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Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments and international organizations

Addendum

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I. Introduction

This note reproduces comments on the draft Convention on Assignment of Receivables in International Trade received subsequently to the comments reproduced in documents A/CN.9/490 and Addenda 1 to 4. Further comments will be issued, if possible, as addenda to this note and in the order they are received.

II. Compilation of comments

Canada

[Original: English/French]

Canada submits the following comments on the draft UNCITRAL Convention on the Assignment of Receivables in International Trade. We would stress that the draft Convention is

more likely to be accepted by a large number of States if its main provisions, in particular the priority rules, are simple and easy to understand and to apply. To that end, we would encourage the Commission to consider simplifying the language where possible in the course of its review of the text at the 34th session.

Negotiable instruments (article 4.1 (b)): The current wording of article 4.1 (b) does not fully reflect the policy that the draft Convention should not impair the rights of a person under the special laws applicable to negotiable instruments. On the other hand, this wording might have the unintended result of excluding receivables from the draft Convention merely because they would be evidenced by negotiable instruments, even in instances where there would be no interference with negotiable instrument law. Accordingly, article 4.1 (b) should be replaced by a provision better expressing its underlying policy, such as the following:

> "Nothing in this Convention affects the rights of a person under the **[special]** laws applicable to negotiable instruments."

We also believe that one should not attempt to define "negotiable instrument" or "securities" and that these matters should be left to national law. However, the provisions of the Convention referring to securities should use the term "securities" instead of "investment securities".

In another vein, we do not see a need to deal specifically with transfers of negotiable instruments by entry in the books of a depository. Most of the time, negotiable instruments so indirectly held will be considered as "securities" under domestic laws. The exclusions of articles 4.2 (d) and 4.2 (f) would then apply. On the other hand, one should not exclude transfers of negotiable instruments which are not securities on the sole ground that they are held by a depository, if the transfer does not constitute negotiation under domestic law.

Consumer protection: The policy approved by the Commission with respect to consumer protection issues would be better reflected by a general provision stating that:

> "Nothing in this Convention affects the rights and obligations of the assignor and the debtor under the **[special]** laws governing the protection of **[parties to] [persons in]** transactions made for personal, family or household purposes."

With this new language, the "without prejudice …" proviso of articles 21.1 and 23 would be unnecessary and should be removed. Note that the language above refers to any applicable consumer protection law, and not only to consumer protection law in the state in which the debtor is located.

Time of the assignment (article 10): Previously, certain provisions of the draft Convention referred to the time of the assignment. These provisions were changed to make reference to the conclusion of the contract of assignment (e.g. article 3). We propose the deletion of article 10, which now serves no useful purpose and could create confusion.

Applicable law in territorial units (article 37): The proposed text for article 37 provides a useful clarification for federal States in which matters dealt with by the choice of laws rules of chapters IV and V are not governed by federal laws. However, we question the appropriateness of incorporating for all States the internal conflict rules of the relevant territorial unit. Instead of stating in the draft Convention a rule providing for internal *renvoi*, one might permit a Contracting State that wishes to adopt such a rule to make a declaration to that effect.

Law applicable to the formal validity of assignments (article 8 and possible new provision in chapter V): The Commission has been asked to consider the incorporation in chapter V of a provision along the lines of article 8 which addresses the law applicable to the form of an assignment. We have concerns with the scope of article 8 as currently formulated.

Article 8 refers the formal validity of an assignment to the law of the State in which the

assignor is located, but also preserves the choice of law rules of the forum if those rules would refer formal validity to a different law. In our view, this approach creates a potential conflict with the policy underpinning the choice of law rule in article 24. In the interests of certainty and predictability, article 24 requires the exclusive application of the law of the assignor's location for issues relating to the priority of the assignee's interest. Yet certain requirements which might be characterized as relating to the "formal validity" of an assignment – e.g. notarial or writing or registration requirements – may also be characterized as relating to "priority"; for example, where such requirements constitute pre-conditions under the law of the assignor's location to the effectiveness of the assignment as a property right or to the right of an assignee to claim priority in the assigned receivable against competing claimants. This risk of overlap between articles 8 and 24 means that third parties, including prospective assignees, will be unable to predict whether an assignment which is formally invalid by the law of the assignor's location might still be held valid if the litigation happens to be heard in a state which refers formal validity to a different law with different formality rules.

Our concerns would be resolved if article 8 were limited to the determination of the law applicable to formal validity only insofar as this is relevant to the reciprocal rights and obligations of the assignor and assignee under their contract of assignment. The utility of such a limited choice of law rule is questionable, however, and it may be preferable to simply delete article 8.

Law applicable to the "characteristics and priority" of the right of an assignee in the assigned receivable; meaning of the "characteristics of a right"; definition of "priority" (article 24, para. 1(a), 2; article 5, para. (g) (and corresponding provisions in article 31): We are concerned that the provisions of the draft Convention designating the law applicable to the priority of the assignee's right in the assigned receivable are both opaque and incomplete. The meaning of the current reference to "the characteristics" of the assignee's right in para. 1 (a) of art 24 (and in art. 31) is not self-evident. The attempted clarification in para. 2 is also unclear. We suggest stating simply that the "priority of the assignee's right" against competing claimants is governed by the law of the assignor's location. At the same time, we think that the priority-related issues governed by the law of the assignor's location should be more clearly delineated to explicitly include the following (where relevant to the determination of priority):

(1) the legal nature of the right of the assignee in the assigned receivable (including whether it is a personal or property right, and whether it is an absolute right or a security right);

(2) any steps necessary to render the assignee's right in the assigned receivable effective against competing claimants (perfection); and

(3) the ranking of any person's title or claim to the assigned receivable as against any competing title or claim.

Law applicable to "characteristics and priority" of assignee's and competing claimants' rights in certain categories of proceeds (article 24, paras. 1 (b) and 1 (c) and corresponding provisions in article 31): We have concerns with the retention in the draft Convention of the choice of law rules in paragraphs 1 (b) and 1 (c) of article 24, currently in square brackets (and the corresponding provisions in article 31). These rules designate the law applicable to the "characteristics and priority" of the rights of an assignee or a competing claimant in proceeds of a collected receivable which take the form of negotiable instruments, investment securities held through a securities intermediary, and bank deposits. We do not think it is feasible, in the limited time available to the Commission, to achieve agreement on appropriately refined and internationally acceptable choice of law rules in these areas. We fear that any attempt to do so may endanger the overall acceptability of the Convention. In this connection, we note that assignments of these categories of intangibles were excluded from the Convention: see article 4, para. 1 (b), 2 (e) and (f). It was thought that the development of a uniform international legal regime, including a uniform international choice of law regime for issues of priority, constituted a separate unification project in itself. This consideration applies equally to the designation of the law applicable to priority in the relevant categories of assets when they constitute proceeds of

receivables since the choice of law rules would have to be identical to the rules applicable to the priority of a right in such assets acquired by an assignee under a direct assignment.

We would therefore prefer to replace the square-bracketed language in paragraphs 1 (b) and (c) of article 24 (and the corresponding language in article 31) with a provision along the following lines: "The priority of an assignee's claim to proceeds is governed by the law applicable by virtue of the rules of private international law." Such a provision would confirm that the choice of law rule in article 24 (and article 31) of the draft Convention for priority in the assigned receivable does not necessarily apply to priority in the proceeds of collection of the receivable. At the same time, the way would be left open for reference to be made to future international law texts to supply the appropriate choice of law rule (see, for instance, the work currently underway in the Hague Conference on Private International Law on an international convention to determine the law applicable to the proprietary aspects of dealings in securities credited to a securities account with a securities intermediary).

Special proceeds priority rule (article 26, para. 2): Under article 26, para 2, an assignee who has a first priority in the assigned receivable under the applicable law as designated by article 24 also has priority in any proceeds received by the assignor, provided that the proceeds are "held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor." The example is then given of "a separate deposit account containing only cash receipts from receivables assigned to the assignee."

We are concerned that the current formulation leaves it unclear whether the "reasonable identifiability" requirement is to be tested objectively or subjectively. Is it enough if the assignor keeps the proceeds segregated from the assignor's other assets, as in the case of proceeds deposited in a separate bank or securities account, even if the assignor is the "apparent owner" of the proceeds in the eyes of third parties? Or must the proceeds be held by the assignor in such a way that a third party would be put on notice without further inquiry that they did not form part of the assignor's patrimony (for example, proceeds deposited by the assignor in a bank account designated on its face as a "trust" account, or in a bank account held in the joint names of the assignor and assignee)?

We think that the wording needs to be clarified to confirm the intent. If it is decided that a "subjective" test should be sufficient, then we have the further concern that the rule does not adequately protect third parties who take a direct interest in the proceeds (e.g. via an assignment of a securities account containing proceeds) in reliance on the assignor's "apparent ownership". This concern arises because the law applicable to the priority of the right of the assignee in the assigned receivable under the Convention (the law of the assignor's location) may differ from the law applicable to the priority of competing claims in the relevant kind of proceeds. Yet a third party who takes an interest in an asset, e.g. a securities account, in ignorance of the fact that it constitutes proceeds of the collection of a receivable would normally assess its priority position according to the law governing priority in the particular category of asset, not according to the law applicable to priority in the assigned receivable.

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