to the Unidroit draft, subject, however, to the following reservations:

In so far as the future Convention is intended to be widely adopted by individual States, it will strengthen the legal position of creditors, since these will, provided that they have registered their interest, in general be entitled to take possession or control of the collateral, which will need to be defined more precisely.

It is especially noticeable, from the point of view of leasing companies, that, unlike earlier drafts, leasing and title reservation agreements are no longer treated in the same way as security agreements. Title reservation and leasing agreements are now correctly recognised as meriting separate categories. No reference is made to the relationship of the revised draft articles to the Unidroit Convention on International Financial Leasing, opened to signature on 28 May 1988 and in force since 1 May 1995, which contains civil law rules governing cross-border financial leasing transactions concerning movable capital equipment. Unidroit will also have to take a position regarding the relationship of the future Convention to the European Union Convention on Insolvency Proceedings.

Remarks on specific provisions of the revised draft articles

Re Article 1(1)

(Mr Kouvshinov)

16. – There is some doubt concerning the use categorically of a definition "associated rights" in the Convention (Article 1). In some countries of continental law (including Russia) one is accustomed to use a definition "proprietary rights" instead.

(Finance & Leasing Association)

17. – We would question the need to extend the scope of this Article to cover "associated rights" particularly in view of the suggested broad definition. The relevant Protocol should be used to provide further clarification.

(Professor Kessedjian)

18. – In several provisions of the revised draft articles (Articles 1(1), 2(1), 15(3)) the term "associated rights" is employed in conjunction with the conjunction "and". After studying the comments of the Space Working Group which led to this addition, I tend to think it would be preferable to substitute the conjunction "or" for the conjunction "and" so as to make it clear that the interest may be either in an asset itself or in rights relating thereto. If not, the interest would have to be in both the asset and the rights, which would not, it would seem to me, correspond to practice.

Moreover, in Articles 1(2) and 7(b), the term "or rights associated with an object" should be added after the word "object".

(Swiss Bankers' Association)

19. – The inclusion of associated rights is supported.

The parties should be free to make the benefit of their contract, such as earnings, subject to the "international interest", by analogy with Article 892 of the Civil Code.

Re Article 1(2)

(Space Working Group)

20. – The Space Working Group respectfully requests that the Space Protocol should be permitted to include lessees of space property as "chargors". We do not want to interfere with the Convention itself, but the unique nature of satellite finance compels us to make our request.

Satellites contain multiple transponders, devices that receive, process, amplify, and transmit electronic signals. Those transponders are leased to various parties. The leases themselves are important sources of revenue for the owner of the satellite.

The transponder leases are quite expensive (and quite valuable). Lessees need to finance their operations by borrowing money, and their leases are often their most significant assets. The legal uncertainty in differing jurisdictions surrounding the registration of those interests means that leasehold financing is often very expensive or completely unavailable. If the financier of the lease were able to register that interest and to transfer the lease to a new lessee in the event of default by the original chargor/lessee, that would greatly increase the availability of financing.

In addition to the registration of the interest in the lease itself, the Space Working Group envisions inter-creditor agreements between (1) the lessee's financier and (2) the financier of the lessor of the transponder, the owner of the satellite. Those agreements would preserve the rights of the lessee's lender, in the event of a default by either the owner of the satellite or by the lessee. Those agreements, sometimes called "non-disturbance" agreements, would also be registrable.

If the Space Working Group correctly understands the objection of the Study Group, the concern is that if the Convention were to extend the definition of "chargor" to include lessees, that would expand the Convention beyond the protection of interests in specific mobile equipment. In other words, the Convention is intended to be an asset-based registry, rather than a debtor-based system.

The Space Working Group is fully in agreement with the central idea that the Convention should be asset-based. We believe that lessees' interests in space property are so closely linked to the physical assets that the scope of the Convention would not be stretched significantly by this extension. Lessees of space property have very valuable rights, and those rights can be used to support the obligations of lessees to their financiers.

While we defer to the judgment of the Study Group and its thoughtful deliberations, we do not believe that expanding the definition of "chargor" in the Space Protocol to include lessees would jeopardise the adoption of the overall Convention. We recognise, however, that this issue

may affect the Contracting States' acceptance of the Space Protocol itself, and we believe that this issue will be subject to further examination.

The Space Working Group wishes to reiterate that we do not want to force other Protocols to recognise lessees of other types of equipment as "chargors". We believe that the current definition of "chargor" is sufficiently broad to encompass our request. Accordingly, no changes in the current draft of the Convention would be needed to accommodate our request. All that we ask is that the Unidroit Study Group permit us to address this issue in the Space Protocol.

(Professor Kessedjian)

21. – Cf. § 18 *supra*.

Re Article 1(2)(a) **et seq.**

(Mr Sommer)

22. – The text should avoid words which seem to be somewhat artificial as it is with: *chargor* and *chargee*. I could not find these two words in my specialised dictionaries and my English books on law, not even in Goode's *Commercial Law* (Harmondsworth 1982). I feel that the French version is much better. (In the French language there is a similar word *chargeur* which has a different meaning as you are certainly aware). I think the two versions of the future Convention should also be as similar as possible language-wise. For me the French version has a certain charm as it is understandable without an interpretation in annexed definitions.

Re Article 1(2)(c)

(Professor Mooney and Mr Whalen)

23. – We remain concerned that the inclusion of "true" leases within the Convention's scope might create problems for lessors in some States. The Study Group may wish to consider alternatives that would not unnecessarily jeopardise a true lessor's residual interest in an object.

(Professor Stoufflet)

24. – I share the reservations echoed by the Secretariat in its introductory remarks with regard to this provision which, if I understand it correctly, treats the lessor's right *qua* lessor in relation to the lessee as that of a seller who has reserved title. The conception of leasing reflected in the text appears to me to be far removed from that obtaining under French law.

That having been said, I nevertheless can see the interest that there may be in safeguarding the rights of the lessor of equipment that may be worth a considerable amount of money.

I presume that it was the intention of the authors of the text to assimilate finance lessors to lessors.

(Swiss Bankers' Association)

25. – It would be desirable to give the concept of “leasing” an all-embracing interpretation so as to cover both hire and leasing transactions.

Re Article 1(3)

(Professor Kessedjian)

26. – I have to confess that I fail to understand either the purpose or the content of this paragraph, which is presented inside square brackets.

(Swiss Bankers’ Association)

27. – The meaning of this provision is not very clear.

Re Article 1(3) **et seq.**

(COSAB-2)

28. – “Applicable law” has not been defined albeit that it is referred to in various Articles of the document (for example Articles 1(3), 13, 27(3), etc.).

Re Article 1(4)

(French Association of Banks)

29. – Reference to a “Protocol” is already to be found in Article 1(4) and there are further references thereto in several other Articles (cf. Article 2(2)-(4)) as also in the Appendix setting out “Definitions”. It is essential that *the legal nature and scope* of the Protocol be spelled out clearly in a substantive provision.

Re Article 2

(Space Working Group)

30. – With respect to the definition of “space property” and the issue of intangible rights, the Space Working Group will defer its discussion of those questions to the Definitions, below. However, the Space Working Group is somewhat concerned about the decision to make various Articles immutable and “not susceptible to modification by a Protocol”.

The Space Working Group recognises that if any given Protocol is given absolute freedom, the uniformity of the Convention will be imperilled. However, it would be unfortunate unnecessarily to curtail the ability of each Protocol to deal with the specific needs of various industries. The proposed language of Article 2(3), which would prohibit any Protocol from varying any provision of the Convention, would severely limit the utility of any Protocol.

If any particular Protocol were to go beyond the boundaries of the Convention, that Protocol would risk rejection by the Contracting States. The Space Working Group believes that the fear of such rejection is a sufficient barrier to inappropriate provisions in the Protocols.

We would also suggest that Article 2 should contain a provision for the procedure for the drafting and adoption of Protocols.

Re Article 2(1)

(Professor Mooney and Mr Whalen)

31. – We believe that both construction equipment and agricultural equipment should be added to the list of categories of objects in paragraph 1, at least provisionally. In addition, we recommend a more precise definition of "associated rights" that would clearly include intangible rights relating to an object.

(Professor Kessedjian)

32. – Cf. § 18 *supra.*

(Ms Schulz)

33. – The draft demonstrates that this sort of international Convention works only when it is restricted to assets with a very high value. To restrict the application of the future Convention to objects like those enumerated in Article 2 is therefore an appropriate way to promote the success of the Convention.

(Mr Sommer)

34. – This Article reads as if the Convention were primarily drafted for big business. I thought that the first intention was to help the medium-sized and small companies working in an Europe without commercial frontiers but with legal boundaries.

I therefore propose the following changes:

"This Convention applies to any objects which are uniquely identifiable and which move or are moved in the ordinary course of business from one State to another, especially:

(a)
...
(h) ..."

(Swiss Bankers' Association)

35. – It is unclear why motor vehicles, especially lorries used for the international carriage of goods, are not expressly included in this list.

Re Article 2(1)(b)

(Electricité de France)

36. – The term “turbines” should be added in Article 2(1)(b).

Re Article 2(1)(d)

(International Maritime Committee)

37. – Our observers have taken the opportunity during the first to third sessions to submit our arguments that registered ships should be deleted from the draft of Article 2(1). The shipping interests feel no necessity for application to ships of a future Unidroit Convention on International Interests in Mobile Equipment. The present national legal regimes have proved satisfactory for the necessities of the shipowning countries. You will be aware that any efforts for unification of maritime law have to cope with the fundamental differences between Common law and codified law. This has, by way of experience, led us to the conclusion that where we do not see a necessity for international unification of law we should try to avoid it. Several international Conventions aiming at unification of maritime law have not been ratified by the majority of the shipowning countries and have therefore achieved only a part of the aim to unify.

I shall be most grateful if you will convey these thoughts to the Unidroit Study Group. The new idea of a Protocol that may provide for the extension of the application of the Convention should make it possible to strike out registered ships instead of keeping them in the draft Convention in square brackets. This will make it possible at a later stage to extend the Convention to apply to registered ships if and when the necessity is felt in shipping circles and the Convention is in force.

(Deutsche Schiffsbank)

38. – Our only remarks refers to Article 2(1)(d). In our opinion “registered ships” are dealt with in the recent UN/UNCTAD International Convention on Maritime Liens and Ship Mortgages to our full satisfaction. It should be unnecessary to establish additional registration procedures for ships.

(Professor Lando)

39. – I find no explanation as to why para. 1(d) *registered ships* has been put in brackets.

Re Article 2(1)(h)

(Professor Diederiks-Verschoor)

40. – Regarding the introductory remarks, it would be advisable to constitute also a Spacecraft Protocol Group. The term *space property* is very unusual; the usual term is *space object* (see The Treaty of 1967 on Principles governing the activities of States in the exploration and use of outer space including the moon and other celestial bodies). There is a lot of discussion on the contents of this term. A definition of “space object” would be desirable. In this respect difficulties could arise regarding rights and associated rights on special sub-parts of a space object, e.g. regarding engines, boosters, etc.

Re Article 2(1)(i)

(Electricité de France)

41. – We would propose adding another category of equipment to those listed in Article 2 (1) (as, for instance, a new sub-paragraph (i)) to cover *cranes and* construction *equipment.*

(Finance & Leasing Association)

42. – Article 2(1) lists categories of objects to which the Convention would apply. However, it remains unclear as to whether these are to be non-international as well as international assets. In sub-paragraph (i), there is reference to “any other category ... which is uniquely identifiable and habitually moves from one State to another in the ordinary course of business”. Does this qualify the rest of the list in sub-paragraphs (a)-(h) or is it an entirely separate category in its own right? Furthermore, there is no mention in sub-paragraph (i) of assets having to be of “high value”. We wonder whether that is intentional, since we had considered it to be a fundamental principle.

(French Association of Banks)

43. – We would propose adding the words “to be used for business or professional purposes” after the word “objects”.

(Professor Lando)

44. – Have *motor vehicles* been left out, or may they be included under para. 1(i)?

(Ms Schulz)

45. – There seems to be no general definition when an interest should be considered as international. It could depend on the contracting parties or on the nature of the asset which could move from State to State. The only allusion in the draft is Article 2, paragraph 1(i), but the notion of “international” described there (i.e. habitually moving from one State to another in the ordinary course of business) is not necessarily suitable for the other assets to which the future Convention shall apply. Neither do the definitions in the Appendix explain when an interest is an international interest under the Convention.

It is possible that the assets mentioned in Article 2, paragraph 1(a)-(g) - space property is a different category - do not cross State frontiers. Is it possible even in this case to create an interest under the future Convention? The text seems not to exclude it. Even if normally objects under the Convention do not stay in a single State, and it is so obvious that the Convention is directed at those moving assets that a special definition for international interests seems not to be necessary, there can be different situations. As I understand the draft in its current wording, it is left open whether or not the Convention should apply in such a case.

(Swiss Bankers’ Association)

46. – It is not quite clear whether the criterion set forth in this general clause, namely the requirement that the equipment must be intended to move habitually across State frontiers in

the ordinary course of business, is also applicable to the categories of equipment listed in Article 2(1)(a)-(h). At first sight this would not seem to be the case (cf. Article 26(1)).

Re Article 2(2)

(Mr Kouvshinov)

47. – As it was agreed upon during the third session of the Unidroit Study Group, the Protocols to the Convention *shall not derogate from basic provisions* set out in the Convention. The Protocols *shall reflect only specific legal aspects* closely connected with specific peculiarities of some kind of mobile equipment.

However, there is a danger to include some basic provisions in the Protocols derogating from those of the Convention on the pretext that it is reflecting specific peculiarities of a particular equipment. It is clear that it will lead to decreased importance of the Convention itself.

In this connection the initial draft of the Aircraft Equipment Protocol (APG 1997 Doc. 4) seems mainly to take into account specific legal aspects of aircraft equipment, especially in its aircraft object registry provisions.

In the Memorandum of the Aircraft Protocol Group (APG 1997 Doc. 5) there is a remark on "the very fine distinctions between 'supplementing', 'modifying' and 'amending' a text". But a clear distinction does take place. For example, in the World Trade Organisation "modification" means a substantive change of provisions and "amendment" only a technical, non-significant change in the text. Some provisions of the above-mentioned draft Protocol do have a trend to mean modifications of the Convention in that sense (the following serve as examples only and not as an exhaustive list):

- instead of the international interest as it is understood in Article 1(2), i.e. an interest granted by the chargor under a security agreement or vested in a person who is the seller under a title reservation agreement or vested in a person who is the lessor under a leasing agreement, and the assignment of an international interest as it is settled in Chapter VII, one can find the definition of the "transfer document" which means "an agreement (other than a title reservation agreement) or instrument by which one person ('the transferor') sells or agrees to sell an aircraft object to another person ('the transferee') and that is expressed to fully divest the transferor of its interest in that aircraft" (Annex I to the draft Protocol);

- in Article VI(3) of the draft Protocol there is a definition of the "obligor" (any legal entity, including one which is acting as an agent or trustee) and its due place seems to be the Convention, but not the Protocol;

- in Article VII(2) of the draft Protocol there is a suggestion to exclude Article 8(2) of the Convention, replacing it by a new provision which seems not to be determined by specific peculiarities of aircraft equipment (by the way it is not clear that "public order" of which Contracting State is meant);

-- in Article XXX of the draft Protocol there is a suggestion that the Convention shall supersede the Unidroit Convention on International Financial Leasing as it relates to aircraft objects, but the draft Convention is not going to replace all substantive provisions concerning international agreements on financial leasing by new ones.

(Professor Mooney and Mr Whalen)

48. – We wish to renew our requests (communicated independently to the Drafting Group) that paragraph 2 be revised to recite that the Convention might come into force with respect to equipment (other than certain specified equipment, such as aircraft, space equipment and rail equipment, for which work on Protocols is underway). See Introductory Remarks to Study LXXII - Doc. 35, § 5. We are mindful of the Drafting Group's concern that providing adequate definitions and registration provisions in the absence of appropriate Protocols would not be possible, given the speed with which further work on the Convention is to proceed. We also realise that these issues must be addressed in the Convention and are separate and apart from equipment-specific issues that would better be dealt with in a Protocol. However, we believe that successful efforts to provide adequate definitions are not altogether out of the question. It also would be possible to defer the effectiveness of the Convention for equipment not covered by a Protocol until such time as a registry could be made operational (which might necessitate a subsequent registry Protocol or general application). Indeed, the UNCITRAL working group has such an approach under consideration for its receivables financing project.

We suggest that paragraph 2 be revised along the following lines (additions shown in underlining and deletions shown in ~~strikeout~~):

> 2. - This Convention shall come into force as regards [aircraft, railway rolling stock, or space property] only if there is in force a Protocol in respect of that category of object ~~as regards any category of object in respect of which there is in force a Protocol~~.

If it proved necessary, we also would consider a new provision in the final clauses of the Convention along the following lines:

> x. - A Contracting State may, at the time of ratification, acceptance, approval or accession, declare that this Convention shall come into force as regards any category of object only if there is in force a Protocol in respect of that category of object.

This provision would afford comfort to those Contracting States who conclude that, in the absence of an applicable Protocol, the Convention should not be effective with respect to any category of object that it specifies in its declaration.

(Ms Fura-Sandström and Ms Hervé)

49. – The addition of a Protocol seems like a good idea. The Convention will then remain general and the Protocol will provide a clear indication of the specification of all these categories while allowing future addition. In order to prepare the Protocol, the consultation of the industry representatives seems necessary to formulate their specific needs.

(Professor Kessedjian)

50. – The system of protocols appears to me extremely complex and I am not sure whether I have entirely grasped its significance. Moreover, provision is made for different protocols of different kinds, which raises the question as to how they will subsequently be identified in the text of the future Convention.

As concerns the entry into force of the future Convention as provided for in Article 2(2), it seems to me a pity that it should be suspended until the entry into force of each protocol. In actual fact, the future Convention itself contains provisions which will in any case apply without any possibility for the protocols to amend the same. Moreover, the future Convention might be conceived as setting forth minimal rules (what might be called a "Convention minimum") with the protocols being allowed to go beyond what is permitted under the Convention and for each type of asset in particular.

Re Article 2(2) and (3)

(Department of State of the United States of America)

51. – While we understand that modification to a number of provisions may be discussed by the Study Group, there are two in particular of importance relating to Article 2. We would recommend that modifications be made to sub-paragraphs (2) and (3) of Article 2, to ensure that the overall scope and purpose of the Convention remain as originally intended, which should ensure support of a wide variety of Governments and industry groups. We believe these recommendations will have the support of many participants, including the Aviation Working Group and the Space Working Group.

In particular, we recommend that paragraph 2 of Article 2 be modified along the following lines: (A) the Convention should apply to all categories of equipment listed in the Convention upon ratification or accession, subject to the following exceptions. (B) Excepted from the above would be specified types of equipment which would only be covered upon ratification or accession to a specialised Protocol, whether that Protocol has been completed and approved at the same time as the base Convention, or is approved at some subsequent stage. (C) Article 2 should further provide that ratifying or acceding States may limit the application of the Convention to one or more types of equipment covered by (A) or (B) above. In this manner, States joining the treaty regime would have available options by which they can tailor the coverage to their needs, but in the absence of exercising such options, would accept broad coverage of the Convention, thus generally upgrading international commercial law standards.

Secondly, sub-paragraph (3) of Article 2, and any provisions which implement that sub-paragraph, should be drafted so as to permit the widest possible scope of modification or deletion of the provisions of the base Convention where deemed necessary within specialised Protocols and so approved by participating States. This would facilitate wider participation in the Convention while maintaining careful attention to developing commercial finance techniques. The presumption should be that any Article of the base Convention can be so modified, unless there is a consensus that it must be mandatory and not variable, presumably for reasons that are nevertheless consistent with the general purpose of the Convention, i.e. to promote trade and commerce through the application of modern finance legal standards.

In this context, it will also be important to provide in the Convention for a process of subsequent consideration of additional Protocols and/or modifications to provisions of the base Convention, as well as a separate process for modifications to existing specialised Protocols. Modifications to specialised protocols which relate to particular industries would need to ensure that changes have the support of that industry and are consistent with specialised commercial finance techniques used in that market.

It is anticipated that provisions relating to the operation of a registry(ies) for equipment not covered by a specialised Protocol would remain quite general, allowing more specific and detailed provisions to be set out in an annex or additional Protocol at such point as that is

feasible. The effectiveness of the Convention as to such equipment could be deferred until such a registry was in operation. While that may be accomplished by the time of the diplomatic Conference, it would not be necessary to do so.

Underlying the above recommendations and reflecting the discussions we have had with others, we would condition these proposals upon a fundamental understanding. The timing for completion of the base Convention and those specialised Protocols which may be sufficiently developed also to obtain final approval, is of the utmost importance. It is our understanding that considerations of a possible host country are well advanced, and upon approval of a host State it will also be possible to provide a target date for the final diplomatic Conference. We accept the proposition that such a date may have a sliding period of time, for example a six-month period, in order to provide flexibility for arrangements and to take into account the timing of scheduled intergovernmental committee meetings. We recommend mid-1999 as a realistic target date.

It should however be understood, and it would certainly be our commitment, that completion of whatever portions of this work are possible at the time of the diplomatic Conference will proceed to completion at that time, and that any portion(s) thereof which are not able to secure consensus for completion would need to be deferred until a subsequent intergovernmental stage of work. This would apply equally to proposed specialised Protocols as well as to basic provisions of the Convention, i.e. those which would be anticipated to apply more broadly under the Article 2(2) modifications as proposed above.

Re Article 2(2)-(4)

(French Association of Banks)

52. – Cf. § 29 *supra.*

(Swiss Bankers' Association)

53. – The suggested limitations and clarifications are to be welcomed if the provisions contained in Article 1(4) are to be adopted.

Re Article 2(3)

(Professor Mooney and Mr Whalen)

54. – We doubt that the approach taken in paragraph 3, although well-intentioned, will be successful. Even if it is retained, we believe that the list of Articles suggested in paragraph 19 of the Introductory Remarks may be far too broad. If a Protocol were determined to derogate from or vary an Article specified in paragraph 3, it would present a difficult legal issue. Even in the absence of a judicial determination, counsel who provide legal opinions would be required to compare every provision of a (possibly detailed and complex) Protocol to each specified Article. It would be necessary to determine, in each case, if any differences "vary" a specified article or merely supplement it. We believe that the Study Group should adopt the approach that the Aircraft Protocol Group appears to favour, under which the terms of a Protocol would control over any inconsistent provisions in the base Convention.

(Ms Schulz)

55. – As mentioned at p. 4 of the introductory remarks, I would like to emphasise that issue and join the concern expressed there about Protocols which might weaken the future Convention if no limits are set on these Protocols. Certainly this has been in the minds of members of the Groups working on the future Convention but this should in fact be drafted as a free-standing instrument so as to ensure and facilitate its application.

The idea of a model Protocol should be given priority so as to render the future Convention and its various Protocols homogeneous in character. A model Protocol could already serve to solve the conflict between Protocols and mandatory provisions of the Convention. In developing a model Protocol there should be an enumeration of the Articles intended to be mandatory.

The approach to specify types of provisions might (even if only exceptionally) make provisions mandatory because of their form or type and not because of their contents.

Re Article 3

(Professor Mooney and Mr Whalen)

56. – We reiterate once again our wish that the Study Group consider a clear directive to a forum court as to when the Convention should be applied.

The Study Group may wish to consider the following draft Article 3:

Article 3

> 1.- This Convention applies if the object of an international interest or the obligor is located in a Contracting State.
>
> 2.- If the obligor is organised under the law of a State or sub-division of a State and the State or sub-division maintains a public record showing the chargor, buyer or lessee to have been organised, the chargor, buyer or lessee shall be deemed to be located in that State. In other cases, the chargor, buyer or lessee is located in the State where its principal executive office is located.

Under this draft Article 3, by its terms the Convention would not apply when none of the forum court, the object or the debtor is located in a Contracting State. The Convention also would not apply if the only connection to a Contracting State is the location of the forum court. In all other cases - when either the object or the debtor is located in a Contracting State - the Convention would apply.

Draft paragraph 2 provides a rule for determining the location of a chargor, buyer or lessee. Entities such as corporations, for which a public record evidencing their organisation exists, would be located in their jurisdiction of organisation. In other cases, the location of the "principal executive office" would control.

(Electricité de France)

57. – The connecting factor may be the ownership of (or the lessor's interest in) the equipment where the owner (or lessor) is linked to the Contracting State *and/or* the use of the equipment where the user is linked to the activity in relation to a Contracting State.

(Professor Kessedjian)

58. – I fail to understand the content of Article 3 and why it is felt necessary to determine a connecting factor. Would this connecting factor serve for applicable law or for jurisdiction purposes? What would be the link between the two?

Re Article 4

(Professor Mooney and Mr Whalen)

59. – Consistent with our comments on Article 2(3), Article 4 probably should refer to the controlling effect of the definitions in a Protocol.

(French Association of Banks)

60. – This Article is difficult to understand. Read literally in the French text, it means that, in the event of divergence between the definitions set out in the Appendix and those featuring in a Protocol, it is to be those set forth in the Protocol which are to prevail. A reading of the English text, which was transmitted to us by the Banking Federation of the European Union, leads us to think that this is the result of an error in the translation.

(Professor Kessedjian)

61. – Article 4 strikes me as being very complicated and it would seem to me preferable, from a purely drafting point of view, to define the terms in a single document to apply to the exclusion of any other. This is all the more necessary since, under the system as at present provided, it is the meaning given in a protocol which will prevail without the reasons for such a rule being clear.

Re Article 5

(Professor Mooney and Mr Whalen)

62. – We hope that the Study Group will address the question whether a provision should be non-variable as it discusses the substance of each draft provisions during the upcoming meeting. Given the overarching importance of party autonomy in commercial and financial transactions, we also hope that any listing of non-variable provisions would be very short. Subject to our comments on Article 13, below, our preliminary view is that the list of non-variable provisions should include at least the provisions listed in the Introductory Comments (paragraph 21). However, Article 5 should give way to any overriding provisions in a Protocol applicable to a specific class of object.

(Finance & Leasing Association)

63. – Although there is to be scope for freedom of contract between the parties, this Article also provides for a number of Articles to be mandatory in principle. Those Articles are yet to be declared. We would question the merits of some being mandatory whilst others are subject to variation by agreement in writing, and would be seeking an explanation of the rationale behind any such distinction.

Re Article 6

(Mr Kouvshinov)

64. – Alternative A of Article 6 seems to be preferable. As to Alternative B it sounds rather dubious: words "in the absence of such principles" are relating (according to the wording) also to the principle of good faith in international trade, but this principle does exist. For example, it is taken into account in multilateral agreements concluded under the aegis of the World Trade Organisation.

(Professor Mooney and Mr Whalen)

65. – We now believe that Alternative B, with all of the square brackets removed, represents the appropriate approach. Following Article 6(1) of the Unidroit Convention on International Financial Leasing, we also suggest that paragraph 1 of this article be revised to refer to "its object and purpose as set forth in the preamble."

(COSAB-2)

66. – The express object of the project embarked on by Unidroit is to harmonise the legal treatment of interests in mobile equipment and to provide certainty in international trade; as such, we are of the opinion that neither good faith considerations nor private international law rules should be referred to in Article 6 of Chapter I; alternatively, private international law rules should only be resorted to where the parties have agreed to derogate from the provisions of Chapter III, as envisaged by Article 5 of Chapter I (if necessary).

(Dr Davies)

67. – In terms of the approach to interpretation to the proposed Convention I would champion Article 6, Alternative B for its purposive approach. I am not sure whether any saving-type provision based upon "good faith in international trade" is a meaningful proposition in the light of the objectives for the Convention. In any event, there are safeguards, for example, the reference to commercial reasonableness in the application of the Chapter III default remedies.

(Electricité de France)

68. – We would indicate a preference for Alternative A. However, this leads to the question as to the body that should be given responsibility for interpretation of the Convention. Will it be a specific body or might one envisage entrusting such a task to the World Trade Organisation?

We would propose adding the adverb "in particular" in Alternative B, paragraph 2, which would then read: " Questions concerning matters governed by this Convention which are not

expressly settled in it are to be settled in conformity with the general principles on which it is based and, *in particular*, the principle of good faith in international trade or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law".

(French Association of Banks)

69. – More than those references to the general principles on which the future Convention is based and to the principle of good faith in international trade, which are customary in texts the purpose of which is to establish an international norm or international rules, it is important to affirm quite clearly the need to comply with the law applicable by virtue of the rules of private international law.

(Professor Kessedjian)

70. – Alternative B of Article 6(2) appears to me to raise drafting problems.

(a) It does not strike me as a good idea to add the principle of good faith to the idea of general principles as though these two ideas were not connected to one another, whereas the principle of good faith is part of these general principles. For this reason I would suggest that the conjunction "and" be replaced by the term "in particular".

(b) As regards that part of the sentence appearing in the second set of square brackets, I would note that it would be difficult to apply since the rules of private international law referred to there are not defined. The interpretation of the future Convention will be a very difficult matter since the rules of private international law of the court seised or the rules of private international law of the court having jurisdiction may be applied. Moreover, where the dispute is submitted to arbitration, the arbitral tribunal will designate the applicable law without necessarily passing *via* the rules of private international law. The drafting techniques generally employed for matters of private international law tend to leave this question unsettled, except where the Convention is itself a private international law Convention, which is not the case, it would seem to me, with the draft at issue. The sentence might therefore perfectly well be brought to an end after the words "law applicable".

(c) Finally, it seems to me that it is open to question whether it is right to say that there might not be any general principles. On the other hand, it is perfectly possible that these general principles may not provide any solution to the question to which one is seeking an answer. It seems therefore to me that the opening clause in the second set of square brackets should rather read: " where no solution is provided by these principles,...".

Summing up, Alternative B of Article 6(2) might be redrafted as follows: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based, in particular the principle of good faith in international trade or, where no solution is provided by these principles, in conformity with the applicable law".

(Professor Lando)

71. – I prefer Alternative A which is in accordance with CISG Article 7, but I miss the good faith principle which is provided in the UNIDROIT *Principles of International Commercial Contracts* (UPIC) Article 1.7, and in the *Principles of European Contract Law (PECL)* Article 1.106,

and which is becoming more and more part of the common core of legal systems. The provision is needed notably to accompany the rules in Chapter III.

Re Article 7(b)

(Dr Davies)

72. – I consider that there are potential conceptual problems in respect of a priority dispute between chargors, sellers or lessors who have a "power" to enter into an agreement to create an international interest as defined in Article 7(b) and the effect of such registration as against a "buyer" anticipated under Article 26(3). Here we are in familiar jurisprudential territory of "power"-v-"rights" dichotomy. It may be that where there is no right to create an international interest the effect of a subsequent disposition will be to extinguish the registered interest in the chattel.

(Professor Kessedjian)

73. – Cf. § 18 *supra*.

Re Article 7(c)

(Swiss Bankers' Association)

74. – One needs to look further into the question whether the mere identifiability of the collateral at the time of the conclusion of the contract may prevent registration under Article 20(1)(a). The requirement of identification should be clarified.

Re Article 7(d)

(Professor Mooney and Mr Whalen)

75. – We understand that an identification of the obligation secured need not be specific and that language in a security agreement (or another document to which it refers) such as "all indebtedness of chargor to chargee of any kind now or hereafter owing" or "payment of the promissory note dated X in the principal amount of Y, together with interest, costs, expenses of collection, attorneys fees and other amounts described therein" would be sufficient.

Re Article 8

(Professor Stoufflet)

76. – This provision opens up for the creditor the possibility of the automatic enforceability of its remedies in relation to the collateral. This enforcement may take one of various forms, including the taking of control over the collateral and the sale or leasing of the collateral.

Unless I am mistaken, such a provision is in line with English contract practice. It is embarrassing for a French lawyer. To my mind, a private agreement conferring such remedies on a secured creditor will run up against strong objections under French law. Of course, theoretically there is nothing to stop these remedies being conferred on a creditor by an international Convention signed by France but the solution represents such a departure from our legal tradition that it is not at all certain that it would be accepted by the French Government, even in an international instrument, especially where the remedy unilaterally decided upon by the creditor would be valid against a receiver in receivership proceedings or against a liquidator in winding up proceedings.

Aware of this difficulty, the authors of the revised draft articles have opened up for signatory States the possibility (under Article 12(2)) of requiring, by means of a declaration entered at the time of signature, an application to the court. The question remains, though, as to whether such a declaration would be judged to be adequate by the French Government. It is not sure that it would, as it is only intended to be effective in respect of remedies exercised on French territory.

It should, nevertheless, be emphasised that the reservations which have just been expressed do not apply to avoidance of a sale (or a lease) for failure to perform. French law recognises the validity of a term providing, in the event of non- payment of the price, for automatic avoidance or for avoidance following the simple giving of notice by the seller to the buyer.

(Ms Fura-Sandström and Ms Hervé)

77. – The application of the uniform rules concerning the default remedies will also facilitate the relations concerning the international interest in mobile equipment while keeping a certain autonomy for the Contracting States or for the contracting parties to the extent that their provisions are not inconsistent with the Convention. The problem might be a certain confusion since the procedural law will depend on the place where the remedy will be exercised.

Re Article 8(1)

(Professor Kessedjian)

78. – On first reading, the provisions of Article 8 appeared to me to open up the possibility of *automatic* application of the remedies provided therein. This is why use of the term "recours" in the French-language version of Article 8(1) did not seem accurate to me. However, after reading the whole of Chapter III, it seems to me that Article 8 is not automatic in its application. Should this interpretation be correct, the formulation used in Article 8(1)(a),(b) and (c) as well as, at least, that used in Article 8(2),(3),(4) and (5) should be amended so as to remove the impression of automatism.

If, on the other hand, my first impression was correct, use of the term "recours" in the French-language version contradicts this idea of automatism. In fact, the term "recours" is a term of art which carries with it the need to go before a court, which is not necessarily the case with the English term "remedies".

Re Article 8(1)(b)

(Mr Kouvshinov)

79. – Such remedy as the granting of a lease in accordance with Article 8(1)(b) is not known under Russian law.

Re Article 8(1)(d)

(Swiss Bankers' Association)

80. – The concept of "court" is too narrow to cover the different bodies that may be competent to give such an order (cf. also Article 12(1)). The same is true in respect of Article 8(3) and (5). Switzerland would need to make a declaration for the purposes of Article 12(4).

Re Article 8(2)

(Professor Mooney and Mr Whalen)

81. – We suggest that the Study Group consider whether the rule under the second sentence of paragraph 2 should be strengthened beyond merely having regard to the terms of a security agreement. Perhaps agreements as to what constitutes commercial reasonableness should be conclusive, at least unless manifestly unreasonable.

(Electricité de France)

82. – The concept of "commercially reasonable" could do with being clarified. We in fact tend to think that this principle will have no meaning either for lawyers from Civil law countries or for lawyers engaged in international commercial law.

This concept is all the vaguer as the sentence which follows fails to provide much in the way of explanation as to the criteria for the determination of what is "reasonable".

(French Association of Banks)

83. – The effective scope of this provision is not brought out clearly enough, even more so as the word "reasonable" introduces an element of subjectivity, nay indeed uncertainty, notwithstanding the clarification supplied by the second sentence.

(Professor Kessedjian)

84. – Cf. § 78 *supra*.

Re Article 8(3)

(French Association of Banks)

85. – The reference to "reasonable" prior notice is too vague: we would accordingly prefer the text to be made clearer on this point. It is moreover advisable to lay down the sanction to be incurred by a chargee who fails to give notice to interested persons or who is late in doing so.

(Professor Kessedjian)

86. – Cf. § 78 *supra*.

(Swiss Bankers' Association)

87. – The reference to "reasonable prior notice" would appear to have been introduced with the right of redemption referred to in Article 9(3) in mind. This should be stated expressly so as to make the content of the term "reasonable" clearer.

One needs, in our opinion, to look further into the question whether the giving of such notice might contradict rules providing for secrecy in respect of banking transactions (especially regarding notice to junior creditors under Article 8(6)(d)) or whether a creditor bank would for this reason actually have to waive the exercise of its own enforcement remedies.

Re Article 8(4)

(Professor Kessedjian)

88. – Cf. § 78 *supra*.

Re Article 8(5)

(Professor Kessedjian)

89. – In Article 8(5) I asked myself whether, in practice, it is logical to make provision for the automatic payment of the excess collected or received by the creditor to the holder of the interest registered immediately after that of the creditor who is the beneficiary of these sums. In fact, it appears to me that two situations may arise:

(a) there may not have been default on the loan or monetary advances which gave rise to the interest registered after the interest of the creditor who has acted, in which case the holder of this interest is not entitled to anything;

(b) there may, on the other hand, have been default on the interest or interests registered prior to the interest of the creditor who has acted. In such a case, if the former creditor or creditors have not acted, would it not be more logical to make provision for payment to these creditors who have registered previously? In general, it is extremely difficult in practice to provide such hard and fast rules because the creditor who receives more than his due will above all not wish to find himself accused of having paid the wrong person. That is why it would perhaps be preferable to put forward a slightly more cautious provision simply making it incumbent upon a creditor who has collected or received more than his due to have the relevant amount *sequestered* and to submit the question as to who should receive this amount to the court having jurisdiction.

Cf. also § 78 *supra*.

(Swiss Bankers' Association)

90. – It should be possible for the chargee to be able to deduct his enforcement expenses.

Re Article 8(6)

(Electricité de France)

91. – It would be more appropriate, in our opinion, to define what is covered by the words "interested persons" at the beginning of the Convention.

Re Article 8(6)(d)

(French Association of Banks)

92. – It is difficult to see who are the persons referred to in Article 8(6)(d) as "having rights subordinate to those of the chargee in or over the object". To take a French example, would this cover the holder of a "national" security interest which he has not registered in the international registry?

(Professor Kessedjian)

93. – From a drafting point of view, it would perhaps make sense to introduce a reference to Article 26 in Article 8(6)(d) since it is Article 26 that establishes the priority as between different interests.

Re Articles 9-10 and 11

(French Association of Banks)

94. – A question arises as to the respective spheres of application of these three Articles. Two interpretations are in fact possible:

- According to the first of these, Articles 9 and 10 would apply in all cases of default in the performance of a secured obligation, regardless of the nature of the interest; Article 10 would only concern those specific cases where there had been default in the performance of contractual duties undertaken by the buyer (under a title reservation agreement) or by the lessee (under a leasing agreement).
- According to the second interpretation, Articles 8 to 9 would only cover the case referred to in Article 1(2)(a), that is an interest granted by the chargor under a security agreement, Article 10 governing in that case the other two classes of "interest", vested in the seller under a title reservation agreement and in the lessor under a leasing agreement respectively.

A reading of the introductory remarks to the revised draft articles does not sway the argument decisively in favour of either one or the other of these two interpretations.

Re Article 9(1)

(Professor Kessedjian)

95. – It seems to me that the word "competent" should be added in the second line of Article 9(1) after the word "court".

(Swiss Bankers' Association)

96. – The concept of "court" is too narrow to cover the different bodies that may be competent to give such an order (cf. also Article 12(1)). The same is true in respect of Article 9(2). Switzerland would need to make a declaration for the purposes of Article 12(4).

Re Article 9(2)

(Swiss Bankers' Association)

97. – Cf. § 96 *supra*.

Re Article 9(3)

(Professor Kessedjian)

98. – A doubt of a purely drafting nature occurred to me as I read Article 9(3). In fact, it seems to me that, contrary to what is indicated there, the creditor is not "garanti" (in the French-language version) "under Article 8(1)" in so far as Article 8 is solely concerned with cases of default in the performance of a secured obligation. It seems to me that the cross-reference should rather be to Article 7 of the future Convention.

(Swiss Bankers' Association)

99. – The expression "by paying" would seem to be too narrow to cover the case of security granted in respect of future or possible claims. We would propose that provision be made expressly for the possibility of deposit.

Re Article 10

(Leaseurope)

100. – The term "résoudre le contrat" is not appropriate in the French text of this provision. The term "mettre fin au contrat" would be more suitable.

Article 10 provides that "in the event of default ... by the lessee under a leasing agreement, the ... lessor, as the case may be, may terminate the agreement and take possession or control of any object to which the agreement relates". According to Article 12(2), in a case where the lessor's right to terminate the leasing agreement under Article 10 may be exercised without leave of the court, such a remedy may be exercised without leave of the court except to the extent that the Contracting State where the remedy is to be exercised has made a declaration under a Protocol annexed to the Convention. The Federation expresses strong reservations at the idea that the lessor's right of termination under Article 10 might be subject to a requirement that such and such a State may perhaps have made a declaration of the kind envisaged in Article 12(2).

(COSAB-1)

101. – Cf. § 6 *supra*.

(Electricité de France)

102. – The concept of taking control is not satisfactorily defined, seeing that it is imaginable that there may be preliminary stages prior to such an operation.

In addition, it is necessary to mention the cases in which a taking of control may occur and to set out the legal grounds for entitlement to judicial attachment.

(Professor Kessedjian)

103. – The English and French texts of Article 10 do not appear to me to be saying the same thing. In fact, in the French text, the term "*revendiquer*" is used, whereas the English text speaks of "tak[ing] possession". Once more, the term employed in the French text which carries with it the idea of legal proceedings being brought, whereas the English term is a concrete term which does not necessarily carry with it the idea of legal proceedings.

(Swiss Bankers' Association)

104. – It should be made clear that a claim for the recovery of possession may be enforced [(4)].

Re Article 11(2)

(Leaseurope)

105. – The Federation is not sure whether the term "inexécution substantielle" as employed in the French text of Article 11(2) corresponds to the term "material default" used in the English text. Whereas the word "material" would seem to mean something negligible, the opposite is true of the word "substantielle". It is worth noting that the previous draft employed the term "substantial" in the English text.

(Professor Kessedjian)

106. – It seems to me that the concept of material default employed in Article 11(2) will create a burden of proof which will be extremely hard to discharge.

(Professor Lando)

107. – Is the concept of *material default* the same as *fundamental* breach under CISG Article 25, and *fundamental* non-performance under UPIC Article 7.3.1 and PECL Article 3.1o3? If so, why is the word *material* used? If not, what is the difference?

(Swiss Bankers' Association)

108. – The term "material" is not sufficiently clear; its content should be spelled out more clearly.

[(4)] *Note by the Unidroit Secretariat*: it would seem that this comment relates to the French text's employment of the term "revendiquer"; the Swiss Bankers' Association speaks of "Anspruch auf Herausgabe des Eigentums".

Re Article 12(1)

(Leaseurope)

109. – The introductory remarks to the revised draft articles indicate in §21 that Article 12(1) was in principle seen as a mandatory rule (this provision indicates the procedural law rules applicable to the remedies to be exercised in a given country: these are to be the procedural rules of the place where the remedies are to be exercised). Article 13 covers "[a]ny additional remedies permitted by the applicable law". This provision fails, however, to spell out what these additional remedies are.

(COSAB-1)

110. – Cf. § 6 *supra.*

(Finance & Leasing Association)

111. – The effect of this Article is to provide that local law will apply. This is bound to cause uncertainty in that procedural laws will differ between Contracting States and may indeed be inconsistent with the provisions of the Convention.

(Professor Kessedjian)

112. – The reasons which led to the drafting of Article 12(1) are hard to fathom. The rule set forth is self-evident. In addition, it is not limited by paragraph 2 of the same Article contrary to what is indicated.

Re Article 12(2)

(Leaseurope)

113. – Cf. § 100 *supra.*

(Professor Kessedjian)

114. – At the end of the second line of Article 12(2) I would replace the words "leave of the court" by "leave of a court". In fact, this rule does not purport to limit the class of courts to be seized nor to designate a court as being specifically competent. This Article is rather intended to specify the automatic character of some of the remedies referred to in the previous paragraph (which serves to reinforce the first interpretation I gave to the provisions of Article 8; cf. *supra*, § 78). Moreover, the term "actions" used in the first line of the French text of Article 12(2) seems to me to contradict the fact that this rule is intended to permit the exercise of a remedy without leave of a court. The term "action" carries with it, in French at least, the connotation of legal proceedings. It should moreover be noted that the French term "droits et actions" is intended to translate the English term "remedy" which in Article 8 of the future Convention is translated in French by the word "recours".

(Professor Stoufflet)

115. – Cf. § 76 *supra.*

Re Article 12(3)

(Professor Mooney and Mr Whalen)

116. – We are unconvinced that the approach of paragraph 3 is appropriate. Inasmuch as the structure and doctrinal characteristics of dispositions of limited interests may vary widely, perhaps references throughout the remedies provisions should be revised to refer to sales, leases or "other dispositions."

The central point is that it may not be in anyone's interest that the chargee sell outright the entire ownership interest in the object; however, sometimes entering into a more limited arrangement makes the most economic sense. Recalling the principles underlying the Convention, it would be unfortunate to diminish the effectiveness of the international interest because of the inflexibility of any particular national regime.

(Finance & Leasing Association)

117. – The notes to Article 12 explain that the purpose of this provision is to deal with the fact that one of the remedies granted under Article 8(1)(b), namely the granting of a lease, is not known at all in certain jurisdictions. That being the case, it also needs to be related to the provisions of Article 14(1) and in particular sub-paragraph (c).

(French Association of Banks)

118. – It is desirable to complete Article 12(3) by adding the words "nor sell" after the words "grant a lease of".

Re Article 12(4)

(Professor Mooney and Mr Whalen)

119. – The references to "court" and "tribunal" might be made plural. Also, because the defined term "court" applies for all purposes of the Convention, perhaps it belongs in the Appendix with the other defined terms.

(Leaseurope)

120. – For those legal systems like that of France, the concept of "court" should be distinguished from that of "President"; it is the latter, and not the court as such, that is authorised to issue "orders" on applications from a party. The concept of "judicial authority" should accordingly be added to that of "court".

(Electricité de France)

121. – Seeing that the term "court" is already mentioned in Article 8(1)(d) and then in Article 9(1), would it not be wiser to define this term in Chapter I of the Convention. In addition, the term "administrative or arbitral tribunal" is mentioned, however, without any reference to judicial tribunals. Consideration might be given to adding this category of tribunal so as to remove any possible doubts.

(Professor Kessedjian)

122. – I am unclear as to reasons which led to the drafting of this paragraph.

(Swiss Bankers' Association)

123. – This provision would be necessary for Switzerland (cf. *supra , re* Articles 8(1) and 9(1)). A broad definition is needed.

Re Article 13

(Professor Mooney and Mr Whalen)

124. – The current formulation of Article 13 may cause a problem if it is made non-variable under Article 5. Certainly parties should be able to agree that additional remedies consistent with the Convention are *not* available. But that agreement would, literally, vary the terms of Article 13, which states that additional, consistent remedies "may be exercised." A reformulation along the following lines, together with a reference to "Article 13(2)" in Article 5, would solve this problem.

Article 13

> 1. - Subject to paragraph 2, any ~~Any~~ additional remedies permitted by the applicable law, including any remedies agreed upon by the parties, may be exercised.
>
> 2. - No remedies may be exercised to the extent ~~that they are not~~ inconsistent with the provisions of this Chapter.

We also urge the Study Group to consider whether the term "inconsistent" will be unreasonably difficult to apply in practice. Finally, we do not understand why Article 13 should refer to the whole of Chapter 3. It would seem more appropriate to mention only the portions of the Chapter that are non-variable under Article 5. It would be odd if remedies were thrown out under Article 13 even though the inconsistent provisions in the Convention could be varied by the parties.

(Leaseurope)

125. – Cf. § 109 *supra.*

(COSAB-2)

126. – Cf. § 28 *supra.*

(Electricité de France)

127. – The question to which this Article gives rise is as to how inconsistency is to be determined.

(Professor Kessedjian)

128. – I imagine that the applicable law referred to in Article 13 is the law applicable to the interest. I think it would in any case be preferable to spell out the fact that the applicable law being referred to is the law applicable to the interest. The remarks that I made under Article 12(2) on the use of the French term "droits et actions" are also valid for this Article (cf. *supra*, § 114).

Re Article 14

(Space Working Group)

129. – The Space Working Group respectfully submits that a new paragraph be added to Article 14 to provide expressly that the Contracting States shall grant comity to each other:

> "Subject to the public policy of each Contracting State, a Contracting State shall recognise the orders, rulings and judgments issued by courts of competent jurisdiction of other Contracting States that arise out of this Convention and are consistent with this Convention."

This paragraph is intended to assist the parties in obtaining international enforcement of rights and remedies under the Convention.

(French Association of Banks)

130. – The orders provided for under Article 14(1) qualify on the whole to be considered "conservatory", with the exception, however, of sale and lease, referred to in Article 14(1)(c). This raises the question as to whether it is necessary to authorise the judge to order these last two measures pending final determination of the claim.

(Professor Kessedjian)

131. – Article 14 creates various problems for me, each one relatively different from the other. In general, it lists the orders which would seem *a priori* to be able to be considered as "mesures conservatoires ou provisoires" (measures of conservation or provisional relief). On the other hand, this list includes measures which may in no way be either provisional or for purposes of conservation, such as sale or the application of the proceeds or income of the object. The "mixed" character of the measures listed makes it more difficult to assess the attributions of jurisdiction made in the text.

Re Article 14(1)

(Professor Mooney and Mr Whalen)

132. – The fourth line probably should refer to "one or more of the following orders."

(Finance & Leasing Association)

133. – We would question the need to include in sub-paragraph (c) an order for the "sale or lease of the object", with the exception perhaps of a short-term lease. We see the rationale of this clause as being preservation of the *status quo* pending final determination of the claim, and

sale of the asset would be inconsistent with that aim. We would also question the reference to "and its value", in sub-paragraph (a) of Article 14(1). We would agree with preservation of the object, but would question how you might preserve its value, as most assets naturally depreciate.

Re Article 14(1)(a)

(Leaseurope)

134. – The term "la conservation du bien" employed in the French text of this provision should be replaced by the words "mesures de conservation" so as to avoid the idea of everlastingness which is carried - in the French language, at least - by the word "conservation".

Re Article 14(1)(c)

(Leaseurope)

135. – Is the sale referred to here really legally feasible "pending final determination of [the] claim"? It should also be borne in mind that a finance lessor, bound by the promise of sale, cannot legally sell to a third party prior to termination of the agreement.

Re Article 14(2)

(Mr Kouvshinov)

136. – The expression in Article 14(2) "a court of a Contracting State has jurisdiction to grant judicial relief ... where the object is within the territory of that State or one of the parties has its place of business within that territory" seems not to be satisfactory concerning an outer-space object which for a long period of time is not within the territory of any State.

(Professor Kessedjian)

137. – Moreover, the question arises whether the jurisdiction rule contained in Article 14 (2) should be left in this Article or whether, on the contrary, it should be moved to Chapter IX designed to contain other possible jurisdiction rules in the light of what will be decided in due course.

Re Article 14(3)

(Professor Kessedjian)

138. – Once again, in Article 14(3), one does not know to what the applicable law mentioned here is referring. It seems to me that on this occasion it cannot be the law applicable to the interests. However, if, contrary to what I think, it really is the intention of the drafters to refer to the law applicable to the interest, than this provision could in certain aspects be quite revolutionary. In fact, what would happen if the competent court as defined in paragraph 2 of this Article finds itself obliged to order a form of relief which is not known to its law but which is known to the law applicable to the interest? At the present time, in the present State of the rules of private international law governing matters of jurisdiction and provisional relief, such a case has not yet being tested.

Re Article 14(4)

(Professor Mooney and Mr Whalen)

139. – Paragraph 4 adds a useful and important right for the parties. However, it probably should be qualified to take account of certain circumstances when its application would be uncertain, such as where a court's taking jurisdiction would violate a fundamental policy of the court as to which the parties agree.

(Electricité de France)

140. – Does the reference to "the courts", on the one hand, mean that there is a general jurisdiction and, on the other hand, lead to the exclusion of the jurisdiction of an arbitral tribunal?

(Professor Kessedjian)

141. – I find it a pity that the principle of freedom of contract is restricted by the provisions of Article 14(4). There would seem to be no reason for imposing this restriction, all the more so when, as here, we are dealing with an essentially commercial law matter where the parties will have acted on an equal footing. Moreover, most legal systems nowadays recognise broad scope for freedom of contract.

Re Article 14(5)

(Professor Kessedjian)

142. – As regards Article 14(5), whilst I can understand the motive of caution behind the concern of the drafters of the Convention to ensure that the effort made should not be undermined by rules of jurisdiction, I nevertheless find it regrettable that such a rule should exist. Moreover, that is one of the reasons why it might be preferable completely to avoid any rule on conflicts of jurisdiction (concerning, *inter alia,* provisional relief and measures of conservation), since the future Convention will mark a remarkable step forward for international commercial law in respect of the interest without rules of jurisdiction necessarily making it any more attractive. These remarks are without prejudice to what I shall be indicating to you in due course

in the note which I am currently preparing on this question of legislative policy regarding international jurisdiction. It is nevertheless remarkable that the drafters should already have included a rule for provisional relief when there is general agreement that this is one of the most difficult issues for international litigation.

Moreover, should jurisdiction rules be included and, above all, should Article 14 be retained, this Article should be completed by a provision dealing with the extra-territorial effect of the relief ordered.

Re Chapters IV - V: the international registration system

(Professor Mooney and Mr Whalen)

143. – We defer our observations on Chapters IV and V pending further consultation with the members of the Registration Working Group. However, we do note our concern that the approach indicated in Article 16(4) may not be appropriate. We will, however, provide comments of these chapters at the upcoming meeting of the Study Group.

(Dr Davies)

144. – In general it is entirely sensible to move towards an on line system of registration rather than a paper based one. Such an approach is consonant with a world where information technology has come of age and it should give a quicker and potentially more accurate response to filing questions. Furthermore, in the light of the agreement that the Protocol was the best place for defining the different categories of assets encompassed by the future Convention for the purposes of its application, it is probably right to shift the issue of errors in registration including wrongful registration and deletions to the Protocol. Nevertheless, I consider that there should be a requirement included in the body of the proposed Convention itself under Article 20 for the obligor to verify (?in writing) at any time the current amount of the debt. Such an approach would be consistent with Article 20(1), (2) and (3).

(Finance & Leasing Association)

145. – In our view, the whole of the registration process needs to be given careful thought. If there is to be one centrally located International Register, then registrations must be transmitted by instantaneous electronic means. An alternative might be local registers such as those that already exist for ships which have a chosen port of registration. The registration process might then be carried out by instructing a local agent, and local rules would apply to that registration.

In the U.K., we have an established system of registration for company charges, which could conflict with the proposed International Registry. Is it envisaged that national registries will continue in tandem, or that registration in the International Registry will suffice? The principle must be established in the Convention - the detail left to implementation at national level.

(Professor Lando)

146. – I have great admiration for this very scholarly attempt to create a new international institution. If it is realistic to expect adherence to it by the major trading nations - which is necessary - and if it is likely that it will be used by the holders of interests, it deserves to be put into force.

However, it cannot be made simple and an international register may be expensive to establish and to operate. Governments would probably be reluctant to pay the costs of its establishment and operation, and if the users would have to pay, they might only wish to use the system when their interest is considerable, and not even then.

I do not know whether it has been considered to rely on a system of *national* registration of interests in mobile equipment (which many countries have). Each country could then keep its own secured transactions (mortgage, *hypothèque*, retention of title, etc.). This system could be aligned with the registration of purely domestic interests. Only a few basic uniform rules on the international effects of the registration of interests would have to be provided, one of which would be that any national interest first registered would, as a general principle, have priority in all Contracting States. It would also imply a system of mutual recognition of court decisions and decisions of the registering authorities.

In addition holders could have their national interests filed in an International File. Registration in that file would serve as information only and have no other effect.

I am aware that such a system will also create technical problems and that it does not have all the advantages of an international register, but it might be more simple, easier to use and less costly. And the same system could be applied to security interests in other movable property. It might be useful even though it may not be adopted by all the major trading nations.

(Mr Schwartz)

147. – Has anyone expressed any views on whether the *same* international interest could be registered in a non-international registry as well as in the proposed Registry? I could see this being viewed as desirable, for example, in the case of U.S. Flag vessels which have their U.S. First Preferred Ship Mortgages registered with the U.S. Coast Guard. Would it not be helpful to provide for a "belt and braces" approach to a dual registration, provided that conflicts in applicable law would not erode the priority of the international interest?

Re Article 15(1)(c)

(Professor Kessedjian)

148.– I am not sure that the French term "subordination de rang" employed in Article 15(1)(c) is right. It seems to me that the term "rang" ought to be sufficient to the extent that the legal concept of *rang* already carries with it the idea of subordination.

Re Article 15(2)

(Leaseurope)

149. – Regarding the term "discharge" of a registration, should this not be completed, for the purpose of clarification, by the words "total or partial"?

Re Article 15(3)

(COSAB-2)

150. – Throughout the revised Articles, reference is made to "object". We note, however, that Article 15(3) refers to "asset".

(Professor Kessedjian)

151. – Cf. § 18 *supra*.

Re Article 16(1)

(Electricité de France)

152. – The composition of the Intergovernmental Regulator is not indicated sufficiently explicitly.

Re Article 16(1) and (2)

(French Association of Banks)

153. – The putting in place of an organisation both at the international level (Article 16(1)) and at the level of States (Article 16(2)) can only be approved.

Re Article 16(2)

(Ms Fura-Sandström and Ms Hervé)

154. – But the future Contracting States could be reticent to accept this Convention because of the material difficulties to establish the registration system.

The designation of an operator of registration facilities in each respective territory will not be easy according to the competences and status of this operator. For example, which language should be used to transmit the information?

The question of the liability of this operator needs to be approached especially since the system contains more than one level. This intermediary will also increase the delay of registration.

Re Article 16(3)

(French Association of Banks)

155. – There is no explanation as to what is involved in the Regulations referred to in Article 16(3), given that this term is not defined in the Appendix.

Re Article 19

(Professor Kessedjian)

156. – Article 19 does not make it a duty for the registrar to act promptly. Do you envisage such a duty being laid down in the Regulations? If not, Article 19 probably needs to deal with this point.

(Swiss Bankers' Association)

157. – In our opinion, provision should be made for the effects of registration to run as from the date of the communication of the information required for registration (by analogy with Article 972 of the Civil Code). A creditor should not have to bear the risk of a shorter or longer time-lapse between his communication of the registration information and the entry of that information into the data bank. Consideration should be given to the question as to whether certain priority effects should be determined by the point in time at which registration information is communicated.

Re Article 20(1)(d)

(Swiss Bankers' Association)

158. – In addition to the requirement of the chargor's consent, the consent of a junior creditor should also be required where the amendment of the registration would adversely affect that party's interests.

Re Article 20(4)

(Space Working Group)

159. – It appears to the Space Working Group that Article 20(4) permits the chargor to discharge a prospective international interest simply upon notice. This leaves open the possibility that a chargor could discharge the registration immediately before the holder advances value to the chargor, thus misleading the holder. We suggest that the parties should have the freedom to decide the conditions for the granting and discharge of a prospective interest and that the Convention or the Protocol should so provide.

If Article 20(4) is retained in any form, we suggest that at a minimum it empower the applicable Protocol to define the circumstances under which a chargor may discharge a prospective interest.

Re Article 22

(Swiss Bankers' Association)

160. – Where the chargor and the chargee consent in general to registration in the Convention register, the client of a bank will find himself obliged expressly to waive the applicability of the rule providing for the secrecy of banking transactions.

Re Article 22(1)

(Professor Kessedjian)

161. – In Article 22(1) I am not sure that I have understood the reason why searching of the international register is limited to registered interests when its usefulness would be increased tenfold if the register could also be searched for any information regarding the chargor and also the holder of the interest.

Re Article 24

(Swiss Bankers' Association)

162. – The question arises as to whether the legal concept of "*prima facie* proof" will be interpreted in an internationally uniform manner.

Re Article 26

(COSAB-1)

163. – Cf. § 6 *supra*.

(Finance & Leasing Association)

164. – The question of priority between a registered international interest and an interest which is either unregistered or not registrable under the Convention needs to be given *very* careful thought.

We must be clear as to the priority between interests which have been registered in respect of Contracting States, and those interests which have not been registered for those States who are not contracting parties to the Convention.

How should national courts approach such a dilemma? Are they to ignore an unregistered interest, even though there can be no obligation to register an interest where a State is not a contracting party to the Convention?

If there is to be no obligation to register an international interest, and the suggestion is followed (Article 26(4)) that priority should be determined by the order of creation, then we would question the value of an International Registry. Priority will not be guaranteed by

registration, particularly where there are many, not few, who have chosen not to ratify the Convention.

(Mr Laval)

165. – When considering the question of the possibility of securing future advances granted by a prior creditor and their priority ranking, it is important to determine whether the future Convention covers purely discretionary advances or those granted pursuant to a pre-existing obligation. Only the latter case should be the subject of international protection in the interests of the obligor and third parties, but Alternative A of the revised draft articles fails to spell this out with certainty.

Since the future Convention does not require the amount of the secured financing to be indicated (5), it is quite possible that the loan might already be reimbursed and that it might, in any case, be reimbursed in advance by a subsequent creditor wishing to obtain a first-ranking security interest. Likewise, only knowledge of the financing agreement makes it possible to ascertain the priority ranking granted to future advances. Third parties should be recognised as being entitled to additional information regarding all those matters which may not be gleaned from a search of the register; this entitlement should take two forms:

– first, the registration system would be able to authorise the registration of documents relating to the transaction, annexed to the financing or title reservation statements which establish the international interests (6). Use of information technology procedures should not increase the cost of operating the register. However, in order to avoid any restriction on public access on the ground of business secrecy, this additional registration should be left to the discretion of the parties and made subject to their written authorisation;

– then, the duty to provide the information may be made incumbent on the creditor who has registered his interest. By reason of the private nature of the transaction, the chargee will doubtless not have authority directly to impart additional information to third parties without the obligor's authorisation. In order to overcome any inertia on the part of the prior creditor, sanctions would need to be laid down along the lines of those provided for by national legislation (7).

Re Article 26(1)

(Professor Mooney and Mr Whalen)

166. – Paragraph 1 may be too narrow. A registered interest should also have priority over unregistrable interests (subject to Article 35).

(Swiss Bankers' Association)

167. – It remains in our opinion unclear whether consensual security interests validly created under national law shall or shall not have priority over interests registered in conformity

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(5) Cf. Article 26(2)(A) of the revised draft articles (Study LXXII-Doc.35).

(6) Cf. Recommendation 9.3 of the Aviation Working Group *in* the Memorandum prepared jointly by Airbus Industrie and The Boeing Company (Study LXXII-Doc.16, at p.23).

(7) Cf. for example, in the United States of America, Section 18(5) of Article 9 of the Uniform Commercial Code which provides for the invalidation of the registered creditor's security interest and its removal from the register.

with the Convention. The impression given by the definition of "unregistered interest" and "international interest" is that the Convention takes no position on this point (let us take as an example an aircraft used normally only in Switzerland). It seems to us that a clear rule on this point is required (cf. also *supra*, *re* Article 2 (1)(i)).

Re Article 26(2)

(Swiss Bankers' Association)

168. – We express a preference for Alternative A on the ground that it makes the legal position of the interested creditors clearer.

Re Article 26(2) and (4)

(Professor Mooney and Mr Whalen)

169. – We concur with the Drafting Group's suggestion that the Study Group adopt Alternative A of paragraph 2 and delete sub-paragraph (b) of paragraph (4). We are mindful, of course, that formulations such as Alternative B address legitimate concerns about the ability of the holder of a first-registered interest to "squeeze out" a junior interest-holder by giving new value, even if discretionary and with knowledge of the junior interest. However, this problem is most significant when the first-registered interest is in the nature of a "blanket" or "floating" lien or charge on all or most of a debtor's assets. In the market for financing expensive equipment addressed by the Convention, we believe that junior interest-holders can protect themselves through arrangements for subordination and other inter-creditor agreements.

The Study Group may also wish to delete paragraph 4 in its entirety. As suggested above, paragraph 1 should provide that a consensual interest that is not registrable should be subordinate to a registered interest. This leaves intact, however, the basic rule of Article 7(b)–for a chargor, seller or lessor to create an international interest in the first place it must have the power to do so. If a person has less than full ownership, for example, it cannot convey a greater interest than it has.

(French Association of Banks)

170. – Article 26(2) is put forward in alternative versions, the second of which would seem to be preferable from every point of view. It is essential that the holder of a first registered interest who gives the obligor additional value with knowledge of a subsequent interest in the same asset should only be able to take priority over the holder of the subsequent interest to the extent that such an advance does not exceed the maximum sum secured by the first interest.

In conformity with the preference we have expressed above, it is desirable that the text of Article 26(4), including sub-paragraph (b) thereof, be maintained in its entirety.

Re Article 26(3)

(Dr Davies)

171. – Cf. § 72 *supra*.

(Swiss Bankers' Association)

172. – The significance for the purposes of this rule of security interests created under national law needs to be clarified.

Re Article 27

(Professor Klein)

173. – Cf. § 11 *supra*.

Re Article 27(2)

(Professor Mooney and Mr Whalen)

174. – An Irish lawyer recently pointed out that the definition or explanation of "trustee in bankruptcy" may be too narrow. For example, it may not cover an "examiner" appointed under Irish law. We suggest that the definition be moved to the Appendix with appropriate expansion and elaboration.

Re Article 27(3)

(COSAB-2)

175. – Cf. § 28 *supra*.

Re Article 27(4)

(Professor Mooney and Mr Whalen)

176. – Paragraph 4 preserves the effectiveness of any "special rules of insolvency law." Given the enormous diversity of national insolvency laws, we remain concerned that the exception to paragraph 1 provided by 4 may be too broad. In that connection, we append to these observations a memorandum prepared by the United States delegation to the UNCITRAL Receivables Project Working Group. In our observations submitted in January 1997, we suggested that the Study Group may wish to consider earlier proposals made by that delegation in connection with the Study Group's consideration of Paragraph 4. Alternatively, we suggested, the

Study Group may wish to consider additional rules in the Convention that would override certain national insolvency rules. For example, international interests registered more than a specified number of months before the commencement of a chargor's insolvency proceeding might be protected from invalidation as preferences.

Consider a bankruptcy rule that would subordinate to the rights of the trustee any interest that is non-possessory and that is not registered in a particular registry under local law. The effect of that bankruptcy rule would be to subordinate all international interests arising under the Convention, registered and unregistered alike, unless registration under the local law were effected. We believe that result would be contrary to the goals of the Convention. Ensuring the viability of the international interest in bankruptcy is not merely a detail; it is, perhaps, the single most fundamental role for the Convention.

(COSAB-2)

177. – Article 27(4) seeks to retain the application of "special rules of insolvency law ... applicable to the insolvency of the obligor".

What "special rules of insolvency law" are envisaged? For example, if the local insolvency law applicable to the obligor only secures rights to a creditor "in possession of the object", is it intended that this "rule" override the provisions of Article 26(1)?

There is clearly a need for the term to be specifically defined as to the scope of application, lest it create uncertainty and endless speculation and/or interpretation by the Courts as to its intended meaning.

(Finance & Leasing Association)

178. – The provisions of the Convention will be subject to local insolvency law, whether conflicting with the Convention or not, which will inevitably create uncertainty. This could upset established rights of priority.

This provision is of fundamental importance to the value of the Convention, and will be of crucial importance for the U.K. leasing industry in deciding whether to support U.K. ratification of the Convention, which may entail subsequent amendment of existing U.K. Insolvency Act and Companies Act provisions.

(Mr Schwartz)

179. – I am very concerned regarding the possible effect of Articles 27(4) and 34(2) of the July 1997 draft Convention. The use in these Articles of the language "Nothing in this Article affects any special rules [*sic*] of insolvency law ... applicable to the insolvency of the obligor" creates an exception under U.S. law that swallows entire the rule of Articles 27(1) and 34(1). It is also inconsistent with Article 7(1) of the Unidroit Convention on International Financial Leasing.

The problem, in my view, stems from the fact that rights created by insolvency law in the U.S. are created under two bodies of insolvency law, in contradistinction to most other legal systems. Under our state-law based system, certain legal rights arise by reason of an obligor's becoming insolvent and can be asserted outside formal bankruptcy proceedings. However, when a formal Federal Bankruptcy case is commenced in the U.S., additional rights are created pursuant to rules of U.S. Bankruptcy law which may be asserted in addition to the state law

rights. These rights may well be asserted by persons who, a U.S. Bankruptcy Court may well rule, does not meet the definition of "trustee in bankruptcy" of Article 27(2). Indeed, in my view, a U.S. Bankruptcy Court would probably read the bulk of the Bankruptcy Code into the exception for "special rules of insolvency law", only imposing a limit on a trustee's avoiding powers under Section 544 of the Bankruptcy Code.

If, as I infer from no. 7, p. 6, and no. 91, p. 39, of the July 1996 Report (Study LXXII - Doc. 27) [(8)], the intention was for the proposed Convention not to shield transfers of International Rights made while an obligor is insolvent without reasonable compensation, then the proposed Convention should be more specific such as adding the phrase "outside formal insolvency proceedings" after "insolvency of the obligor" in Article 27(4) and "insolvency of the assignor" in Article 34(2). This does conflict to some extent with the more absolute provision of Article 7(1) of the Unidroit Convention; however, it accords better with the stated intentions of the drafters.

As you are aware, there are state-law doctrines regarding the recharacterisation of lease interests and retention of title arrangements. They are, strictly speaking, not explicit rules triggered by insolvency. It is conceivable that they might be taken into account by a Bankruptcy Court in determining whether an asset belongs to the Bankruptcy estate for purposes of determining whether the estate is insolvent. To that end, such an interpretation by a U.S. Court of Articles 27(4) and 34(2) may conflict with Article 7(1) of the Unidroit Convention. Perhaps the better solution would be explicitly to enumerate the legal exceptions in the same manner as the classes of covered equipment are listed.

In addition, pursuant to 11 U.S.C. § 1129(b), a lender's priority could be challenged and the terms of the Registered Interest rewritten in a "cram down" situation to the extent that this "special rule" of insolvency were deemed to apply.

There are numerous other such examples of proposed Articles 27(4) and 34(2)'s possible application by a U.S. Bankruptcy Court which would severely erode the overall intent of the proposed Convention. I should think that the title reservation agreements and leasing agreements named in Article 2(b) and 2 (c) might also be at risk - such as they were in the *Lykes* case.

Re Chapter VII

(Professor Mooney and Mr Whalen)

180. – At the outset we should note our overarching concern about the approach taken in Chapter VII. In particular, we are concerned that extending the scope of the Convention beyond assignments of interests in order to cover assignments of rights to payment may result in

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(8) As another observation, the use of the word "preferences" in point 91, p. 39, of the July 1996 Report is suceptible to different interpretations. Under U.S. Bankruptcy law, a preference is a constructive fraud as to which the grant of full compensation is not a defence. *See* 11 U.S.C. § 547(b). As I understand the term "preference", for example under English law, there is a requirement of knowledge of the insolvent state of the obligor. This difference was missed as well by the U.S. Supreme Court in *Granfinanciera S.A. v. Nordberg*, 492 U.S. 56(1989). To the extent that an exception is made for a U.S. style preference, an International Interest registered in accordance with proposed Article 19, but not contemporaneously with its grant by an insolvent obligor could be avoided if the registration was made within 90 days of the filing of the obligor's Bankruptcy Petition. Thus the current insecurity of a lender to a U.S. obligor would not be alleviated since it would still have to wait 90 days before being sure that a registration could not be attacked for reasons outside the lender's control.

an unacceptable breadth. We recognise that this approach may be feasible for leases, title reservation agreements and security agreements under which an object secures its own price or an obligation incurred in order to purchase the object. When an object secures an obligation unrelated to the object, however, several problems arise. We have noted some of them below. The problems result in large part because an object could secure various types of obligations that are unrelated to both the object and to one another. We believe that it is important at this stage for discussions to take place among the members of the Study Group and the delegations to the UNCITRAL Receivables Project Working Group. Assignments of receivables play an increasingly important role in financial markets. Efforts to reform the legal regime should proceed with great care. Our comments that follow should be understood in this light.

(Mr Laval)

181. – Even though international interests in aircraft equipment cover a classic security interest, that is a mortgage, a seller's interest under a title reservation agreement and a lessor's interest under a leasing agreement, the future Convention would appear to make their transfer subject to an uniform regimen, whereas under domestic law a distinction would be drawn between the right of ownership and the accessory right *in rem* (9). This result may be achieved by analysing the right of ownership as being used by way of security. Regardless of whether the interest is a right of ownership or a security interest, the chargee is deprived of the material use of the asset. Only the value of the asset is allotted to him in settlement of the debt he is owed. This entitlement to the value of the asset may consequently be transferred in order to secure the debt owed to a third party, at least up to the amount of the original debt and without any modification of the sub-obligor's rights over the charged asset. As a result, interests which originally conferred on their holders a position of exclusivity will, upon their transfer, bring about a situation where there will be concurrently held security interests in the same charged asset and establish an order of priority as between the chargees.

On the other hand, the future Convention tends to dissociate the transfer of secured obligations from their recovery (10) ; the continuing nature of the contractual relationship between the assignor and the debtor, the *intuitu personae* nature of this relationship, possible restrictions in the agreement which is the subject of the assignment, provide justification for the recovery of the assigned debts continuing to be looked after by the assignor. However, the protection that the debtor may expect as a result may appear illusory since the assignor will only act as agent of the assignee.

If the great merit of the future Convention is that it dispenses with the need to seek the consent of the debtor in cases where it might be difficult to obtain the same, the written refusal of the debtor in the agreement which is the subject of the assignment might nevertheless retain a certain effectiveness and not only trigger the contractual liability of the assignor.

Likewise, it may appear paradoxical to validate an assignment of debts without the debtor's consent and even without his being informed thereof and to grant the assignee, in the event of default by the assignor, the contractual remedies drawn from the relationship between assignor and debtor.

(9) Cf. Report by the Unidroit Secretariat on the second session of the Study Group (Study LXXII-Doc.27), §104, at p.45.

(10) Cf. Article 31 *a contrario* of the revised draft articles (Study LXXII-Doc.35).

Re Article 28

(Professor Kessedjian)

182. – Article 28 provides no rule whereby persons other than parties to the assignment may be protected. It is true that the obligor in relation to the interest is protected under Article 31 but other third parties are not.

Should it not be necessary for the validity of an assignment to be made subject to another condition, namely registration in the international register, as provided for in Article 15? This condition of validity could be applicable only *erga omnes* and not *inter partes*.

Re Article 28(2)

(Swiss Bankers' Association)

183. – It should not be possible for national law to require additional conditions to be met for the recognition of a valid assignment (for example, the consent of the chargor, the giving of notice to the chargor, etc.), i.e. the list of conditions set out in this provision should be expressly indicated as being exhaustive (in our opinion, also in view of the chapeau of Article 29(1)).

Re Article 29(1)

(Professor Mooney and Mr Whalen)

184. – We understand that the purpose of paragraph (1)(b) is to cause an assignment of an interest to result as well in the assignment of related rights to payment. Assuming that this is a proper approach, we noted in our earlier observations that the draft should be revised to make clear that the valid assignment of an international interest (*i.e.* the interest in an object) carries with it, automatically, the valid assignment of the obligation secured (*i.e.* the receivable owed by the obligor to the assignor). The current version of Paragraph 1 is an improvement, inasmuch as sub-paragraph (b) provides that the assignment of an interest in the object carries with it "all the rights of the assignor under the agreement creating or providing for the international interest." However, in many, perhaps most, situations the chargor's obligation to pay, and the chargee's right to payment, will not be "rights . . .under the agreement creating or providing for the international interest." Instead, the right to payment often will be under a separate promissory note, loan agreement or other undertaking. Although less typical, it is also possible that some or all of the rights to payment could be reflected in an agreement separate from a leasing agreement or title reservation agreement.

We suggest that paragraph 1 be revised to provide clearly that an assignment of an international interest carries with it all rights to payment secured by or associated with the interest. The Study Group may wish to consider a formulation along the following lines:

1. - An assignment of an international interest made in conformity with the preceding Article transfers to the assignee, to the extent agreed by the parties:

(a) all the rights and priorities of the assignor under this Convention; ~~and~~

(b) all the rights of the assignor to payment or other performance secured by or associated with the international interest[, so far as such rights are assignable under the applicable law]; and

(c) all the rights of the assignor under the agreement creating or providing for the international interest[, so far as such rights are assignable under the applicable law].

Finally, we suggest that the Study Group discuss the limitation on the effectiveness of assignments to rights that are assignable under the applicable law. There are good arguments why such limitations on assignability, as well as contractual restrictions that may appear in an agreement to be assigned, should not be enforceable.

Re Article 29(2)

(French Association of Banks)

185. – The means whereby the assigned rights "revest" in the assignor under Article 29(2) need to be spelled out. Is this "revesting" automatic or not?

Re Article 31

(Professor Mooney and Mr Whalen)

186. – Under both current Article 29(1) and the formulation suggested above, an assignee receives only "rights of the assignor." It follows that the obligation of an obligor to pay or render performance to an assignee should be no greater than the obligor obligation to the assignor absent the assignment. Stated otherwise, the assignee's right to enforce payment or performance by the obligor is subject to any defences or offsetting claims that the obligor may have against the assignor under the applicable agreements and the applicable law. The Study Group may wish, however, to make this point clear in an explanatory note or in the text of the Convention itself.

Article 31 provides that an obligor is to pay or render performance to an assignee upon satisfaction of the specified conditions. Conceivably and mistakenly, clause (c) might be read to provide also that once the obligor's obligation to an assignee vests it will not be upset by the obligor's subsequent receipt of *another* notification from *another assignee*, at least if the obligor has "knowledge of any other person's [*i.e.* the first-to-notify assignee's] superior rights." But this will not always be the case. For example, receipt of a mere notification does not necessarily give the obligor "knowledge of . . . superior rights," much less "actual" knowledge. Moreover, the duties

of the obligor to the assignee are conditioned in part on an international interest having been assigned, presumably under Article 29, which governs validity. Therefore, because the first-to-notify assignee may not have registered its assignment or may have registered it subsequent to the registration by the second-to-notify assignee, the first-to-notify assignee's rights will not necessarily be "superior."

The Study Group may wish to clarify the rules applicable to the obligor's duties in the situations envisioned by the preceding paragraph. If Article 31 is interpreted (as we believe it should be) or revised to provide that the obligor is always obligated to the first-to-notify assignee, the foregoing discussion identifies another possible anomaly. The assignee with the senior interest in the right to payment secured by or associated with an international interest will not necessarily have a senior interest in the collections made by the assignee with the junior interest. That is because the scope of the Convention does not extend to "proceeds." Presumably, whether the junior assignee would be entitled to retain the proceeds as against the claims of the senior assignee would be governed by the applicable law. Nevertheless, we suggest that Article 31 be understood to provide that the obligor's duties run only to the first assignee to notify the obligor and to satisfy the other conditions, as well. We suggest that the explanatory notes could make this clear.

Alternatively, the Study Group may wish to abandon the wrongful knowledge requirement in Article 31(c). In its place, the obligor's consent might be required. That approach would also conform with commercial practice.

Re Article 32(1)

(Professor Mooney and Mr Whalen)

187. – We are uncertain how and whether paragraph 1 would be applied to the right to take possession in Article 8(1)(a) and to lease under Article 8(1)(b). The assigned rights are intangibles not capable of being possessed or, it would seem, being leased. The same point can be made concerning Article 14(1)(b) and (c).

Re Article 32(1), chapeau, line 1)

(Swiss Bankers' Association)

188. – The word "assignor" should be replaced by the word "obligor" so that assignments by way of security of obligations owed by third parties are correctly covered.

Re Article 33

(Professor Mooney and Mr Whalen)

189. – Article 33 incorporates by reference the basic first-to-register priority rules of Article 26 when "there are competing assignments of international interests and at least one of the assignments is registered." Article 33 works in tandem with Article 28. Their ultimate goal is to provide an assignor with an effective means to assign, of record, its international interest. The desired result is the assignee's receipt of the international interest, effective against competing assignments of the international interest, together with the right to payment of the obligations

that it secures, the rights to payment under a leasing agreement or the right to payment under a title reservation agreement as the case may be. Article 33 creates a problem, however, because it may be both too narrow and too broad.

Article 33 may be too narrow because it addresses only competing assignments of *international interests* but does not apply directly to competing assignments of *rights to payment* secured by international interests. If an assignee of a right to payment has not received an assignment of an international interest, Article 33 would leave to applicable law the priority contest among competing assignments of the *right to payment.* (11) The interest of a subsequent assignee of a right to payment presumably would be junior to the interest of an earlier assignee of the right to payment under the applicable law, even if the subsequent assignee also received an assignment of the international interest and registered the assignment in the international registry. This analysis shows that assignees of loans secured by an international interest could not, under Article 33, safely ignore the applicable law. A better approach, perhaps, would be to provide explicitly that if an obligation secured by an international interest is assigned the international interest is itself automatically assigned.

This analysis also shows why the reach of Article 33 may be too broad. Assume that an assignee wishes to avoid perceived problems concerning assignments under the local law (e.g. registration, notification to Obligor of the assignment, etc.). The assignee could escape the applicable law entirely by making sure that the loan is secured by at least one object (even a used container of inconsequential value). By registering the security interest in the container and the assignment of the interest to Assignee, they could accomplish an effective assignment of the entire loan.

This overbreadth could also prove a trap for the unwary where cross-collateralization provides that an object secures many different obligations and many other objects secured the same obligations (12). A subsequent assignee of one or more of the obligations would be at risk it if failed to discover an earlier assignment of an international interest securing the various obligations. It could ensure its priority only if it conducted a serial number search in the international registry for every object covered by the Convention that is owned by Obligor. (This problem would be reduced if it were possible to search against the name of the obligor, which would be feasible even in a system in which interests are indexed according to the description of the object.)

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(11) An example may be useful. Assume that Lender extends a large loan to Obligor, secured by an object (say, one container) covered by the Convention. The amount of the loan is many times larger than the value of the object. (In a secured transaction (*i.e.* not a title reservation agreement or a leasing agreement), the obligation that is secured has no necessary relationship to the object that secures it or the value of the object.) Assume next that Lender assigns to Assignee its right to payment of the loan. Assignee takes the necessary steps under the applicable law to ensure that the assignment is effective against Lender's creditors and any subsequent assignee, but it takes no steps with respect to the international interest in the container (indeed, Assignee may not even know that the loan is secured by the container, may not care (even if it does know) and may assume that it is unsecured). If, under the applicable law, Assignee does not automatically receive Lender's rights in the *international interest* as a result of the assignment to it of the *right to payment*, then Article 33 would not apply.

(12) Consider another example. A promissory note given by Obligor evidences a loan made by Lender that is secured by object A, which is an object covered by the Convention. Another note is secured by object B, and another by object C. Each loan is made under a separate agreement that does not reference the others, except that each provides that the object securing it also secures "all other existing and future obligations of Obligor to Lender." Lender then assigns to Assignee the note and an assignment of the international interest in object A. Under Article 28, the assignee would have a valid and effective assignment of the right to payment under the note *and also the notes secured by Objects B and C.*

It would be possible to address the overbreadth problem in order to protect third parties who could not know about or conveniently investigate the international interests or for an assignee that knows about one international interest securing the obligations but not of others, would be to adjust and limit the priority rule of Article 33. Priority of the assignee's interest could be limited to a priority with respect to (i) all recoveries of value in connection with enforcement of the assigned international interest against the object and (ii) all payments actually made by the obligor to and collected by the assignee. Otherwise applicable law would apply to other priority contests. Alternatively, the scope of Chapter VII could be limited to title retention agreements, purchase money interests (which would require a new defined term) and leases.

Note that these problems do not exist (or are not as serious) in the cases of title reservation agreements (as well as other purchase money transactions) and leasing agreements. In those cases, the right to payment that is to be assigned necessarily relates to the purchase or lease of a specific object and a prospective assignee is in a position to search the international registry to determine if there has been a previous assignment relating to the international interest in that object. However, it is possible to imagine some analogous problems in the case of master leases with numerous schedules assigned to different assignees.

Re Article 34(2)

(Professor Mooney and Mr Whalen)

190. – See our comments above concerning Article 27(4), which are equally applicable here.

(Mr Schwartz)

191. – Cf. § 179 *supra.*

Re Article 35

(Professor Klein)

192. – Cf. § 11 *supra.*

(Mr Laval)

193. – The distinction between the legal and the economic ownership of the charged asset should be taken into consideration for the application of liens. Finance lessors and sellers under title reservation agreements must be enabled by their right of ownership, where enforceable, to escape application of the *pari passu* rule with creditors of the user. By authorising registration of liens to secure payment for services rendered in respect of charged assets, the future Convention deals with the problem of limiting liens but refrains from dealing with that of service debts of an user who is not the owner. Doubtless creditors who have dealt with the user knowing that he was a lessee are excluded [13]. On the other hand, service debts may arise at a

[13] By basing itself on the concept of services rendered in respect of an asset rather than that of debts arising out of the operation of the asset, current in the maritime law field (cf. the International Convention on Maritime Liens and Mortgages, adopted in Geneva on 6 May 1993), the future Convention is aiming at a narrower criterion which leads to the exclusion of creditors such as the seller and suppliers who have dealt with the user.

time when the creditor is not in a position to assess how ownership rights are split [14]. Unifying the rules governing international interests militates in favour of an uniform application of liens.

(Professor Stoufflet)

194. – This provision creates no problem for me. Rather it brings to mind a question concerning the regimen to be applied to security interests over movables falling within the sphere of application of the Convention once it has entered into force.

Is the international interest referred to in Article 1(2)(a) an entirely new security interest, distinct from the conventional security interests recognised under the different national laws, or, as it would appear, can an interest created under national law be recognised as an international interest where, on the one hand, it falls within the sphere of application of the Convention and where, on the other hand, the terms of Article 7 were complied with at the time of its constitution? Nothing then would stand in the way of such an interest being registered.

Re Article 35(1)

(Professor Mooney and Mr Whalen)

195. – We are unsure why eligibility for status as a registrable non-consensual interest should be limited to interests arising out of judicial enforcement or the rendering of services. For example, tax liens would not appear to qualify. Giving paragraph 1 the broadest possible scope might encourage States to utilise it to reduce the problem of secret, unpublicised liens.

Re Article 35(2)

(Professor Mooney and Mr Whalen)

196. – Paragraph 2 is important. Some Contracting States may find it useful to provide a narrow and circumscribed listing of non-consensual priority claims with a view to improving opportunities for obtaining needed financing. That approach might not be necessary or feasible for other Contracting States. Paragraph 2 does not makes it clear that a declaration thereunder could be general (and it could be interpreted to the contrary). Stated otherwise, we believe that a general description in an instrument deposited under paragraph 2 should be sufficient, *without the need to specify each particular local law interest that the State wishes to include.* For example, the following declaration should be sufficient to provide maximum preservation of a State's priority structure for non-consensual interests.

> [State X] hereby declares that all non-consensual interests in [YY objects] are preferred non-consensual interests that, without registration, have priority over registered international interests, if and to the extent that the preferred non-consensual interests:
>
> (i) arise under the laws of [State X] or any political sub-division thereof; and
>
> (ii) without any act of publication have priority under such laws over a registered interest of the same type as the international interest.

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[14] For example, fuel suppliers and those creditors owed airport taxes.

(Civil Aviation Authority)

197. – I agree that the matter of the relationship between preferred national creditors and holders of international interests should be removed from the priority rules to Chapter VIII.

Re Chapter IX - Jurisdiction

(Mr Kouvshinov)

198. – One of the main ideas of the Convention is the establishment of the *centralised* International Register providing for *an uniform system* of registration of international interests in mobile equipment. However, proceeding from the provisions of Articles 12, 14 and 16, the attitude to jurisdiction seems to be rather *"decentralised" and not very uniform*: as per Article 12(4) "court" is understood as a State court or an administrative or arbitral tribunal specified by any Contracting State; as per Article 14 interim judicial relief shall be granted by a court of a Contracting State, whilst a trial may take place in a court of another Contracting State, and as per Article 16(5) in different Protocols different adjudicators shall be designated with the power to review acts and omissions of the Registrar.

In this connection it seems important to use the concept of an *uniform attitude to jurisdiction* as realised, for example, in the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States,* which provides for the creation of the *International Centre for Settlement of Investment Disputes* (in Washington D.C.). The jurisdiction of the Centre is elaborated upon in that Convention as extending to any legal dispute arising out of any investment transaction, which the parties to the dispute *consent in writing* to submit to the Centre.

The practice of the settlement of disputes and discrepancies arising out of international commercial transactions testifies to the fact that *arbitration proceedings are in general more speedy, effective and economical* than those of State courts.

By analogy with the above-mentioned Convention the following provisions (given in a form of preliminary and approximate wording only) can be included in Chapter IX "Jurisdiction" (with appropriate changes to Articles 12, 14, 16 and others):

"[CHAPTER IX - JURISDICTION

Article 36

1.– There is hereby established the International Centre for Settlement of Disputes Arising out of or in Connection with the Implementation of the Convention on International Interests in Mobile Equipment, Protocols to this Convention and the Regulations of the Intergovernmental Regulator (hereinafter the Centre).

2.– The jurisdiction of the Centre shall extend to any legal dispute:

(a) between holders of international interests [and registered registrable national interests];

(b) between such holders and the Registrar on acts and omissions of the latter alleged to be in contravention of this Convention, the Protocol or the Regulations mentioned in paragraph 1 [; and

(c) claims for the granting of speedy relief under Article 14.]

The Centre shall provide facilities for conciliation and arbitration in respect of such disputes. When the parties have given their consent in writing, no party may withdraw its consent unilaterally.

3.– The seat of the Centre shall be at the seat of the International Institute for the Unification of Private Law (hereinafter called Unidroit). [The seat may be moved to another place by decision of the Governing Council of Unidroit adopted by a majority of two-thirds of the members of that Council.]

4.– *Alternative A*: [The Secretariat of Unidroit shall perform the functions of the Secretariat of the Centre and shall maintain a Panel of Conciliators and a Panel of Arbitrators.]

Alternative B: [The Governing Council of Unidroit shall establish the Secretariat of the Centre. The Secretariat of the Centre shall maintain a Panel of Conciliators and a Panel of Arbitrators.]

5.– The Governing Council of Unidroit shall:

(a) adopt the Administrative and Financial Regulations of the Centre;

(b) adopt the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings;

(c) adopt the Rules of Procedure for Conciliation and Arbitration Proceedings;

(d) *Alternative A:* [approve the use of the Unidroit Secretariat's administrative services as the Secretariat of the Centre;]
Alternative B: [approve the use of administrative services of the Secretariat of the Centre;]

(e) *Alternative A:* [determine the conditions of service of the Deputy Secretary-General of Unidroit - Chairman of the Centre and the Centre's staff;]

Alternative B: [determine the conditions of service of the Chairman of the Centre and the Centre's staff;]

(f) adopt the annual budget of income and expenditure of the Centre;

(g) approve the annual report on the operation of the Centre.

Article 37

1.– The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

2.– Each Contracting State may designate to each Panel [four] persons who may but need not be nationals of such State.

3.– Persons designated to serve on the Panels shall be persons of high moral quality and recognised competence in the field of law, industry and finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

4.– Panel members shall serve for a renewable period of [five] years.

5.– In the case of death or the resignation of a Member of a Panel, the Contracting State which designated the member shall have the right to designate another person to serve for the remainder of the member's term.

6.– A person may serve on both Panels.

7.– All designations shall be notified to the Deputy Secretary-General of Unidroit - Chairman of the Centre [to the Chairman of the Centre] and take effect from the date on which the notification is received.

Article 38

The Centre as an integral part of Unidroit enjoys the latter's full international legal personality, immunities and privileges.

Article 39

Any Contracting State may, at the time of ratification, acceptance or approval of this Convention and the Protocol to this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre and the latter shall transmit such notification to all Contracting States. Such notification does not constitute the consent required by Article 36(2).

Article 40

The consent of the parties to arbitration under Article 36(2) shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition for submitting disputes to the jurisdiction of the Centre.]"

Re Chapters IX, X and XI

(Professor Mooney and Mr Whalen)

199. – We believe that the Study Group should discuss how and when these three Chapters are to be prepared. In particular, given the scope of the draft Convention, Chapter X may be difficult to address and a preliminary discussion may be particularly worthwhile.

Re Definitions

(Mr Kouvshinov)

200. – The definition of "associated rights" (or "proprietary rights") in the Appendix does not need the word "control" because in countries with a continental system of law the classic formula of rights to ownership, possession, disposal and use covers control.

A definition of "Regulations" is missing from the Appendix.

(Space Working Group)

201. – The Space Working Group respectfully requests that the Definitions include a definition of "space property". If it is the intention of the Drafting Group to delegate the definition of "space property" to the Space Protocol, then that is an acceptable alternative. The text of that definition follows, together with the appropriate comments:

"Space property" means:

(1) any object that is or is intended to be launched or otherwise placed in space, even if returned from space; provided, however, that such an object does not become "space property" until it is in space;

(2) all physical equipment forming an identifiable part of the space property or attached to or contained within the space property;

(3) to the extent permissible and assignable under otherwise applicable law, all permits, licences, approvals and authorisations granted or issued by a national or international agency or authority to control, use and operate the space property;

(4) all intangible rights necessary to control, operate and transfer ownership of or rights in the space property;

(5) all contracts and contractual rights relating to the manufacture, launch, operation, control and tracking of the space property;

(6) all proceeds and revenues derived from the space property. For the purposes of this sub-paragraph, "proceeds" and "revenues" mean whatever is received upon the sale, lease, use, operation, licencing, exchange or disposition of space property, including without limitation insurance proceeds.

Comments

Paragraph (1) describes objects that are or are "intended" to be located in space. Thus, the interest of the holder may be registered even if the object has not yet been launched. The

interest itself does not come into full effect until the object is in space. Once in space, the object becomes space property, and it retains that characterisation even if it is eventually returned to Earth (as in the case of a reusable space vehicle or an orbiting satellite or other space equipment that is retrieved and returned to the surface of the Earth by a reusable space vehicle or otherwise).

We recognise that the boundary of air and space remains undefined as a matter of international law. Although we would like to propose an arbitrary boundary between air and space, we recognise that this is still a fundamental issue of State sovereignty. Some within the Space Working Group suggested further consideration should be given to proposing a boundary that applies solely in the context of this Convention and that would not affect any other treaties or Conventions.

The broad language of paragraph (1) means that this registry is not limited to orbiting satellites. It also covers interests in manned objects and in space property not in orbit around the Earth.

Paragraph 2 is intended to cover not only the entire space object but also items such as transponders or component parts.

Paragraph 3 is intended to cover a broad range of governmental permits and authorisations, which are a central component of the value of space property. These permits and authorisations include the right to use specific radio frequencies and orbital positions.

Note, however, that if the governmental or regulatory agency issuing the permits or authorisations has prohibited the transfer or assignment of those rights, the registration of an international interest will not supersede that prohibition. This is very important: we do not intend to impair or affect the sovereignty of any Contracting State.

Under Paragraph 4, we have tentatively decided to include intangible rights appurtenant to the space property. We recognise that many such intangibles are already covered by existing registration laws. However, those intangible rights are central to the value of space property, unlike almost any other kind of equipment. We are particularly concerned about technology needed for the telemetry, tracking and control of the space property.

Paragraph 5 covers all contractual rights connected with the space property, whether arising before or after launch. Although the property does not become “space property” until it is in space, many agreements entered into before launch are relevant thereafter. For example, satellite purchase agreements often contain warranties that are valuable in the event of a post-launch malfunction.

Paragraph 6 includes the proceeds and revenues received (or to be received) by the chargor. The Space Working Group suggests that proceeds and revenues be covered by the registry because the insolvency laws of many nations will not recognise a financier's right to those proceeds and revenues, unless the financier has a properly registered interest in those proceeds and revenues. Especially in the context of satellite finance, those proceeds and revenues may be the most easily available “space property” that the financier can reach to satisfy an unpaid debt.

We recognise that this definition of proceeds and revenues is very broad, and we are concerned about interfering with existing registration laws currently governing ground-based proceeds and revenues. This issue will require additional discussion and consideration.

We also recognise that the Unidroit Study Group is opposed to including accounts receivable and proceeds within the scope of the Convention. We believe that those revenue streams are a very important part of the value of "space property", since the equipment itself cannot be easily possessed (unlike almost any other type of equipment).

It is our experience that many other asset-based registration systems have successfully included within their scope revenues derived from specific assets, such as rents from land. It is true that whenever an asset-based registration scheme includes a revenue stream, any subsequent purchaser of that stream must make inquiry into their source or their provenance. In the case of space property, however, the sources of those revenues are discreet and are easily determined.

We recognise that the issue of proceeds and other intangibles may affect the acceptability of the Space Protocol by the Contracting States, and we are willing to take that risk at this time. We do not believe, however, that this issue will affect the acceptability of the overall Convention.

The Space Working Group respectfully requests, therefore, that (1) given the unique needs of the space industry, and (2) given the ease with which other parties may verify that the intangibles in question are derived from space property, the Unidroit Study Group permit the Space Working Group to include intangibles within the definition of "space property", solely for the purposes of the Space Protocol.

(Electricité de France)

202. – We would propose that the list of definitions should feature in Chapter I of the Convention. In addition, to this list might be added definitions of "court" and "trustee in bankruptcy" so as to make the Convention clearer.

(Swiss Bankers' Association)

203. – (h) "obligor"

This concept should also cover the case of security granted by third parties (in particular, a third party pledge and assignments by way of security of obligations owed by third parties); this definition needs therefore to be expanded accordingly.

Additional Matters

(Professor Mooney and Mr Whalen)

204. – In reviewing a working draft of the Aircraft Equipment Protocol we noted several areas of treatment that are not necessarily aircraft-specific and that might be considered for inclusion in the draft Convention. These include (i) an explicit reference in the text to the interpretive note or notes; (ii) provisions contemplating that agents, trustees and other representatives can be obligors, chargees, lessors and sellers; (iii) the right to export an object as a remedy following default; (iv) provision for the written consent of an obligor to an assignment prior to the assignment and without identification of the assignee; (v) provision for the validity of waivers of sovereign immunity; (vi) the irrelevance of characterisation of a transaction under the Convention for other purposes of applicable law, such as taxation or tort liability; (vii) the basis for determining a court's jurisdiction and (viii) validation of a choice of applicable law by the parties.

General concluding remarks

(Leaseurope)

205. – Leaseurope generally finds itself wondering whether this future Convention will ever be able effectively to be put into operation: the cost involved in running the proposed registry efficiently would seem to be very high. What is more, for the Convention to be genuinely meaningful, it will need to be adopted by a majority of legal systems, and therefore by a majority of States. The Federation likewise expresses its reservations regarding the extent to which the future Convention may be considered to be representative in view of the intense lobbying carried out by aviation interests.

(Ms Fura-Sandström and Ms Hervé)

206. – In conclusion, this ambitious project, once adopted, could be very useful in view of the complexity of the issues involved in the international financing of high value mobile equipment but it seems that the registration system will be established with difficulty.

(Professor Lando)

207. – There can be no doubt that this field of the law needs harmonisation. I wish the Study Group all the support it will need.

APPENDIX

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RECEIVABLES FINANCING

Revised articles of draft Convention on Assignment in Receivables Financing

Note by the Secretariat

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INTRODUCTION

1. At the current 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 fourth 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 (New York, 14-25 July 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 dreports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the 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-fifth session (New York, 8-19 July 1996), the Working Group considered a note prepared by the Secretariat, which contained provisions on a variety of issues, including form and content of assignment, rights and obligations of the assignor, the assignee, the debtor and other third parties, subsequent assignments and conflict-of-laws issues (A/CN.9/WG.II/WP.87). At that session, the Working Group decided to continue its work on the assumption that the text being prepared would take the form of a convention (A/CN.9/432, para. 28).

6. At its twenty-sixth session (Vienna, 11-22 November 1996), the deliberations of the Working Group were based on newly revised articles of the draft Convention prepared by the Secretariat (A/CN.9/WG.II/WP.89). At that session, the Working Group had before it a note by the Secretariat containing comments submitted by the Permanent Bureau of the Hague Conference on International Private Law on the conflict-of-laws provisions of the draft Convention (A/CN.9/WG.II/WP.90). Having exhausted the time available for deliberations at that session, the Working Group decided that conflict-of-laws issues should be addressed at the beginning of the current session on the basis of a revised draft of the conflict-of-laws rules contained in document A/CN.9/WG.II/WP.87 (A/CN.9/434, para. 262).

7. This note sets forth a revised version of the draft Convention, reflecting the deliberations and decisions of the Working Group thus far. In addition, it includes an annex dealing with registration, which has been prepared by the Secretariat pursuant to a request by the Working Group (A/CN.9/432, para. 251). Additions and modifications to the text are indicated by underlining.

DRAFT CONVENTION ON ASSIGNMENT

IN RECEIVABLES FINANCING

References: A/CN.9/434, para. 14 (26th session, 1996)

Remarks

1. In its present formulation, the title suggests that the scope of the draft Convention is narrower than it actually is (the term "receivables financing" does not appear in draft article 1, it only appears in the title of and the preamble to the draft Convention, as well as in draft articles 5(4) and 15(3); the terms "assignment" and "receivable" have been defined broadly in draft articles 2 and 3; and the list of exclusions in draft article 4 has been kept short).

2. Should the Working Group decide to cover only financing transactions, the term "receivables financing" in the title should be retained, and the terms "assignment" and "receivable" should be defined in a narrower way (for a discussion on scope, see remarks to draft article 1).

* * *

PREAMBLE

The Contracting States,

Considering that international trade cooperation on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

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

Have agreed as follows:

References: A/CN.9/434, paras. 15-16 (26th session, 1996)

CHAPTER I. SCOPE OF APPLICATION

Article 1 [1(1)]. [(4)] Scope of application

(1) This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this Chapter:

(a) if, [at the time of the assignment,] the assignor and the assignee have their places of business in a Contracting State; or

(b) if the rules of private international law lead to the application of the law of a Contracting State.

[(2) The provisions of articles 26 to 28 apply [to assignments of international receivables and to international assignments of receivables as defined in this Chapter] independently of paragraph (1) of this article.]

References: A/CN.9/434, paras. 17-25 (26th session, 1996)

A/CN.9/432, paras. 14-18 and 29-32 (25th session, 1996)

A/CN.9/420, paras. 19-25 and 30-31 (24th session, 1995)

Remarks

I. Substantive scope of application

1. The Working Group's approach thus far has been that, while the focus of the draft Convention should be on assignments made in order to secure financing and other related services, other types of assignment might be covered as well (A/CN.9/432, paras. 66 and A/CN.9/434, para. 43). The Working Group may wish to review that approach. An attempt to cover assignments beyond receivables financing could be seen as an objectionable wholesale reform of all assignment law and compromise the acceptability of the draft Convention to States. In addition, such an approach would require the preparation of specific rules to address the needs of particular practices (e.g., a registration approach would not be suitable for assignments of tort receivables, deposit accounts or insurance policies; a different rule on no-assignment clauses might be required in refinancing transactions; further examples are given below).

Tort receivables

2. In order to reflect a tentative decision made by the Working Group at its previous session to cover tort receivables (A/CN.9/434, paras. 74 and 81), the text of the draft Convention refers in several places to "the agreement or the court order" confirming a tort receivable (this limitation is due to the fact that, in the absence of such a confirmation, a tort receivable arising from an illegal act is of no value for financing purposes). In a number of articles, a specific rule is introduced with regard to tort receivables (e.g., draft article 5(2) dealing with the time at which a receivable might be deemed to arise, draft article 12(b) dealing with the time of transfer of future receivables, draft article 12(1)(c) limiting the representations of the assignor as to the absence of any defences on the part of the debtor to the assignment of contractual receivables). As to the modification of the original receivable, draft article 21 would need to be revised in order to cover it (see remark 3 to draft article 21).

3. In addition, a specific rule would need to be devised in order to address the problem of conflicting rights in tort receivables. Insurers having paid a claim and looking for reimbursement through their insured's tort receivable may be prejudiced, if other financiers could obtain priority by way of registration. In addition, a provision giving priority to the first assignee to register, if applied to tort receivables, might impair settlement in which all parties involved in a tort are supposed to participate (this is particularly so if the registration would operate to establish a priority right even with regard to a future tort receivable).

Insurance policies

4. Statutes providing for a registration system usually exclude the assignment of receivables arising under insurance policies, leaving priority disputes to other law. Such an approach is considered to be desirable, since insurers maintain records of title and claims to policies and, therefore, there is no need for another registry of these interests. However, insurance money

payable as compensation for collateral damaged or destroyed (which would include insurance proceeds) are covered by those statutes as proceeds of collateral. Whether the insurer, having paid the person with a right in the proceeds, acquires the rights of the insured against the tortfeasor by subrogation is left to other law. Should the Working Group decide to adopt a registration system in dealing with conflicting claims, it may wish to reconsider its decision to cover the assignment of insurance premiums or to develop a different priority rule for such assignments.

5. As to life insurance policies, it might be argued that if the assignment by the policy owner were to be further facilitated, the main purpose of such policies, i.e. to provide the beneficiaries a substitute for support, might be frustrated. In addition, insurance policies could be inadvertently assigned in case of an assignment of all present and future receivables of the policy owner ("omnibus clause"). As to term insurance, it may be argued that there is no real advantage in facilitating their assignment. The policy would have no present value for the assignee. In addition, facilitating such assignments may expose the assignor to abuse (e.g., if the policy owner-assignor is unable to buy additional insurance at an affordable price due to advancing age or illness or injury, the assignee may try to induce the assignor to provide security out of other assets, perhaps at great cost to the assignor, its unsecured creditors and dependants).

Deposit accounts

6. Covering the assignments of deposit accounts might lead to undesirable results for the banking sector. For example, the depositary institution, which is the debtor in the context of a deposit account, may not wish to have to pay to anyone else other than the depositor. In addition, separate provisions would need to be developed with regard to a number of matters, e.g., discharge of the debtor, defences and set-offs, the right of the depositary institution to dispose of the funds in the account and conflicts of priority (between assignees of the deposit account and between the depositary institution and the assignee).

Conclusion

7. In view of the above, it may be more realistic in terms of what can be achieved within a reasonable period of time to focus on the main receivables financing transactions (e.g., those involving receivables arising from the provision of goods and services, including financing-related services). If the draft Convention becomes so successful that it would be desirable to cover additional types of receivables, this could be done in the context of a revision of the draft Convention that would include the preparation of additional provisions addressing particular needs of certain practices.

II. Territorial scope of application

8. The Working Group may wish to review its decision that both the assignor and the assignee need to have their places of business in a Contracting State (A/CN.9/434, para. 23). At the previous session of the Working Group, the concern was expressed that requiring the assignee to be located in a Contracting State would both unnecessarily limit and create uncertainty as to the scope of application of the draft Convention (A/CN.9/434, paras. 123, 127, 134 and 192).

A third disadvantage of the present formulation of draft article 1(1)(a) is that an assignor, located in a Contracting State the law of which does not allow the assignment of future receivables, would not be able to benefit from the draft Convention simply because the assignee is not located in a Contracting State.

9. As to the argument that the assignee should be in a Contracting State since the draft Convention addresses the relationship between the assignor and the assignee, it might need to be considered in the light of the fact that the only provisions dealing with that relationship (i.e. draft articles 15 and 16) are non-mandatory provisions (with the exception of draft article 15(1), which, however, is of no consequence for the rights of the assignee as against the assignor).

10. Moreover, even with an expanded scope, to the extent that the draft Convention affects the rights of the debtor, it cannot change the otherwise applicable law, unless the debtor is located in a Contracting State (e.g., only the type of notification prescribed by the law of the State in which the debtor is located will trigger its obligation to pay the assignee instead of the assignor; see remark 1 to draft article 7).

III. Conflict of laws

11. Under paragraph (1)(b), the draft Convention would be applicable if the law governing the assignment, or the law governing the receivable (e.g., the contract from which the receivable arises), or the law governing a particular relationship (e.g., the law governing insolvency) is the law of a Contracting State. The Working Group may wish to consider requiring instead that both the original contract and the contract of assignment are governed by the law of a Contracting State (see article 2(1)(b) of the UNIDROIT Convention on International Factoring, hereinafter referred to as "the Factoring Convention").

12. Paragraph (2) is modelled on article 1(3) of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, hereinafter referred to as "the Guarantee and Standby Convention". It is intended to extend the scope of application of the conflict-of- laws rules of the draft Convention to cover assignments, irrespective of whether they are connected to a Contracting State or not. Such an approach may be justified, should the Working Group decide to harmonize the conflict-of-laws rules on assignment and not to formulate gap-filling rules (see remark 1 to draft article 26).

* * *

Article 2 [3(1) and (3)]. Assignment of receivables

(1) For the purposes of this Convention, "assignment" means the transfer by agreement from one party ("assignor") to another party ("assignee") of its right to payment of a monetary sum ("receivable") owed by another party ("debtor") in return for value, credit or related services given or promised by the assignee to the assignor.

(2) "Assignment" includes the transfer of receivables by way of security for indebtedness or other obligation, or by any other way, including subrogation by agreement, novation or pledge

of receivables.

References: A/CN.9/434, paras. 62-70 and 72-77 (26th session, 1996)
A/CN.9/432, paras. 40-49 and 53-69 (25th session, 1996)
A/CN.9/420, paras. 33-43 and 53-69 (24th session, 1995)

Remarks

1. Draft article 2, which is intended to function as a scope provision, contains a brief, basic definition of "assignment", "receivable", "assignor", "assignee" and "debtor". Under the modified definition of "assignment", the explicit exclusion of gratuitous assignments, automatic assignments by operation of law and assignments of contracts in draft article 4 is unnecessary. No reference is made in paragraph (2) to absolute assignments, since such assignments are intended to be covered by the definition of assignment contained in paragraph (1), and paragraph (2) merely states a rule of interpretation.

2. The Working Group may wish to consider whether the definition of "assignment" is adequate so that the draft Convention validates both the transfer and the agreement to transfer (in some legal systems the invalidity of the agreement may invalidate the transfer, while in other legal systems the invalidity of the agreement may give rise to a claim against the assignee based on the principle of unjust enrichment).

* * *

Article 3 [1(2)]. Internationality

(1) A receivable is international if, at the time it arises, the places of business of the assignor and the debtor are in different States. An assignment is international if, at the time it is made, the places of business of the assignor and the assignee are in different States.

(2) For the purposes of this Convention:
(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract [or other agreement or court order giving rise to the assigned receivable];
(b) if a party does not have a place of business, reference is to be made to its [registered office or]habitual residence.

References: A/CN.9/434, paras. 26-33 (26th session, 1996)
A/CN.9/432, paras. 19-25 (25th session, 1996)
A/CN.9/420, paras. 26-29 (24th session, 1995)

Remarks

1. Under the definition of internationality contained in paragraph (1) of draft article 3, the draft Convention will apply to the following situations: the assignor is in country A, the

assignee is in country B and the debtor is in country C (international assignment of international receivables); the assignor and the assignee are in country A and the debtor is in country B (domestic assignment of international receivables); and the assignor and the debtor are in country A and the assignee is in country B (international assignment of domestic receivables).

2. The term "relevant contract" in paragraph (2) means the assignment, in case of an internationality-test relating to the assignment, and the original contract, in case of an internationality-test relating to the receivable. The words within square brackets are intended to address situations in which tort receivables are involved.

3. In order to enhance certainty and predictability as to the application of the draft Convention, the reference to the circumstances known to or contemplated by the parties, as a criterion to be used in the "closest relationship" test, has been deleted from paragraph (2) (such an approach is followed in article 1(4)(a) of the UNCITRAL Model Law on International Commercial Arbitration). It should be noted, however, that in case a contract is negotiated by the branch office of a large corporation located in country A, concluded by another branch office in country B, while payments are made by yet another branch office in country C, it may be difficult to determine which is the place with the closest relationship to that contract.

4. The Working Group may wish to consider the following additional questions: whether a receivable owed by several debtors or to several assignors would be international, even if only one debtor or only one assignor is located in a country other than the country in which the other party to the transaction is located; and whether an assignment, in which several assignors or several assignees are involved, would be international, even if only one assignor and one assignee are located in different countries.

5. The reference to the "registered office" is intended to cover legal entities registered in one place and doing business in a number of other places (e.g., post-office box companies). It was drawn from article 12(4) of the draft UNCITRAL Model Legislative Provisions on Cross-border Insolvency (annex to A/CN.9/435).

* * *

Article 4 [2]. Exclusions

This Convention does not apply to assignments made:
(a) for personal, family or household purposes;
(b) solely by endorsement or delivery of a negotiable instrument;
(c) as part of the sale, or change in the ownership or the legal status, of a business out of which the assigned receivables arose.

References: A/CN.9/434, paras. 42-61 (26th session, 1996)
A/CN.9/432, paras. 17 and 62-66 (25th session, 1996)

* * *

CHAPTER II. GENERAL PROVISIONS

Article 5 [3 and 15(1)]. Definitions and rules of interpretation

For the purposes of this Convention:

(1) "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises.

(2) A receivable is deemed to arise at the time when the original contract is concluded [or, in the absence of an original contract, at the time when it is confirmed in an agreement between the creditor and the debtor or in a court order].

(3) "Future receivable" means a receivable that might arise after the conclusion of the assignment.

[(4) "Receivables financing" means any transaction in which value, credit or related services are provided for value in the form of receivables. "Receivables financing" includes, but is not limited to, factoring, forfaiting, securitization, project financing and refinancing.]

(5) "Writing" means any form of communication that [preserves a complete record of the information contained therein] [is accessible so as to be usable for subsequent reference] and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

(6) "Notification of the assignment" means a statement informing the debtor that an assignment has taken place.

(7) "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized to administer the reorganization or liquidation of the assignor's assets.

(8) "Priority" means the right of a party to receive payment in preference to another party.

(9) Priority with regard to the receivables includes priority with regard to cash received upon collection or other disposition of the receivables, provided that the cash may be identified as proceeds of the receivables.

References: A/CN.9/434, paras. 70-72, 75-76, 78-85, 166-194 and 244 (26th session, 1996)
A/CN.9/432, paras. 40-72 (25th session, 1996)
A/CN.9/420, para. 44 (24th session, 1995)

Remarks

1. In paragraph (5), alternative language, drawn from article 6 of the UNCITRAL Model Law on Electronic Commerce, has been added within square brackets for the consideration of the Working Group. It is intended to ensure that assignments made by way of electronic means of communication would be covered by the draft Convention. The definitions set forth in

paragraph (7) and in draft article 24 are drawn from article 2 of the draft UNCITRAL Model Legislative Provisions on Cross-border Insolvency (annex to A/CN.9/435).

2. Priority under the draft Convention means that a party may satisfy its claim in preference to other claimants, under the implicit conditions that there is a valid assignment as between the assignor and the assignee and that the assignee has extended credit to the assignor. In draft article 11, it is provided that an assignment is effective as of the time it is made, but such effectiveness should not prejudice the rights of several assignees of the same receivables, the insolvency administrator and the assignor's creditors. Draft articles 23 and 24 specify further that, after the establishment of an appropriate registration system, the first assignee to register has priority among several assignees and that the assignee has priority over the insolvency administrator and the assignor's creditors if the assignment and registration take place before the opening of the insolvency proceeding or attachment, unless a State adopting the draft Convention declares that it will not be bound by the registration provisions.

3. The exact meaning of priority depends on whether an absolute assignment or an assignment by way of security is involved, a matter not addressed in the draft Convention but left to the parties and other applicable law. In case of an absolute assignment, priority means that the assignee obtains payment and does not need to account or return to the assignor any remaining balance. As a result, other assignees are left only with a remedy against the assignor. In case of an assignment by way of security, the assignee obtaining payment first has to turn over to the assignor, or the assignee next in line of priority, any remaining balance. Again, if there is nothing left after the assignee with priority satisfies its claim, other assignees may have recourse only against other assets of the assignor as unsecured creditors.

4. In draft article 23, it is implied that several assignments of the same receivables may be valid. The Working Group may wish to express that idea explicitly, since in some legal systems after the first assignment the assignor has nothing more to assign ("nemo dat quod non habet"). As a matter of drafting, the Working Group may wish to refer, rather than to the effectiveness of an assignment and priority, to the validity of an assignment as between the parties thereto and its effectiveness as against the debtor and other parties.

5. Paragraph (9) is intended to achieve that the party with priority as to the receivables would have priority as to their identifiable cash proceeds. It is supplemented by draft article 11(3) providing that the assignee would have a right to claim identifiable cash proceeds of receivables. If the right in the receivables does not extend to their proceeds, it is of little value. On the other hand, some types of proceeds (non-cash proceeds or cash proceeds that are not identifiable) may be better left to other law, since they raise complicated problems that might not lend themselves to unification. The Working Group may wish to define cash proceeds as "including money, checks, deposit accounts and the like".

* * *

Article 6. Party autonomy

(1) As between the assignor and the assignee, articles [...] may be excluded or varied by agreement.

(2) As between the assignor and the debtor, articles [...] may be excluded or varied by agreement.

[(3) Nothing in this Convention invalidates an assignment which is valid under rules other than the provisions of this Convention].

References: A/CN.9/434, paras. 35-41 (26th session, 1996)
A/CN.9/432, paras. 33-38 (25th session, 1996)

Remarks

1. Draft article 6 is based on the assumption that: the assignor and the assignee should not be able to exclude or vary the provisions dealing with the protection of the debtor or the rights of third parties such as other assignees, the insolvency administrator and the assignor's creditors; and that the assignor and the debtor should not be able to exclude or vary the provisions dealing with the rights of such third parties.

2. The Working Group may wish to address the question whether the parties may exclude the relevant provisions of the draft Convention only explicitly, or whether they may do so implicitly as well, e.g., by choosing the law of a non-Contracting State (a choice, which under draft article 6 in its present formulation would not result in the exclusion of the rules dealing with the rights of third parties). In addition, should the Working Group prefer to allow parties to exclude the draft Convention as a whole, the question might need to be addressed whether the draft Convention may apply, under paragraph (1)(b), only if the parties had not excluded its application explicitly (this approach is followed in article 1(1)(b) of the Guarantee and Standby Convention).

3. Paragraph (3) is intended to recognize the contractual freedom of the parties to conclude an assignment and to make explicit that one of the goals of the draft Convention is to validate assignments that might be invalid under other applicable law and not to invalidate assignments that are otherwise valid (the conflict between a Convention and a non-Convention assignee is addressed in draft article 23(4)).

* * *

Article 7 [4]. Debtor's protection

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

(2) Nothing in this Convention affects the debtor's right to pay in the currency and in the country specified in the payment terms contained in the original contract [or in any other agreement or court order giving rise to the assigned receivable].

References: A/CN.9/434, paras. 86-94 (26th session, 1996)

A/CN.9/432, paras. 87-92 and 244 (25th session, 1996)
A/CN.9/420, para. 101 (24th session, 1995)

Remarks

1. Paragraph (1) has been revised in view of the fact that the draft Convention may effect a number of changes to the legal status of the debtor, including: the validity of an assignment in breach of a no-assignment clause (draft article 13); a change in the way the debtor may discharge its obligation (draft article 18); the inability of the debtor to raise against the assignee defences or rights of set-off that it could raise against the assignor for breach of a no-assignment clause (draft article 19(3)); the limitation of the debtor's right to modify the original contract after notification (draft article 20(2)); the ability of the debtor to agree not to raise certain defences (draft article 21); and the inability of the debtor to recover from the assignee payments made despite the fact that the assignor may have failed to earn the assigned receivables by performance (draft article 22). An additional change may be that, in financing transactions with a floating interest, the assignee acquires the right to set the new rate and the debtor may be faced with an unexpected rate. In view of the above, the Working Group may wish to reconsider the question whether the debtor needs to be in a Contracting State for the draft Convention to apply to the rights and obligations of the debtor.

2. Paragraph (2) is intended to ensure that the debtor will not be required to pay in a different country or currency from the one that was initially envisaged. Such a provision is necessary, since, under draft article 18(2), after notification the debtor is discharged by paying in accordance with the instructions set forth in the notification.

* * *

Article 8 [6]. Principles of interpretation

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

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

References: A/CN.9/434, paras. 100-101 (26th session, 1996)
A/CN.9/432, paras. 76-81 (25th session, 1996)
A/CN.9/420, para. 190 (24th session, 1995)

* * *

Article 9 [5]. International obligations of the Contracting State

Variant A

(1) [Subject to paragraph (2) of this article,] this Convention does not prevail over any international convention [or other multilateral or bilateral agreement] which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.

(2) If an international convention [or other international or bilateral agreement] contains a provision similar to that contained in paragraph (1) of this article, this Convention prevails.

Variant B

This Convention prevails over any international convention [or other multilateral or bilateral agreement] which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention, unless a Contracting State makes a declaration under article 29.

References: A/CN.9/434, paras. 96-99 (26th session, 1996)
A/CN.9/432, paras. 73-75 (25th session, 1996)
A/CN.9/420, para. 23 (24th session, 1995)

Remarks

Under variant A, the draft Convention doe not prevail, except in case of a "negative conflict" between two conventions, i.e. a situation in which two conventions may give precedence to each other, as a result of which it may not be clear which one applies. Under variant B, the draft Convention prevails, unless a State makes a declaration to the contrary listing the international agreements to which it will give precedence (the question of the effect of a determination made by a State in violation of its international obligations would need to be addressed). The Working Group may wish to combine variants A and B in a rule providing that the draft Convention would not prevail unless the requirements of variant A or B were met.

* * *

CHAPTER III. FORM AND EFFECT OF ASSIGNMENT

Article 10 [7]. Form of assignment

(1) An assignment [in a form other than in writing is not effective, unless it is effected pursuant to a contract between the assignor and the assignee which is in writing] [shall be evidenced by writing].

(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.

References: A/CN.9/434, paras. 102-106 (26th session, 1996)
A/CN.9/432, paras. 82-86 (25th session, 1996)
A/CN.9/420, paras. 75-79 (24th session, 1995)

Remarks

Under the first set of bracketed language in paragraph (1), writing would be a condition of the validity of the assignment. The underlined language is intended to ensure that one writing is sufficient (which is important in view of the fact that stamp duty would have to be paid). Under the second set of bracketed language, writing is not a condition of validity but serves evidentiary purposes (this may include a list of receivables with the signature of the assignor, or the financing contract document). Such an approach would address the problem of post-default fraudulent behaviour by the assignor disputing, in collusion with one of several assignees, the assignor's creditors or the insolvency administrator, that an assignment has taken place. In addition, it would be consistent with the approach taken in draft article 6(3) that the draft Convention should not invalidate assignments that may be valid under other applicable law.

* * *

Article 11 [9]. Effect of assignment

(1) [Without prejudice to the rights of several assignees obtaining the same receivables from the same assignor, the insolvency administrator and the assignor's creditors:]
(a) an assignment of receivables that are specified individually is effective to transfer the receivables to which it relates;
(b) an assignment of receivables that are not specified individually is effective to transfer receivables that 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 timewhen the receivables arise.

(2) An assignment may relate to existing or future, one or more, receivables, and to parts of or undivided interests in receivables.

(3) An assignment of receivables is effective to transfer the rights to cash received upon collection or other disposition of receivables, provided that the cash may be identified as proceeds of the receivables.

References: A/CN.9/434, paras. 66-67, 113, 126 (26th session, 1996)
A/CN.9/432, paras. 101-108 (25th session, 1996)
A/CN.9/420, paras. 45-56 (24th session, 1995)

Remarks

The opening words of paragraph (1) are intended to ensure that, while the assignment is effective as of the time it is made, the rights of several assignees of the same receivables, the

insolvency administrator and the assignor's creditors should not be prejudiced (in that priority may be based on time of registration; see draft articles 23 and 24).

* * *

Article 12 [8]. Time of transfer of receivables

[Without prejudice to the rights of the insolvency administrator and the assignor's creditors:]
(a) a receivable arising up to the time of the assignment is transferred at the time of the assignment; and
(b) a future receivable is deemed to be transferred [at the time agreed upon between the assignor and the assignee and, in the absence of such agreement,] at the time of the assignment [or, in the case of a receivable arising from an agreement other than the original contract or from a court order, at the time when it [arises] [becomes payable]].

References: A/CN.9/434, paras. 108 and 115-122 (26th session, 1996)
A/CN.9/432, paras. 109-112 (25th session, 1996)
A/CN.9/420, paras. 57-60 (24th session, 1995)

Remarks

1. Under draft article 12(a) in combination with draft article 5(2), a receivable is transferred at the time of the assignment, if the contract or other legal act from which it might arise exists at the time of assignment. The opening words may be retained if the Working Group wishes to preserve the rights of an insolvency administrator or the assignor's creditors with regard to existing receivables that have not been fully earned by performance at the time of the opening of the insolvency proceeding or attachment (draft article 12(a)) or with regard to receivables that have not arisen at that time (draft article 12(b)). Draft article 12(b) reflects a decision taken by the Working Group at its previous session (A/CN.9/434, para. 121). By establishing the rule that a receivable may be transferred even before it comes into existence, draft article 12(b) is aimed at establishing certainty as to the rights of the assignee and at facilitating the use by the assignor of its future receivables for financing purposes.

2. In order to enhance certainty and uniformity, the Working Group may wish to specify the exact time of assignment (the time of assignment is referred to in draft articles 15(1)(c) and 23-24). On the assumption that the Working Group decides that the assignment must be in writing, one approach might be to provide that the time of assignment is the time referred to in the assignment document. However, such an approach might create the risk of fraudulent behaviour of the assignor in collusion with the assignee (or one of the assignees) at the detriment of the insolvency administrator or the assignor's creditors (or other assignees).

* * *

Article 13 [10]. Agreements limiting the assignor's right to assign

(1) A receivable is transferred to the assignee notwithstanding any agreement between the assignor and the debtor 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 to the debtor in respect of an assignment made in breach of an agreement limiting in any way the assignor's right to assign its receivables, but the assignee is not liable to the debtor for such a breach.

References: A/CN.9/434, paras. 128-133 and 135-136 (26th session, 1996)
A/CN.9/432, paras. 113-126 (25th session, 1996)
A/CN.9/420, paras. 61-68 (24th session, 1995)

Remarks

1. The Working Group may wish to consider whether: the borrower in a syndicated bank loan may preclude the lenders from assigning the loan to a competitor of the borrower (which would not be a true assignment but a part of a take-over scheme); the assignor may preclude the assignee from assigning the receivables further (a no-assignment clause in the assignment); the assignee may preclude a subsequent assignee from assigning the receivables further (a no-assignment clause in a refinancing contract).

2. In addition, the Working Group may wish to consider whether a different approach is warranted in case the debtor is a State by providing, for example, that the assignment is effective for all purposes, but the State-debtor may discharge its obligation by paying the assignor. In such a case, if payment is made to the assignor, the assignee could still prevail over the assignor's creditors and the insolvency administrator with regard to the proceeds of the receivables.

* * *

Article 14 [11]. Transfer of security rights

(1) Unless otherwise provided by law or by agreement between the assignor and the assignee, any personal or property rights securing payment of the assigned receivables are transferred to the assignee without a new act of transfer.

(2) Without prejudice to the rights of parties in possession of the goods, a right securing payment of the assigned receivables is transferred to the assignee, notwithstanding any agreement between the assignor and the debtor, or the person granting the security right, limiting in any way the assignor's right to assign such a security right.

(3) 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 security rights.

References: A/CN.9/434, paras. 138-147 (26th session, 1996)
A/CN.9/432, paras. 127-130 (25th session, 1996)
A/CN.9/420, paras. 69-74 (24th session, 1995)

Remarks

1. Paragraph (2) has been prepared by the Secretariat in order to address concerns expressed at the previous session of the Working Group (A/CN.9/434, paras. 143-145). It is intended to reflect the decision of the Working Group that: the transfer of security rights should be effective despite agreements between the assignor and the debtor restricting their transferability; and that the transfer of those security rights should not prejudice the rights of the guarantor/issuer of an independent undertaking or a party who is in possession of the goods (A/CN.9/434, para. 146).

2. Paragraph (2) does not refer to independent undertakings, since the rule in paragraph (1) cannot apply to such undertakings for the reason that they are not "security rights" and are normally not transferred automatically. Should the Working Group decide to extend the application of the rule in paragraph (1) to independent guarantees and stand-by letters of credit, a reference should be added in paragraph (1), e.g., to "supporting rights", while in paragraph (2) it should be ensured that such a transfer of "supporting rights" does not prejudice the rights of a guarantor/issuer of an independent undertaking (that would need to be defined, possibly along the lines of article 3 of the Guarantee and Standby Convention).

* * *

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section I. Assignor and assignee

Article 15 [12]. Rights and obligations of the assignor and the assignee

(1) Subject to the provisions of this Convention, the rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

(2) The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices which they have established between themselves.

(3) In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, to have impliedly made applicable to the assignment a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to the particular receivables financing practice.

References: A/CN.9/434, paras. 148-151 (26th session, 1996)
A/CN.9/432, paras. 131-144 (25th session, 1996)
A/CN.9/420, paras. 73, 81 and 95 (24th session, 1995)

Remarks

The Working Group may wish to merge paragraph (1) into draft article 11(1) and to delete paragraphs (2) and (3). Paragraph (2) may not be necessary, since parties may, in any case, agree to be bound by usages or not to be bound by practices established between themselves.

Paragraph (3) may introduce uncertainty since there does not seem to be a distinct body of usages on receivables financing practices.

* * *

Article 16 [13]. Representations of the assignor

(1) Unless otherwise agreed between the assignor and the assignee, the assignor represents that:
(a) notwithstanding an agreement between the assignor and the assignee limiting in any way the assignor's rights to assign its receivables, the assignor has, at the time of assignment, the right to assign the receivable;
(b) the assignor has not [neither] previously assigned [, nor will later assign,] the receivable to another assignee; and
(c) the debtor does not have, at the time of assignment, any defences or rights of set-offs arising from the original contract or any other agreement with the assignor, other than those specified in the assignment.

(2) Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the financial ability to pay.

References: A/CN.9/434, paras. 152-161 (26th session, 1996)
A/CN.9/432, paras. 145-158 (25th session, 1996)
A/CN.9/420, paras. 80-88 (24th session, 1995)

Remarks

1. In the context of its discussion on paragraph (1)(b), the Working Group may wish to consider the question whether a representation of the assignor that it will not assign the same receivables again should be retained in a default rule such as draft article 16. Normally, such "negative pledge" types of representations are a matter of negotiation and are undertaken only in the context of specific transactions.

2. Paragraph (1)(c) is intended to limit the representation as to the absence of defences of the debtor to situations involving contractual receivables, since such a representation would not be appropriate in the case of non-contractual receivables. The Working Group may wish to consider whether the representation as to the absence of defences of the debtor should also refer to defences arising after the time of the assignment.

* * *

Article 17 [14, 15]. Notification of the assignment

(1) The assignor and the assignee may agree as to which of them is entitled to notify the debtor and request payment and as to whether payment shall be made to the assignor or the assignee, or that no notification of the assignment shall be given to the debtor. In the absence

of an agreement, both the assignor and the assignee are entitled to notify the debtor and request payment to the assignee.

(2) Notification of the assignment given to the debtor in breach of an agreement under paragraph (1) is effective, but may make the assignee liable to the assignor for breach of contract.

(3) Notification shall be in writing and shall reasonably identify the receivables and the person to whom or for whose account or the address to which the debtor is required to make payment.

(4) Notification of the assignment may relate to receivables arising after notification. [Such notification is effective for a period of five years after the date it is received by the debtor, unless:
(a) otherwise agreed between the assignee and the debtor; or
(b) the notification is renewed in writing during the period of its effectiveness [for a period of five years unless otherwise agreed between the assignee and the debtor.]

References: A/CN.9/434, paras. 162-165 (26th session, 1996)
A/CN.9/432, paras. 159-164 (25th session, 1996)
A/CN.9/420, paras. 89-97 (24th session, 1995)

Remarks

With the exception of the bracketed language in paragraph (4), draft article 17 is intended to reflect the agreement already reached by the Working Group on the issues addressed in this provision. The bracketed language in paragraph (4) is intended to protect the assignor by limiting the types of future receivables in respect of which notification may be given. While financiers may wish to obtain a right in all future receivables, they usually advance credit only on the basis of future receivables that may arise within a limited period of time. On the other hand, introducing such a time limit would place on the assignee and the debtor the burden of having to keep track of the time of effectiveness of notifications, and might increase uncertainty and the cost of credit.

* * *

Section II. Debtor

Article 18 [16]. Debtor's discharge by payment

(1) Until the debtor receives notification of the assignment, it is entitled to discharge its obligation by paying the assignor.

(2) After the debtor receives notification of the assignment, subject to paragraph (5) of this article, it is discharged only by paying in accordance with the payment instructions set forth in the notification.

(3) In case the debtor receives notification of more than one assignment of the same receivables made by the same assignor, the debtor is discharged by paying in accordance with the payment instructions set forth in the first notification.

(4) [In case the debtor receives notification of the assignment from the assignee,] the debtor is entitled to request the assignee to furnish 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, [the writing evidencing assignment or] any [other] writing emanating from the assignor and indicating that the assignment has taken place.

(5) This article does not affect any other ground on which payment by the debtor to the party entitled to payment or to a competent judicial [or non-judicial] body, or to a public deposit funddischarges the debtor.

References: A/CN.9/434, paras. 176-191 (26th session, 1996)
A/CN.9/432, paras. 165-172 and 195-204 (25th session, 1996)
A/CN.9/420, paras. 98-115 and 124-131 (24th session, 1995)

Remarks

1. Draft article 18 is intended to set forth the ways in which the debtor may discharge its obligation by payment. It is not meant to establish an obligation of the debtor to pay, which is left to the contract or other legal relationship between the assignor and the debtor and the law governing that relationship (see A/CN.9/432, paras. 173 and 181). The rule is that up to notification the debtor may discharge its obligation by paying the assignor (it may discharge by paying the assignee, but, in such a case, the debtor exposes itself to the risk of having to pay twice); after notification, discharge is obtained by payment to the assignee or to the person entitled to payment under paragraph (5).

2. Under paragraph (2), the debtor's obligation to pay the assignee or as instructed by the assignee is triggered by the receipt of the notification by the debtor. The assignee bears the burden of ensuring that the notification is received by the debtor and, if something goes wrong (e.g., the assignor undertakes to notify the debtor but fails to do so), the risk of loss may be allocated by agreement between the assignor and the assignee.

* * *

Article 19 [17]. Defences and rights of set-off of the debtor

(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences arising from the original contract [or from any other agreement or court order giving rise to the assigned receivable] of which the debtor could avail itself if such claim were made by the assignor.

(2) The debtor may raise against the assignee any right of set-off arising from contracts between the assignor and the debtor other than the original contract [or any agreement or court

order other than that giving rise to the assigned receivable], provided that they were available to the debtor at the time notification of the assignment was received by the debtor.

(3) Notwithstanding paragraphs (1) and (2), defences and rights of set-off that the debtor could raise pursuant to article 13 against the assignor for breach of agreements limiting in any way the assignor's right to assign its receivables are not available to the debtor against the assignee.

References: A/CN.9/434, paras. 194-204 (26th session, 1996)
A/CN.9/432, paras. 205-209 (25th session, 1996)
A/CN.9/420, paras. 132-151 (24th session, 1995)

Remarks

The Working Group may wish to address the question whether the debtor may raise against the assignee rights of set-off, the basis for which was created before notification, although they may have not been "available" to the debtor at that time (e.g., a reciprocal and similar claim which becomes payable only after notification).

* * *

Article 20 [19]. Agreement not to raise defences and rights of set-off

(1) Without prejudice to [the law governing consumer-protection] [public policy requirements] in the State in which the debtor has its place of business, the debtor may agree with the assignor in writing not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 19.

(2) The following defences may not be waived:
(a) defences arising from fraudulent acts on the part of the assignee or the assignor;
(b) defences based on the debtor's incapacity to incur liability; and
(c) the defence that the debtor has not signed the original contract [or other agreement giving rise to the assigned receivable], that the signature of the debtor has been forged, that the original contract [or other agreement giving rise to the assigned receivable] has been materially altered after the debtor signed it, that the agent who signed the original contract [or other agreement giving rise to the assigned receivable] for the debtor lacked authority to sign or exceeded such authority, or the signatory signed in a capacity other than as a representative of the debtor.

(3) An agreement between the assignor and the debtor not to raise any or certain defences and rights of set-off precludes the debtor from raising against the assignee those defences and rights of set-off.

(4) Such an agreement may only be modified by written agreement. [Subject to article 21, such a modification is effective as against the assignee.]

References: A/CN.9/434, paras. 205-212 (26th session, 1996)

A/CN.9/432, paras. 218-238 (25th session, 1996)
A/CN.9/420, paras. 136-144 (24th session, 1995)

Remarks

The reference to the place of business of the debtor in paragraph (1) should be understood in the light of draft article 3(2)(b) (i.e., if the debtor does not have a place of business, reference is to be made to its registered office or its habitual residence). Paragraph (2) was drawn from article 30(1) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"; see A/CN.9/434, para. 211). The words within square brackets in paragraph (2)(c) are intended to cover agreements whereby disputes arising from torts are settled. The second sentence of paragraph (4) is aimed at protecting the assignee from a modification of an agreement not to raise defences or rights of set-off, which may be agreed upon between the assignor and the debtor without the knowledge of the assignee. The Working Group may wish to consider whether the modification of such an agreement should be subject to the consent of the assignee.

* * *

Article 21 [18]. Modification of the original contract

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

(2) After notification of the assignment, an agreement under paragraph (1) of this article is effective as against the assignee and the assignee acquires corresponding rights, [if it is made in good faith and in accordance with reasonable commercial standards or, in case of a modification relating to a receivable fully earned by performance, it is consented to by the assignee [if the modification is provided for in the assignment or is later consented to by the assignee].

[(3) Paragraphs (1) and (2) of this article do not affect any right of the assignee against the assignor for breach of an agreement between the assignor and the assignee that the assignor will not modify the original contract without the assignee's consent.]

References: A/CN.9/434, paras. 198-204 (26th session, 1996)
A/CN.9/432, paras. 210-217 (25th session, 1996)

Remarks

1. The purpose of draft article 21 is twofold, first to protect the debtor by allowing the debtor to pay under the modified contract, and second to protect the assignee from such modifications and to ensure that the assignee acquires rights under the modified contract. The draft article covers contractual modifications (e.g., a modification of the time of payment or

the amount owed, or an agreement not to raise defences; see also draft article 20(4)), but not modifications by operation of law or resulting from a court decision.

2. Under paragraph (2), a choice needs to be made. Reference to good faith may create some uncertainty, but avoids putting on the parties the burden of having to obtain the consent of the assignee to every little modification of an unperformed contract, a procedure that might be burdensome for the assignee as well.

3. The rule contained in paragraph (1) might well apply to cases in which non-contractual receivables might be modified by agreement. Paragraph (2), however, might not be appropriate in case of non-contractual receivables. In such cases, the consent of the assignee may be required if the modification is in the form of an agreement between the assignor and the debtor, but not if the modification takes the form of a court order.

* * *

Article 22 [20]. Recovery of advances

Without prejudice to [the law governing consumer-protection] [public policy requirements] in the country in which the debtor has its place of business and the debtor's rights under article 19, failure of the assignor to perform the original contract [or other agreement or court order giving rise to the assigned receivable] does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignee.

References: A/CN.9/434, paras. 213-215 (26th session, 1996)
A/CN.9/432, paras. 239-244 (25th session, 1996)
A/CN.9/420, paras. 145-148 (24th session, 1995)

* * *

Section III. Third parties

Remarks

Rule based on registration

1. The Working Group has failed so far to reach agreement on a rule dealing with conflicts of priority. Draft articles 23 and 24, as well as draft articles 1 to 6 of the annex to the draft Convention, constitute an effort to assist the Working Group in resolving this difficult issue. They are based on the assumption that a registration-based approach can provide more certainty and address more adequately conflicts of priority than any other system based on the time of the assignment or of notification of the debtor (no system can provide full certainty; see remark 2 to draft article 6 of the annex).

Interim or alternative rule

2. However, the priority rules of the draft Convention cannot be based on registration in the absence of an appropriate registration system. Therefore, an alternative regime needs to be provided for the intervening period until the establishment of an appropriate registration system, as well as for the period thereafter for those countries that may not wish to adopt a registration-based approach (ultimately, achieving real uniformity would depend on how successful the one or the other system proves to be in practice). Such an interim or alternative regime may be based on the time of the assignment, a conflict-of-laws rule, or no uniform rule at all.

Time-of-assignment rule

3. A priority rule based on the time of the assignment may work well in the context of local markets, in which potential assignees have a way to know assignors sufficiently well and, in addition, to acquire information about the financing transactions that take place through means other than, e.g., a public registry. However, in the context of a global market such an approach would not provide adequate protection to potential assignees, since they would have no other alternative but to rely on representations of the assignor or any other means of obtaining information about domestic financing transactions. In addition, an interim rule based on the time of the assignment would prevent the States that might be interested in a registration-based system from adopting the draft Convention since, until the registration system becomes operational, under a time-of-assignment rule, a prior foreign assignee would prevail over a domestic assignee who has registered under domestic rules.

4. However, the conflict between the assignee and the insolvency administrator or the assignor's creditors may be resolved without reference to registration. If an assignment is effective towards the assignor, it should be effective towards the insolvency administrator and the assignor's creditors. In addition, the element of reliance on the receivables by potential lenders and the need to forewarn them does not exist in case of conflicts with the insolvency administrator or the assignor's creditors. The situation may be different in the case of creditors relying on the receivables when they take legal action against the assignor, but even in that case the potential damage to those creditors as a result of the lack of publicity would be limited to the costs of the legal proceedings (the counter-argument should not be overlooked, namely that insolvency laws may, in principle, be against "secret rights" compromising the equal distribution of assets among creditors).

Conflict-of-laws rule

5. A uniform conflict-of-laws rule may not provide the desired uniformity with regard to the priority rights of assignees, since assignees, depending on the law applicable in each case, would have to follow a different process in order to obtain priority. In particular, a uniform conflict-of-laws rule providing that priority conflicts are governed by the law governing the receivable (e.g., the law governing the contract from which the receivable arises) would not provide the desired degree of certainty (draft article 28(1)). In order to determine the applicable law, the assignee would have to examine the agreement between the assignor and the debtor, and if there is no choice of law clause included in that agreement, the assignee would have to determine, e.g., which is the law with the closest relationship with the contract from which the receivable arises. In addition, as a result of such a rule, receivables arising

from different contracts and assigned in bulk by the same assignor to the same assignee would be governed by different priority rules which would not be acceptable in practice.

6. However, a uniform conflict-of-laws approach would constitute an improvement of the present situation in that the same law would be applicable if a priority dispute were to be brought before the courts of any Contracting State. In particular, a rule, based on the place of business of the assignor or the place where insolvency proceedings are opened, would provide sufficient certainty, since assignees would normally be able to know which is that place at the time of assignment (draft article 28(2) and (3)). It should be noted that the Convention on the Law Applicable to Contractual Obligations, Rome, 1980, hereinafter referred to as the "Rome Convention", does not deal with conflicts of priority (although the view has been expressed that, under article 12(2) of the Rome Convention, the law governing the receivable to which the assignment relates governs some conflicts of priority).

7. After the establishment of an international registration system, draft article 28 could function as a uniform conflict-of-laws rule. If the forum is in a Contracting State, the substantive provisions of the draft Convention would apply, provided that the assignor and the assignee are located in a Contracting State (draft article 1(1)(a)); otherwise, they would apply if the law applicable under draft article 28 is the law of a Contracting State (draft article 1(1)(b)). If the forum is in a non-Contracting State, the substantive provisions of the draft Convention would apply, provided that the conflict-of-laws provisions of the forum (not those of the draft Convention, which the forum does not have to apply since it is in a non-Contracting State) lead to the law of a Contracting State.

No interim or alternative rule

8. A regime based on registration without a substantive or conflict-of-laws rule, as an interim or alternative rule, would fail to provide the desired certainty and predictability with regard to the rights of assignees under the draft Convention. In addition, it would prevent States that might not wish to follow a registration-based approach from adopting the draft Convention.

Notification of the assignment

9. The regime contemplated in the draft Convention sets aside notification of the debtor as a way to determine priority. A priority system based on notification of the debtor could not work in international receivables financing, since, in order to find out whether earlier assignments have been made, assignees would have to contact and rely on information provided by debtors, which, if provided at all, may not be accurate or complete. In bulk assignments involving, e.g., hundreds of debtors in several countries, even if such a procedure were reliable, it would be time-consuming and costly; and if future receivables were involved, such a procedure would not be feasible, since the identity of the debtors would not be known at the time of assignment. In addition, an approach based on notification could not work in non-notification financing transactions (in which the assignment is a matter between the assignor and the assignee and the debtor is not notified).

* * *

Article 23 [22]. Competing rights of several assignees

(1) Until the establishment of a registration system as provided in article 1 of the annex to this Convention, priority among several assignees of the same receivables from the same assignor [is determined on the basis of the time of the assignment] [will be governed by the law determined in accordance with paragraph (1) of article 28].

(2) After the establishment of a registration system as provided in article 1 of the annex to this Convention, priority among several assignees of the same receivables from the same assignor will be governed by paragraphs (3) and (4) of this article. However, if a State makes a declaration under paragraph (1) of article 30, priority will be [determined on the basis of the time of the assignment] [governed by the law determined in accordance with paragraph (1) of article 28].

(3) An assignee who has registered certain information about the assignment under this Convention has priority over another assignee of the same receivables from the same assignor who has registered later or not registered at all. If neither assignee registers, priority is determined on the basis of the time of the assignment.

(4) An assignee asserting priority under the provisions of this Convention has priority over an assignee asserting priority based on grounds other than the provisions of this Convention. However, if the State the law of which is applicable under paragraph (1) of article 28 has made a declaration under paragraph (2) of article 30, priority will be determined on the basis of the time of the assignment.

(5) Notwithstanding the preceding paragraphs of this article, conflicts of priority may be settled by agreement between competing assignees.

References: A/CN.9/434, paras. 238-254 (26th session, 1996)
A/CN.9/432, para. 247-252 (25th session, 1996)

Remarks

1. Draft article 23 deals with conflicts between several assignees of the same receivables from the same assignor (double financing). It is based on the assumption that an assignment made subsequent to the first assignment may be valid, a matter that the Working Group may wish to clarify further.

2. Paragraph (1) is intended to set forth a rule that would apply before the establishment of a registration system for the registration of assignments under the draft Convention. Even after the establishment of such a registration system, the system envisaged in paragraph (1) would apply in case a State declares that it will not be bound by the registration provisions of the draft Convention (see draft article 23(2) and 30(1)). Under the first set of bracketed language, the basis for resolving priority conflicts among several assignees of the same receivables from the same assignor would be the time of assignment, while, under the second set of bracketed language, such conflicts would be governed by the law applicable under draft article 28(1) (should that approach be preferred by the Working Group, paragraph (1) may be merged with the conflict-of-laws rule dealing with conflicts of priority, i.e. draft article 28). Paragraph (2)

is aimed at introducing paragraphs (3) and (4), i.e. the priority regime that would prevail after the establishment of a registration system, unless a State makes a declaration under draft article 30(1). Under paragraph (3), priority conflicts would be resolved on the basis of registration and, in the absence of registration, on the basis of the time of the assignment.

3. Paragraph (4) deals with priority conflicts between a domestic and a foreign assignee of domestic receivables (such conflicts would be covered if both the domestic and the foreign assignee are located in a Contracting State; see draft article 1(1)(a)). Such conflicts could arise if the priority rules of the draft Convention are not identical with those applicable to domestic assignments of domestic receivables. They could also arise if the priority rules of the draft Convention and those of other applicable law require different types of registration (e.g., one requires international and the other requires local registration, although, in such a case, the problem may be addressed by requiring that data registered locally should be transmitted to the international registry; see introductory remark 8 to the registration provisions and remark 5 to draft article 3 of the annex).

4. Granting priority to a Convention assignee over a non-Convention assignee would result in maximum certainty with regard to the rights of Convention-assignees, but could be objectionable to States, since the priority rule of the draft Convention would displace the non-Convention priority rule (this would be the result of the first set of bracketed language in paragraph (1)). The second sentence of paragraph (4) allows Contracting States to "opt out" of the rule contained in the first sentence of paragraph (4). The same result may be achieved through paragraph (2) allowing a State to opt out of the registration provisions of the draft Convention as a whole. Another way to approach this matter might be to leave it to the parties of a domestic assignment of domestic receivables to opt into the priority rule of the draft Convention, e.g., by registering at the international registry.

5. Paragraph (5) is intended to preserve party autonomy in the settlement of priority disputes by allowing competing claimants to settle such disputes by agreement. Such an approach may enhance the chances of the assignor to obtain new financing on the basis of its receivables.

6. The Working Group may wish to address the conflict that might arise between an assignee and a person who extends to the assignor credit secured by a security interest in all the assignor's inventory (or a seller of goods retaining title until full payment of their price). Such a conflict may often arise since the right of the inventory financier may extend to the receivables generated from the sale of the inventory. If priority is given to the inventory financier, assignors whose receivables are created by the sale of inventory will not be able to obtain credit on the basis of those receivables (that would be the result of the first set of bracketed language in paragraph (1)). On the other hand, if priority is given to the first to register, an inventory financier would have to register at the international registry, although the draft Convention would not cover rights in inventory. Such an approach would present the advantage of providing certainty as to the rights of third parties, but also the disadvantage that it would supplant otherwise applicable law. The Working Group may wish to address the conflict that might arise between an assignee and an inventory financier in the same way as a conflict between a domestic and a foreign assignee of domestic receivables.

* *

Article 24 [21, 23 and 24]. Competing rights of assignee and insolvency administrator or creditors of the assignor

(1) Until the establishment of a registration system as provided in article 1 of the annex to this Convention, priority between an assignee and the insolvency administrator or the assignor's creditors will be governed by [paragraph (3) of this article] [the law determined in accordance with paragraphs (2) and (3) of article 28].

(2) After the establishment of a registration system as provided in article 1 of the annex to this Convention, conflicts of priority referred to in paragraph (1) of this article will be governed by paragraph
(4) of this article. However, if a State makes a declaration under paragraph (1) of article 30, priority will be governed by [paragraph (3) of this article] [the law determined in accordance with paragraphs (2) and (3) of article 28].

[(3) An assignee has priority over an insolvency administrator and creditors of the assignor, including creditors attaching the assigned receivables, if:
(a) the receivables [were assigned] [arose] [were earned by performance] before the opening of the insolvency proceeding or attachment; or
(b) the assignee has priority on grounds other than the provisions of this Convention].

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

(5) Except as provided in this article, this Convention does not affect the rights of the insolvency administrator or the rights of the assignor's creditors.

[(6) This Convention does not affect:
(a) any right of creditors of the assignor to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferentialtransfer;
(b) any right of the administrator in the insolvency of the assignor,
(i) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer,
(ii) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the opening of the insolvency proceeding,
(iii) to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract, or
(iv) to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee;
(c) in case the assigned receivables constitute security for indebtedness or other obligations,] any insolvency rules or procedures generally governing the insolvency of the assignor:

(i) permitting the insolvency administrator to encumber the assigned receivables with privileged claims for taxes, wages and similar privileges, provided that the assignee is treated fairly and equitably with other creditors whose receivables may be so encumbered,
(ii) providing for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding;
(iii) permitting substitution of the assigned receivables for new receivables of at least equal value,
(iv) providing for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured, or
(v) other rules and procedures of similar effect and of general application in the insolvency of the assignor [specifically described by a Contracting State in a declaration made at the time of signature, ratification, acceptance, approval of or accession to this Convention.]

(7) An assignee asserting rights under this article has no fewer rights than an assignee asserting rights under other law.]

[(8) For the purposes of this article:
(a) "insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court for the purpose of reorganization or liquidation;
(b) "opening of an insolvency proceeding" is deemed to have taken place when the order opening the proceeding becomes effective, whether or not [final] [subject to appeal]; and
(c) "attachment" is deemed to have taken place when the order attaching the assigned receivables becomes effective, whether or not [final] [subject to appeal].]

References: A/CN.9/434, paras. 255-258 and 216-237 (26th session, 1996)
A/CN.9/432, para. 253-258 and 260 (25th session, 1996)

Remarks

1. Same as in draft article 23, paragraphs (1) and (2) of draft article 24 set forth a priority regime based on a distinction between the time before and the time after the establishment of a registration system under the draft Convention. In paragraph (1), a choice has to be made between a substantive rule based on the time of assignment and a conflict-of-laws rule.

2. In paragraph (3) or (4), whichever is preferred, a decision needs to be made as to whether the time of assignment or the time when the receivables arise or are fully earned by performance needs to be before the opening of the insolvency proceedings or attachment. An approach based on the time of assignment would result in receivables that may not have arisen or not been fully earned by performance before the opening of the insolvency proceedings or before attachment being taken away for the estate of the assignor, a result that might be considered as an undue interference with national law. The assignment of future receivables or not fully earned receivables is ineffective towards the insolvency administrator and the assignor's creditors in many legal systems since it is considered as being a disposition after the opening of the insolvency proceeding or after attachment.

3. Paragraph (5) is based on the assumption that, once the validity of an assignment has been established by the draft Convention, nothing inhibits the insolvency administrator or the assignor's creditors to challenge the assignment on any grounds other than its basic validity. Under paragraph (6), which appears within square brackets for the consideration of the Working Group, certain matters are generally left to national insolvency law (e.g., the rights of the insolvency administrator with regard to post-insolvency future and unearned receivables, and its rights to assign or encumber the assigned receivables in certain circumstances); other matters would be left to national insolvency law only under certain conditions (e.g., if "equal value" is given to the assignee, or if a security assignment is involved). By listing the rights of an insolvency administrator that are not affected by the draft Convention, paragraph (6) may enhance certainty and predictability to the extent that an assignment may not be challenged on grounds other than those listed. On the other hand, to the extent that the list may not be exhaustive, such an approach may result in excluding rights of insolvency administrators currently existing under national insolvency law.

4. Paragraph (7) is intended to reflect the principle of national treatment of a foreign assignee, a principle that was broadly supported at the previous session of the Working Group (A/CN.9.434, para. 234).

* * *

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25 [25]. Subsequent assignments

(1) This Convention applies to international assignments of receivables and to assignments of international receivables by the initial or any other assignee to subsequent assignees, even if the initial assignment is not governed by this Convention.

[(2) A subsequent assignee has the rights afforded by this Convention to an assignee and is subject to the debtor's defences and rights of set-off recognized by this Convention.]

[(3) A receivable assigned by the assignee to a subsequent assignee is transferred notwithstanding any agreement limiting in any way the assignor's right to assign its receivables. Nothing in this article affects any obligation or liability for breach of such an agreement, but the subsequent assignee is not liable for breach of that agreement.]

(4) Notwithstanding that the invalidity of an assignment renders all subsequent assignments invalid, the debtor is entitled to discharge its obligation by paying in accordance with the payment instructions set forth in the first notification.

References: A/CN.9/432, paras. 264-268 (25th session, 1996)
A/CN.9/420, para. 188-195 (24th session, 1996)

* * *

CHAPTER VI. CONFLICT OF LAWS

Article 26. Law applicable to the rights and obligations of the assignor and the assignee

(1) [With the exception of matters which are settled in this Convention,] the [effectiveness] [validity] of an assignment as between the assignor and the assignee and the mutual rights and obligations of the assignor and the assignee are governed by the law [expressly] chosen by the assignor and the assignee.

(2) In the absence of a [valid] choice, the [effectiveness] [validity] of an assignment as between the assignor and the assignee and the mutual rights of the assignor and the assignee are governed by the law of [the country in which the assignor has its place of business] [the country with which the [contract of] assignment is most closely connected].

[(3) Unless the [contract of] assignment is clearly more closely connected with another country, it is deemed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the [contract of] assignment has, at the time of conclusion of the [contract of] assignment, its place of business].

References: A/CN.9/WG.II/WP.87, article 21
A/CN.9/WG.II/WP.90, paras. 4-7 and 15-18
A/CN.9/420, paras. 185-195 (24th session, 1995)

Remarks

1. The Working Group may wish to consider the question of the scope of the conflict-of-laws rules (draft article 1(2)). If these rules are aimed at filling the gaps left in the draft Convention, their scope of application should be limited to the scope of the draft Convention (and, in order to avoid a renvoi sistiation, they should apply only in case the forum is in a Contracting State and not by way of the conflict-of-laws provisions of the forum). If, however, the Working Group prefers to establish a uniform conflict-of-laws regime with regard to assignment, as suggested by the Permanent Bureau of the Hague Conference on Private International Law (A/CN.9/WG.II/WP.90, paras. 4-7), the scope of the conflict-of-laws provisions of the draft Convention should be broader than the scope of the draft Convention (articles 21 and 22 of the Guarantee and Standby Convention constitute a precedence for such an approach).

2. The expression "the mutual rights and obligations of the assignor and the assignee", drawn from the Rome Convention, is intended to cover both the contractual and the proprietary effects of the assignment as between the parties thereto (the term "relationship between the assignor and the assignee may be too broad in that it could cover the financing contract as a whole; while the term "assignment" may be too narrow in that it would not cover the issue of the validity of the assignment, or too broad in that it could cover the effects of assignment towards the debtor).

3. Paragraph (3) is intended to supplement one of the options being offered in paragraph (2) ("the closest relationship" option, which is drawn from the Rome Convention).

* * *

Article 27. Law applicable to the rights and obligations of the assignee and the debtor

[With the exception of matters which are settled in this Convention,] the assignability of a receivable, the right of the assignee to request payment, the debtor's obligation to pay as instructed in the notification of the assignment, the discharge of the debtor and the debtor's defences are governed by the law [governing the receivable to which the assignment relates] [of the country in which the debtor is located].

References: A/CN.9/WG.II/WP.87, article 22
A/CN.9/WG.II/WP.90, paras. 19-20
A/CN.9/420, paras. 197-201 (24th session, 1995)

Remarks

Paragraph (1), following the approach of the Rome Convention, lists the matters covered by draft article 27. Such an approach may be justified, since: the general reference to "the rights and obligations" might create some uncertainty; there is no contractual relationship between the assignee and the debtor; and some issues that might be covered by draft article 27 might not fall under the "relationship" between or the "rights and obligations" of the assignee and the debtor, e.g., the assignability of a receivable, or even priority among several assignees of the same receivables. Such a list of rights and obligations could also include the obligation of the assignee, if any, to notify the debtor (the right of the assignee to notify the debtor might be part of the assignor-assignee relationship).

* * *

Article 28. Law applicable to conflicts of priority

(1) The priority among several assignees obtaining the same receivables from the same assignor is governed by the law [governing the receivable to which the assignment relates] [of the country in which the assignor has its place of business].

(2) The [priority between an assignee and] [the effectiveness of an assignment as against] the insolvency administrator is governed by the law [governing insolvency] [of the country in which the assignor has its place of business].

(3) The [priority between an assignee and] [the effectiveness of an assignment as against] the assignor's creditors is governed by the law of the country in which the assignor has its place of business.

References: A/CN.9/WG.II/WP.87, article 23
A/CN.9/WG.II/WP.90, paras. 21-22
A/CN.9/420, para. 154 (24th session, 1995)

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CHAPTER VII. FINAL CLAUSES

Remarks

In view of the fact that the substantive provisions of the draft Conventions refer to a number of declarations, the Secretariat has prepared a tentative draft of certain final clauses dealing with declaration-related issues. Pending determination of the declarations in the substantive provisions of the draft Convention, draft articles 29 to 31 are aimed at raising the issues that should be addressed rather than resolving them in any final way.
[...]

Article 29. Conflicts with international agreements

A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that the Convention will not prevail over international conventions [or other multilateral or bilateral agreements] listed in the declaration, to which it has or will enter and which contain provisions concerning the matters governed by this Convention.

Article 30. Registration

(1) A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that it will not be bound by the registration provisions of this Convention.
(2) A State may declare, at [the time of signature, ratification, acceptance, approval or accession] [any time], that it will not be bound by paragraph (4) of article 23.

* * *

Article 31. Effect of declaration

(1) Declarations made under article 29 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary.

(4) Any State which makes a declaration under articles 29 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the

<u>first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary</u>.

* * *

Article 32. <u>Reservations</u>

<u>No reservations are permitted except those expressly authorized in this Convention</u>.

* * *

ANNEX

Registration

<u>Meaning and purpose</u>

1. Registration under the draft Convention means the non-mandatory entering into a data base of certain information about the assignment. The purpose of such registration is not to create or evidence property rights, but to protect third parties by putting them on notice about assignments, that have been concluded or will be concluded, and to provide a basis for settling conflicts of priority.

2. With regard to potential assignees, the effect of registration is that they are put on notice as to earlier or
later assignments. The notice gives only enough information for the searcher to be forewarned and thereby enabled to make such further inquiry and take such further action as it deems appropriate under the circumstances. If no transaction is registered, potential lenders may obtain priority by registering (in such a case, however, an earlier assignee, who has not registered, may not be able to obtain payment; for a discussion of the concept of "priority", see remarks 2-4 to draft article 5). If a transaction is registered, they may request more information from their potential borrower or from registered lenders, seek to negotiate with registered lenders a subordination agreement (i.e. an agreement settling priority conflicts), or avoid to provide financing on the basis of the receivables in respect of which an assignment has been registered.

<u>Key features</u>

3. Because of its limited function, and in marked contrast to classic registration, registration under the draft Convention requires the placement on public record of a very limited amount of data, i.e., identification of the assignor and the assignee and a brief non-specific description of the receivables to be covered, which may be existing or future. This means that a single notice can cover a large number of present or future receivables, arising from one or several contracts, as well as a changing body of receivables and a constantly changing amount of secured debt often involved in modern financing ("revolving credit"). In addition, such registration is inexpensive and simple, requires no formalities (such as notarial involvement)

and requires no supervision by the registrar, who performs the non-discretionary service of receiving, archiving and disclosing the data submitted for registration for the appropriate fee.

4. Registration of the entire transaction cannot accommodate the needs of modern financing in that it does not permit the registration of a transaction before the actual transaction has taken place and in that it would require multiple registration for successive transactions between the same parties, which would serve no purpose, burden the registry and entail additional cost. In addition, such registration would raise difficult legal issues, such as authentication.

5. Another key feature of registration under the draft Convention is that the registration process, i.e. the submission of data by the registering party to the registry, the receipt of the data by the registry and the handling of the data by the registry so that the data become available to searchers, would need to be computerized.

6. With regard to the submission of data, two systems could be envisaged, the submission in paper and the submission in electronic form. Submission of data in paper form would require that the data be entered into the data base manually by the registry staff, which would increase the risk of error and the potential liability of the registry. A system that provides for direct electronic data entry, which is easily accommodated by existing telecommunication systems, would eliminate this problem. Either system of data submission could accommodate electronic, remote access, searching.

7. A purely electronic system (electronic data entry and electronic searching) would maximize efficiency and minimize human involvement, thereby permitting speed, availability at all hours, freedom from the risk of data entry error on the part of the registrar (which reduces its potential liability) and reduction in cost of registration. Users could enter data or conduct a search through a simple desktop or even a laptop computer via secure, private communications networks ("Value Added Network" or "VAN"). In order to be able to make the data entered into the registry available to searchers, the registry needs to have software to convert the data entered to the format used by the registry and to archive and index the data.

8. A registration system could be based on an international registry/data base that could be linked to existing national registries. Countries that do not currently have such a registry would not need to establish one; registration could take place directly at the international registry. In countries that do have a registration system compatible with that of the draft Convention, registration could take place through the national registry. Such an approach would require, however, effective coordination between the several registration places, namely that all the data registered locally would be transmitted promptly to the international data base.

* * *

Article 1. Establishment of a registry

At the request of not less than one third of the Contracting States, the depositary shall convene a conference for designating a registry or registries and enacting[, revising or amending] registration regulations for the registration of data about assignments under this Convention.

Remarks

1. In the absence of an international registration system, draft article 1 of the annex provides for a mechanism to trigger the application of the registration provisions of the draft Convention, i.e. the appointment of an organization to act as registry and the preparation of registration regulations by Contracting States (i.e., States in respect of which the draft Convention has entered into force).

2. While the basic principles applying to registration are set out in the text of the draft Convention, the mechanics of the registration process that may need to be amended from time to time to fit changing needs and changing technologies are better dealt with in a separate body of rules, the regulations. Under draft article 1 of the annex, the initial set of regulations would need to be prepared by the Contracting States appointing an organization to act as registry. The Working Group may wish to consider whether the authority to revise or amend the regulations should stay with the Contracting States or be delegated to the registry. Under the draft UNIDROIT Convention on International Interests in Mobile Equipment (hereinafter referred to as "the draft Convention on Mobile Equipment"), the Governing Council of UNIDROIT is to determine the location of and manage the international registry envisaged, as well as promulgate from time to time the regulations necessary for the operation of the registry (UNIDROIT 1996, Study LXXII - Doc. 30, draft article 16(2)).

* * *

Article 2. Duties of the registry

(1) The registry receives data registered under this Convention and the regulations and maintains an index by the name of the assignor [and the registration number] in order to be able to make the data available to searchers upon request.

(2) Upon receipt of data, the registry shall assign a registration number and issue and send to the assignor and the assignee a verification statement in accordance with the regulations.

(3) Upon receiving a search request, the registry shall issue a search result in writing listing all data registered with regard to the receivables of a particular person.

(4) Upon expiration of the period of effectiveness of a registration, or receipt of a notice by the assignee or a court order issued under article 5 of the annex to this Convention, the registrar shall remove data registered from the public records of the registry.

Remarks

1. Draft article 2 of the annex describes in general terms the duties of the registry. The verification statement referred to in paragraph (2) is aimed at allowing the assignor and the assignee to verify that the data entered into the registry correspond with the data that they wished to have entered and to correct any errors.

2. The Working Group may wish to consider the additional questions of court jurisdiction and liability. Registration-related disputes would normally involve priority conflicts between competing parties, or occasionally requests to the courts to issue orders binding on the registry. With regard to priority disputes, they could be left to be resolved by courts having jurisdiction with regard to the parties to such disputes. However, in order to avoid that conflicting orders are addressed to the registry, it may be desirable to have only one court with jurisdiction over the registry (e.g., a court in the country where the registry might be located, although if all that is established is a data base, it might be difficult to determine its "location"). Alternatively, the international registry could be exempted from the jurisdiction of any national court and registration-related disputes could be referred to alternative methods of dispute resolution. The draft Convention on Mobile Equipment vests the international registry with the privileges and immunities of an international organization and exempts it from the jurisdiction of national courts, subject to agreement to the contrary between the registry and the host State (UNIDROIT 1996, Study LXXII - Doc. 30, draft article 16(3)).

3. With regard to the liability of the registry, it should be noted that national registration systems similar to that envisaged by the draft Convention have worked well with and without a liability rule. In jurisdictions in which the registry is liable for errors in the operation of the system, there have been very few liability suits. In some of those jurisdictions, a percentage of the registration fee is directed to a fund, the proceeds of which may be used to pay liability claims. Such an approach is considered as increasing the confidence of the users in the system. However, the risk of errors (and, therefore, the cost of insurance) would be significantly reduced in a fully electronic system, in which the only role of the registrar would be to maintain an operational system.

4. The determination of the issues of jurisdiction and liability depend to some extent on whether a governmental or private organization would run the registry. A governmental organization would normally enjoy sovereign immunity, while a private organization would be subject to the jurisdiction of a court and could be made liable more easily.

* * *

Article 3. Registration

(1) Any person may register data with regard to an assignment at the registry in accordance with this Convention and the registration regulations. The data registered shall include the legal name and address of the assignor and the assignee and a brief description of the assigned receivables.

(2) Registration is effective from the time that the data referred to in paragraph (1) are available to searchers.

(3) Data may be registered before or after an assignment is made.

(4) Data registered may relate to one or more assignments and to receivables not existing at the time of registration.

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

Remarks

1. Following the example of modern national legislation, paragraph (1) limits the information that needs to be entered into the registry to the absolutely necessary for the registration to fulfill its "warning" function (additional identification elements may be provided for in the regulations, e.g., the number given to a company by the company registry or another identification number, the date of birth of a person; "legal name" may be defined in the regulations).

2. The assignor's authorization is not part of the minimum data that need to be registered for the registration to be effective. Authorization is a matter between the parties and does not concern the registry in receiving data. In addition, parties may adequately protect their interests: lenders, by obtaining authorization from the assignor before extending credit; and assignors by demanding that data registered be removed from the public record of the registry (see draft article 5 of the annex; assignors are informed through the verification statement foreseen in draft article 2(2) of the annex). Additional remedies, e.g., for slander of title, may be provided in the draft Convention or left to national law.

3. The Working Group may wish to address the following questions: the effect of a change in the name of the assignor on the effectiveness of registration relating to receivables arising after the change (some statutes provide that the registration remains effective for a certain period of time after the assignee learns of the change of the name and the new name of the assignor); whether an all-encompassing description of the assigned receivables should be sufficient (e.g., "all present and future receivables") or whether a more specific description should be required (e.g., receivables arising in May, or receivables from sales of equipment or from sales to a particular debtor or from x, y, z contracts).

4. An additional question which the Working Group may wish to consider is the effect of a change in the place of business of the assignor with respect to receivables arising after the change. If the assignor's new place of business is in a Contracting State which has not declared that it will not be bound by the registration provisions of the draft Convention, no additional registration may be necessary. However, if the assignor moves to a non-Contracting State, the assignee may need to follow the process prescribed by the law of that State in order to ensure priority (although, under draft article 1(1)(a), the draft Convention is applicable as long as the assignor has its place of business in a Contracting State at the time of assignment, even if subsequently the assignor moves to a non-Contracting State).

5. Normally only assignments with an international element would be entered into the international registry. However, a domestic assignee of domestic receivables should be able to register ("opting into" the priority rules of the draft Convention). In jurisdictions with a registration system, the question might arise whether both local and international registration would be required. Local registration in the jurisdiction in which the assignor is located would sufficiently protect the assignee towards the insolvency administrator. However, for the

assignee to ensure priority towards international assignees, international registration would be required. Problems might be overcome if the two registration systems were linked so that data registered locally would be transmitted to the international data base. In such a case, local registration would amount to international registration (see remark 5 to draft article 23 and introductory remark 8 to the registration provisions).

6. Paragraph (2) provides that registration is effective when the data become available to searchers. In a fully electronic system, the data would become searchable upon receipt by the registry. On the other hand, in case of a paper notice where the data would need to be entered into the data base by the registry staff, the registration would become searchable and, therefore, effective only after the entry of the data in the computerized index. In such a case, the registering party could protect itself from the risk of losing its priority by withholding credit until the registration becomes effective.

7. Under paragraph (3), if A registers and receives an assignment subsequently, A will have priority from the time of registration, not the time of assignment. Such pre-registration is aimed at addressing the time-gap between the time of financing and the time of registration, during which
uncertainty would prevail as to the rights of an assignee towards third parties.

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Article 4. Duration, continuation and amendment of registration

(1) A registration under this Convention is effective [for a period of five years after registration] [for the period of time specified by the registering party].

(2) A registration may be renewed for successive additional periods if it is requested six months before expiry of the period of its effectiveness for an additional period of [five years] [time specified by the registering party].

(3) A registration may be amended at any time during the period of its effectiveness. The amendment is effective from the time it becomes available to searchers.

Remarks

Limiting the duration of the effectiveness of a registration is intended to ensure that the registration system is not over-burdened with data relating to non-existing rights. Often parties are not prepared to promptly cause the removal of data from the record of the registry, in particular if some cost is involved. Paragraph (1) presents two alternatives, one with a fixed time-limit and another, more flexible, that allows the parties to set the time during which a registration would be effective. In the large majority of cases, a 5-year time period might be sufficient. On the other hand, the ability of the parties to "buy" a longer time period ab initiowould lessen the need for registering continuation statements.

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Article 5. Right of the assignor to remove or amend data registered

(1) The assignor may demand in writing that the assignee register a notice removing or amending the data registered. [The assignor shall state explicitly the nature of the action requested and the grounds for its request].

(2) If the assignee fails to comply with such demand within fifteen days of its receipt, the assignor may request a competent court to order that the data registered be removed or amended on the ground that they refer to receivables in which the assignee has no interest or has a different interest.

Remarks

1. Under paragraph (1), the assignor may request from the assignee to cause the removal or amendment of data that are on the public record. If the assignee does not comply with that request, the assignor has to go to court (there is no automatic deregistration). Automatic deregistration would expose the assignee to the risk of losing its priority position, if it does not act to respond to an erroneous or mischievous demand by the assignor. This risk would be even greater in case of a demand made on the eve of insolvency and could affect the cost of credit. On the other hand, in favour of automatic deregistration, it could be argued that placing on the assignee the burden of having to go to court would be more appropriate, since the assignee may register without having to prove authorization by the assignor or that an assignment has taken place.

2. The Working Group may wish specify the court with jurisdiction to issue the order referred to in paragraph (2).

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Article 6. Registry searches

(1) Any person may search the records of the registry and obtain a search result in writing.

(2) A search may be conducted according to the name of the assignor [or the registration number].

[(3) A search result in writing that purports to be issued from the registry is admissible as evidence and is, in the absence of evidence to the contrary, proof of the data to which the search relates, including:
(a) the date and time of registration; and
(b) the order of registration as indicated in the registration number referred to in the written search result.]

Remarks

1. Paragraph (1) provides for a registry open to the public. In practice, a searching party will be either an actual or potential assignee or a third party acting on behalf of an assignee. In order not to exclude new methods of search, no method of search is specified in paragraph (1) (it is left to be addressed in the regulations). Paragraph (2) identifies two search criteria: the name of the assignor and the registration number (the number given to a company by the registry under draft article 2(2) of the annex). A search result may need to match only one of those criteria.

2. A search based on the name of the assignor may not reveal all prior assignments. For example, A (assignee) registers the assignment of receivables owned by B (assignor) after ensuring that B has not already assigned those receivables to someone else; B then assigns the same receivables to C, who will be able to discover the existence of A's rights through a search using B's name. However, if C assigns to D, D will not be able to discover A's rights through a search based on C's name. The significance of this problem should not be exaggerated, since no registration system can provide absolute certainty. In the example given above, D will have to find the name of the initial assignor by relying on representations of its immediate assignor.

3. Another problem is the language to be used for the data entered into the international data base to be reasonably retrievable (in particular for the name of the assignor, since this would be the relevant search criterion). The experience gained at the national level indicates that it would be possible for the international registry to operate, at some cost, in more than one language. This would mean that certain languages would need to be identified as official languages of the registry. The Working Group may wish to consider whether the language problem may be addressed by the use of numbers (e.g., by using the registration number assigned by the registry as an alternative search criterion, or by using a number issued by a company registry or other authority to identify an assignor).

4. Paragraph (3), which appears within square brackets for the consideration of the Working Group, is intended to ensure that once a search result appears to be authentic, it should be admissible as prima facie evidence of the data it contains. However, a party may always challenge the authenticity of a search result. The Working Group may wish to consider whether paragraph (3) is necessary, since the admissibility and evidential value of a search result might be left to be freely evaluated by courts.

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1. 0/ Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1993), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374 to 381.

2. 0/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28 (UNCITRAL Yearbook, vol. XI:1980, part one, II, A).

3. 0/ Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session (1993), Official Records of the General Assembly, Forty-eighth

Session, Supplement No. 17 (A/48/17), paras. 297-301; Report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session (1994), Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

4. 0/ The numbers in square brackets refer to the articles of the previous version of the draft Convention (A/CN.9/WG.II/WP.89).