UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/420
18 December 1995

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-ninth session
New York, 28 May - 14 June 1996

REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-FOURTH SESSION (Vienna, 13 - 24 November 1995)

CONTENTS

V.95-60435

I. INTRODUCTION

1. At the present session, the Working Group on International Contract Practices commenced work on preparation of a uniform law on assignment in receivables financing, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995).[1]

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

[1] 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 to 381.

resume its work on security interests in general, which the Commission at its thirteenth session, in 1980, had decided to defer for a later stage.[2]

3. At its twenty-sixth session, in 1993, the Commission considered a note by the Secretariat concerning certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade. Those issues included differences among national laws concerning the validity of assignments of claims, differing requirements for a valid assignment of a claim to be effective towards the debtor and conflicts of priority between the assignee and another person asserting a right in the assigned claims. The note suggested that a study should be prepared on the possible scope of uniform rules on assignment of claims and on possible issues to be dealt with in the rules. After considering that note, the Commission requested the Secretariat to prepare, in consultation with the International Institute for the Unification of Private Law ("UNIDROIT") and other international organizations, a study on the feasibility of unification work in the field of assignment of claims. [3]

4. At its twenty-seventh session, in 1994, the Commission had before it a report on legal aspects of receivables financing (A/CN.9/397). The report suggested that work might be both desirable and feasible, in particular if it were limited to assignment of international commercial receivables, i.e., claims for payment of sums of money that arose from international commercial transactions, including assignments by way of sale and by way of security, non-notification assignment, factoring to the extent that it was not covered in the UNIDROIT Convention on International Factoring (Ottawa, 1988; "the Factoring Convention"), forfaiting of non-documentary receivables, securitization and project finance. The report described a number of possible issues, such as no-assignment clauses, bulk assignments, form of assignment, effects of assignment between the assignor and the assignee, effects of assignment towards the debtor and towards third parties, as well as the related issue of priorities among claimants laying a claim on the assigned receivables. In addition, it referred to the possibility of international registration as a possible solution to the problem of priorities. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, which was preparing a draft convention on security interests in mobile equipment, and with the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions. After discussion, the Commission requested the Secretariat to prepare a further study that would discuss in more detail the issues that had been identified and would be accompanied by a first draft of uniform rules. [4]

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[2] 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] 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), para. 301.

[4] 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), para. 210.

5. That more detailed report was presented to the Commission at its twenty-eighth session, in 1995 (A/CN.9/412). The report concluded that it would be both desirable and feasible for the Commission 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 the effects of such assignments on the debtor and other third parties. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law, the European Bank for Reconstruction and Development (EBRD), the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. After deliberation, the Commission decided to entrust the Working Group on International Contract Practices with the work of preparing a uniform law on assignment in receivables financing.

6. The Working Group, which was composed of all States members of the Commission, commenced its work at its twenty-fourth session, held at Vienna from 13 to 24 November 1995. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Chile, China, Ecuador, Finland, France, Germany, Hungary, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Belarus, Bosnia and Herzegovina, Costa Rica, Croatia, Indonesia, Iraq, Paraguay, Philippines, Slovenia, Sweden, Switzerland, Syrian Arab Republic and Turkey.

8. The session was attended by observers from the following international organizations: European Bank for Reconstruction and Development (EBRD), Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), Banking Federation of the European Union, Federación Latinoamericana de Bancos (FELABAN) and International Credit Insurance Association (ICIA).

9. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Masao Ikeda (Japan)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WP.II/WP.85) and a Report of the Secretary-General on assignment in receivables financing (A/CN.9/412).

11. The Working Group adopted the following agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Assignment in receivables financing;
4. Other business;

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

12. The Working Group considered assignment in receivables financing on the basis of the Report of the Secretary-General on assignment in receivables financing, which contained preliminary drafts of uniform rules on certain of the issues dealt with in the Report ("the draft uniform rules"; A/CN.9/412).

13. The deliberations and conclusions of the Working Group, including its consideration of the draft uniform rules, are set forth below.

III. CONSIDERATION OF DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

A. General remarks

14. The Working Group began its deliberations with a general discussion of the commercial need for and the purpose of its incipient work in the area of receivables financing, and consideration of some of the possible guiding principles of that work.

15. It was noted that there had been an increased perception of a need for developing an acceptable international legal framework for receivables financing. The present legal environment, it was reported, was characterized by divergences among legal systems with the effect that cross-border assignments (in which the assignor, the assignee and the debtor were not in the same country) might be unenforceable against the debtor or might be challenged by creditors of the assignor. It was pointed out that the absence at the national level of modern legislation on assignment of receivables geared to the needs of international trade and the wide lack of treaty arrangements on the subject had come to constitute one of the most significant obstacles to receivables financing. This situation it was noted impacted in particular on commercial parties that had only limited access to potential sources of financing other than those based on receivables.

16. In terms of the broad aims and principles that could guide the work being undertaken, the Working Group was urged to strive for a legal text that would have the effect of increasing the availability of credit. It was said that the content and approach of that text should be guided by developments in current international commercial practice, rather than being based on particular national perspectives. It was observed that those aims would be furthered by facilitating "secondary financing" or "refinancing" of receivables, a type of transaction, also involving assignment, between the initial and a subsequent assignee that faced the same problem of possible ineffectiveness in a cross-border context.

17. An additional principle which was widely endorsed in the discussion was the desirability, in going beyond what had been accomplished internationally thus far in this field, of building on those accomplishments rather than attempting to supplant them.

18. In this regard, the attention of the Working Group was drawn in particular to the Factoring Convention. Attention was also drawn to the importance of having regard to the work currently

being undertaken by UNIDROIT regarding security interests in mobile equipment, as well as to the work of the International Bank on Reconstruction and Development (IBRD), which was involved in several national law reform projects in the area of secured transactions, and the European Bank for Reconstruction and Development (EBRD), which had prepared a Model Law on Secured Transactions.

B. Scope of application

19. The Working Group engaged in a discussion of the scope of application of the draft uniform rules based on a draft article, which read as follows:

"Draft article 1. Scope of application

"(1) These rules apply to the assignment for [commercial] [financing] purposes of receivables between an assignor and one or more debtors whose places of business are in different States:

(a) when the States [are Contracting States] [have adopted the rules]; or

(b) when the rules of private international law lead to the application of the law of [a Contracting State] [this State].

"(2) For the purposes of this [Convention] [law]:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the [contract giving rise to the receivables] [assignment] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the [conclusion of the contract] [assignment];

(b) if a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1)

Substantive scope of application: "commercial" vs. "financing" purposes

20. The Working Group exchanged views as to the question whether the assignments to be covered by the draft uniform rules should be limited by a reference to a "commercial" or to a "financing" purpose.

21. One view was that the draft uniform rules should focus on assignments effected for "financing" purposes, rather than referring to the broader notion of "commercial" purposes. It was suggested that such an approach was desirable to avoid overlapping with the Factoring Convention. It was stated that referring to assignments for "financing" purposes would reduce the potential for overlap, in view of the fact that the Factoring Convention covered assignments for financing purposes only if one additional function among those enumerated in article 1(2)(b) of the

Convention (i.e., maintenance of accounts relating to the receivables, collection of receivables or protection against default in payment by debtors) were performed by the assignee.

22. As to the question of defining the "financing" purposes of assignments, a number of suggestions were made. One suggestion was to set forth the characteristic elements of receivables financing transactions, while at the same time giving an indicative list of assignments that should be included. Another suggestion was to create a rebuttable presumption that all assignments were for financing purposes and, at the same time, to list certain types of assignments that should be excluded. Yet another suggestion was simply to refer to the financing contract, as was done in draft article 2(2), without further specifying the nature of that contract. It was stated that such a flexible formulation was essential to preserve party autonomy in the context of receivables financing, the usefulness of which, as indicated by its rapid development, lay to a great extent in the ability of the parties involved to vary the details of assignments in order to address their needs.

23. A number of suggestions were made as to how overlap between the draft uniform rules and the Factoring Convention could be avoided. One suggestion was to provide that the draft uniform rules did not deal with factoring transactions. That approach drew the objection that it was so broad as to preclude the text from dealing with certain types of factoring and of factoring-related issues that were not covered in the Factoring Convention, as well as precluding coverage of factoring for States not parties to the Factoring Convention. Another suggestion was that, if the text to be prepared would take the form of a convention, a provision could be included along the lines of article 21 of the Rome Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention"), to the effect that the convention would not prejudice the application of international conventions to which a Contracting State was, or might become, a party.

24. Another view was that application of the draft uniform rules should be predicated on assignments effected for "commercial" purposes. It was stated that such an approach would have the advantage of encompassing a broader variety of assignments. It was observed that under such an approach only assignments effected for personal, household or family purposes would be excluded from the scope of application of the draft uniform rules. In the discussion, the attention of the Working Group was drawn to the need to distinguish between assignments for consumer purposes, which would likely be excluded from coverage, and assignments for commercial purposes of consumer receivables. In that connection, a note of caution was struck as to the desirability of covering assignments of consumer receivables, even if they were concluded for commercial purposes, in view of the social policy issues that might potentially be involved.

25. Yet another view was that, in order to achieve uniformity and to avoid the difficulty of having to distinguish the notions of "commercial" and "financing" purposes, all assignments should be covered, or alternatively assignments effected for "commercial or financing" purposes. It was also suggested that the text of the draft uniform rules might omit any reference at all to the purpose of the assignment.

Internationality test

26. The Working Group agreed that the draft uniform rules should cover both international and domestic assignments of "international receivables", namely, receivables in which the assignor and the debtor had their places of business in different States. Beyond that, the view was expressed that paragraph (1) should be reformulated so as to cover, in addition to international or domestic assignments of international receivables, international assignments of domestic receivables, namely assignments in which the assignor and assignee had their places of business in different States, while the assignor and the debtor had their places of business in the same State. In support of such coverage, it was stated that the international assignment of domestic receivables effected in the context of refinancing and securitization transactions was an increasingly important practice that needed to be covered.

27. Several concerns were raised with regard to that suggestion. One concern was that, merely by virtue of the domestic creditor's decision to assign its receivables to a foreign assignee, the domestic debtor might find its legal position subjected to a different legal regime. That result was said to be particularly undesirable if the debtor was a consumer, which would raise the question of the possible impact of the draft uniform rules on consumer protection issues. It was further observed that the matter raised questions beyond merely those of consumer protection, but reached into questions of debtor's rights and protection generally. In response, it was pointed out that the main concern of the consumer as a debtor was the maintenance of its ability to discharge its obligation to a known creditor and to raise against the assignee, whether foreign or domestic, the same defences that were available to the debtor against the assignor. It was noted that debtor protection issues, including, to the extent it would be relevant, consumer protection, could be addressed in the context of draft article 4, dealing with no-assignment clauses, and draft articles 9 to 12, dealing with debtor protection issues.

28. Other considerations raised regarding applicability of the draft uniform rules to domestic receivables included the concern that uniformity and harmonization of law might not be served if assignment of some domestic receivables were covered by domestic law, while assignment of other domestic receivables would be covered by the draft uniform rules, depending on whether the domestic creditor decided to assign the receivables to a foreign rather than to a domestic creditor. Yet another concern involved the potential implications of an international assignment for the question of the currency in which a domestic receivable should be paid and possible exchange controls. It was noted that that problem would arise in any case in the international assignment of international receivables and could be dealt with, if the principle were adopted that the debtor's obligation to pay should not be changed as a result of assignment.

29. After discussion, the Working Group affirmed that both domestic and international assignments of international receivables should be covered. With regard to the suggestion that international assignments of domestic receivables should also be covered, it was agreed that a provision to that effect could be prepared, but kept within square brackets, pending further consideration once the draft articles dealing with debtor protection issues had been discussed.

Territorial scope of application

30. It was noted that draft article 1, which in its present formulation resulted in the application of the draft uniform rules to domestic and international assignments of international receivables, required that the assignor and the debtor have their places of business in different States and that those States adopt the draft uniform rules. It was observed that, if the suggestion to enlarge the substantive scope of application of the draft uniform rules to include international assignments of domestic receivables were accepted, namely assignments between parties (assignor and assignee) whose places of business were in different States, the question would arise whether it would be necessary to require that the assignee have its place of business in a State that had adopted the draft uniform rules. The view was expressed that that would not be necessary since, in a cross-border context, only the law of the State of the debtor and the assignor would be relevant to enforcement, in view of the fact that the assignee would seek to enforce the assignment in one of those States.

31. The view was expressed that application of the draft uniform rules by virtue of the private international law rules, referred to in paragraph (1)(b) of draft article 1, could introduce uncertainty, as private international law rules on assignment were subject to uncertainty. Accordingly, it was suggested to delete the paragraph or to retain it in brackets pending further consideration.

Paragraph (2)

32. As to the question of which place of business would be relevant in case a party had more than one place of business, some preference was expressed for the place which had the closest relationship with the assignment. The view was also expressed that the place which had the closest relationship with the original contract and its performance might be a more appropriate reference point. It was suggested, however, that the Working Group might wish to revisit the matter, after it had considered further the question of whether to cover international assignments of domestic receivables.

C. Definitions

33. The Working Group considered a number of definitions based on a draft article, which read as follows:

"Draft article 2. Definitions

"(1) 'Receivable' means any right of a creditor to receive or to claim the payment of a monetary sum, unless it is in the form of a bill of exchange or a promissory note.

"(2) 'Assignment of receivables' means the transfer, by way of sale, as security for performance of an obligation, or otherwise, from one party ('assignor') to another party who provides financing to the assignor ('assignee') of receivables arising from a contract ('the original contract') made between the assignor and a third party ('the debtor').

"(3) 'Financing contract' means the contract by which the assignee provides financing to the assignor."

Paragraph (1)/"Receivable"

34. The suggestion was made to replace the term "receivable" by the term "claim", which might be more easily understood in various languages. However, it was generally felt to be preferable to retain the term "receivable" for consistency with the terminology of the Factoring Convention.

35. While the Working Group agreed that the right to payment was the essential element of the definition of "receivable", several observations were made as to detailed aspects of the definition. One was that the words "right ... to receive" might not capture the meaning of the term in an appropriate way. Another observation was that the reference to "a creditor" might inadvertently lead to the exclusion of some rights to payment that were intended to be covered, for example, royalties paid to the licensor of intellectual property. The suggestion was also made of a need to specify whether the reference to a "monetary sum" included foreign currency and commodities easily transferable into money, such as precious metals.

36. Differing views were expressed as to the types of receivables to be covered. One view was that all receivables in the form of negotiable instruments should be excluded, since their transfer was covered by other international texts. Another view was that, while emphasis could be given to non-documentary receivables, the application of the draft uniform rules to documentary receivables should not be excluded.

37. In support of such a broader approach, it was pointed out that negotiability was looked at in practice not from the point of view of the form of the instrument, but rather from the perspective of the protection of the transferee, which could be achieved in the context of the present work without necessarily excluding all negotiable instruments from the scope of application of the text to be prepared. In addition, it was observed that in practice there was a need for financing on the basis of receivables, irrespective of their form (contractual or unilateral, documentary or non-documentary), which should be accommodated. The example of "mortgage warehousing" transactions was given, in which notes incorporating lenders' receivables arising from home loans and secured by mortgages were put together in pools and sold by lenders in capital markets for refinancing purposes. This enabled lenders to obtain lower interest rates in capital markets and to make a profit while offering lower home loan interest rates. It was further explained that notes were kept in a central location where possession could be obtained by the buyers and that there was an increasing interest in replacing paper with electronic documents, the transfer of which was not regulated by any international legal text. A view was expressed, however, that in some countries arrangements such as "mortgage warehousing" were subject to regulation by special laws and should not be covered.

38. After discussion, the Working Group agreed that emphasis should be given not to the form in which the receivables might appear, but rather to the way in which they might be transferred, and that accordingly receivables transferred by way of assignment would be covered, while receivables to be excluded, including receivables transferred by way of endorsement, would be listed. The Working Group further agreed that contractual receivables should be covered, while the inclusion of non-contractual receivables (e.g., insurance, tort receivables) could be considered at a future session of the Working Group. It was suggested that the inclusion of further types of receivables, including receivables arising from leases or license agreements, could also be considered at a later stage.

Paragraph (2)/"Assignment of receivables"

39. As regards the scope of the notion of "assignment of receivables", there was general agreement that the definition should make it clear that the draft uniform rules were intended to apply to the entire range of assignment and related practices described in the document before the Working Group (A/CN.9/412, paras. 14 to 21), i.e., assignments by way of sale, of security, or in payment of a pre-existing debt. It was recalled that those practices included, apart from assignment proper, functional equivalents thereof, for example, depending on the national legislation applicable, legal techniques such as subrogation, pledge or novation. As a matter of drafting, it was widely felt that paragraph (2) was insufficiently reflective of the broad scope given to the notion of assignment, in that it relied on terminology typically used in the context of assignment by way of sale. It was agreed that paragraph (2) should be reworded using more neutral terminology, possibly to be combined with an express reference along the lines of "assignment by way of sale, by way of security or by any other method".

40. Triggered by the reference in the second part of paragraph (2) to "financing", the Working Group had occasion again to exchange views as to whether the applicability of the draft uniform rules should be linked to the purpose of the assignment. One view was that any reference to "financing" as the purpose of the assignment should be avoided since assignments of receivables existed outside the context of financing and such assignments should also be covered by the draft uniform rules. It was stated that, for example, in the context of insurance, the claims of an insured party against the party responsible for damages under tort law would typically be assigned to the insurer. Another view was that, should a reference to "financing" be included in the definition of "assignment of receivables", it should at least be accompanied by a definition spelling out the characteristic elements of "financing". With respect to a possible definition of "financing", objections were raised on the grounds that, in view of the fact that financing techniques were evolving rapidly, any such definition ran the risk of becoming rapidly obsolete, which might adversely affect the acceptability of the draft uniform rules. An alternative suggestion was to replace the reference to "financing" by a reference to assignment "against a monetary sum".

41. In favour of retaining the reference to "financing" in the definition of "assignment of receivables", the view was expressed that the focus of the draft uniform rules should be on the types of assignment that had financing as a common purpose. It was recalled that the mandate given to the Working Group by the Commission was to undertake the preparation of a uniform law regarding "assignment in receivables financing". A further view, which attracted considerable support, was that, although a general reference to the purpose of financing needed to be included in the draft uniform rules, it should not necessarily be made part of the definition of "assignment of receivables" under draft article 2. It was stated that, although the draft uniform rules should focus on financing transactions, nothing should prevent their being made applicable also to other types of assignments of receivables, irrespective of the purpose for which the assignment was concluded. While strong support was expressed in favour of deletion of the words "who provides financing to the assignor ('assignee') of receivables arising from a contract ('the original contract') made between the assignor and a third party ('the debtor')" at the end of paragraph (2), it was decided that the matter would need to be discussed further, after a decision had been taken regarding references to "financing" in draft article 1 and elsewhere in the draft uniform rules. As a matter of drafting, it was noted that, should the latter part of paragraph (2) be deleted as part of a deletion of the reference to "financing", the paragraph would still need to retain a definition of the terms "assignee" and "debtor".

42. With respect to the reference to "receivables arising from a contract" at the end of paragraph (2), the view was expressed that the definition should cover not only those receivables that arose from contracts but also other types, for example, receivables created by operation of law or by a decision rendered by a court of justice. It was generally felt, however, that such a broad notion of the receivables to be covered by the draft uniform rules might create conflicts with other legal regimes, possibly of a mandatory nature, which might be applicable to assignments of receivables generated by non-contractual mechanisms.

43. After discussion, the Working Group adopted the substance of the definition of "assignment of receivables", subject to further consideration of the reference to "financing", which it decided to place between square brackets.

Paragraph (3)/"Financing contract"

44. Differing views were expressed regarding the need for including a definition of "financing contract" in the text of draft article 2. One view was that such a definition was useful since it established a clear distinction between the assignment itself and the underlying financing transaction. It was also stated that adopting a broad definition of "financing contract" made it less likely that it would be necessary to describe in detail the various types of financing transactions envisaged in the draft uniform rules. Doubts were expressed, however, as to whether a definition of "financing contract" was needed at all, particularly in view of the fact that the notion was used only in the context of draft article 7, dealing with the breach of the financing contract. It was also suggested that the current definition was too bare to be helpful. After discussion, the Working Group decided to place paragraph (3) between square brackets, pending a final decision as to how the concept of "financing" would be dealt with in the draft uniform rules.

D. Bulk assignment

45. The Working Group discussed bulk assignments based on a draft article, which read as follows:

> "Draft article 3. Assignment of receivables
>
> "(1) An assignment of one or more receivables is effective if, when the assignment is effected or when the receivables come into existence, they can be identified as receivables to which the assignment relates.
>
> "(2) The assignment of future [or conditional] receivables operates to transfer the receivables directly to the assignee when they come into existence [or when the condition is fulfilled] without the need for a new assignment."

Paragraph (1)

General remarks

46. As a matter of drafting, it was generally felt that paragraph (1) currently dealt with too many distinct issues, which would be better addressed separately, either in several paragraphs of the same article or in separate articles. The following issues were identified as requiring separate treatment: recognition in-principle of bulk assignment and of assignment of single receivables; the notion of effectiveness of assignment as between assignor and assignee; the notion of effectiveness of assignment with respect to debtors and third parties; the criterion for effectiveness of assignment; the time when assignment was effected; recognition in-principle of assignment of future claims; the extent of the notion of future claim.

"An assignment of one or more receivables"

47. There was general agreement that an important aim of the draft uniform rules would be to overcome uncertainty under various national laws with regard to the validity of the assignment of more than one receivable, in particular assignments in which receivables were not specified individually, sometimes referred to as "bulk assignments". At the same time, it was generally felt that the assignment of single receivables was an important practice, in particular in the context of refinancing transactions, which could benefit from the draft uniform rules.

"is effective if,"

48. It was noted that, by relying on the unqualified concept of "effectiveness", the draft provision was intended to establish the conditions for the actual transfer of the assigned receivables not only as between the assignor and the assignee but also vis-à-vis the debtor and other third parties. On that point, the draft uniform rules deviated significantly from the approach taken in article 5 of the Factoring Convention, which dealt with the validity of the relevant provision in the factoring contract and its effects as between the assignor and the assignee, without affecting the position of third parties.

49. The view was expressed that the approach taken in the draft provision was inappropriate since it unnecessarily mixed the question of defining "assignment of receivables" for the purposes of the draft uniform rules, a question dealing essentially with the scope of the draft uniform rules, with issues regarding the rights and obligations of third parties. It was stated that such issues were too complex to be dealt with by way of a bare reference to "effectiveness" in paragraph (1) and that they should be further discussed in the context of the draft provisions dealing with the debtor's duty to pay and with priorities among several creditors laying a claim on the assigned receivables. It was suggested that the draft provision should be reworded along the following lines: "An assignment may relate to one or more receivables if ...".

50. While some support was expressed in favour of that view and it was agreed that the matter would be considered further, the prevailing view at this stage was that it was appropriate for the draft uniform rules to attempt to provide certainty with respect to such important issues as effectiveness and validity of an assignment erga omnes. With respect to the possible deviation from the approach taken in the Factoring Convention, it was felt that the preparation of the draft uniform rules should be regarded as a welcome opportunity to build on the result already achieved

by the Factoring Convention but also to go beyond that Convention, particularly regarding an issue such as effectiveness of the assignment vis-a-vis third parties, which could not be fully addressed in that Convention since it focused on the factoring contract and not on the transfer of receivables by way of assignment in general. As a matter of drafting, it was suggested that the reference to "effectiveness" in the draft provision might usefully be complemented by a reference to "validity".

"when the assignment is effected"

51. It was generally felt that the draft uniform rules should provide for effectiveness of an assignment at as early a point of time as possible, so as to avoid retention of the receivables in the estate of the assignor in case of insolvency. However, it was generally felt that the draft provision might need to be redrafted with a view to clarifying the point in time as of which the assignment should be regarded as effective. It was pointed out in that regard that the draft provision, which was formulated along the lines of "the assignment is effective when the assignment is effected", might appear to be somewhat circular.

"or when the receivables come into existence"

52. There was general agreement that the draft uniform rules should recognize, as a general principle, that future claims could validly be transferred by way of an assignment. While that principle might not currently be admitted under all domestic laws, or might be limited in some way (e.g., as in the case of a national law that recognized the validity of assignment of future receivables only if they arose within a specified period of time), it was noted that the assignment of future receivables was the essential basis of financing in the context of receivables financing transactions. However, although it was generally felt that a liberal approach to the assignment of future receivables was desirable from an economic point of view, the view was expressed that it should not be to the detriment of legal certainty, a result that could be avoided by setting out sufficient criteria as to the identification of future receivables.

53. Having settled on the desirability of adopting a liberal approach to the issue of assignment of future receivables, the Working Group proceeded with a discussion of the various types of assignment of "future receivables" that might be encompassed, noting that "future receivables" might vary considerably in nature and certainty. At one end of the spectrum were "fixed-term receivables", described as involving situations where the existence of the future receivable, the date as of when payment could be sought and its amount were certain (e.g., claims arising from a sales contract already concluded). At the other end of the spectrum, lay purely "hypothetical receivables" (e.g., claims that might arise if a merchant was able to establish a business and to attract customers). Between those two extremes, a variety of situations were conceivable, where the existence of the claim, its amount and date of payment might vary from "future" to "conditional" and even to purely "hypothetical". It was also suggested that, while the term "future receivables" would normally include "conditional" and "hypothetical" receivables, it should not include rights to payment arising from contracts existing at the time of assignment, whether or not the rights have been earned by performance.

54. Some doubts were expressed as to whether the draft uniform rules should recognize the entire range of "future receivables". It was stated that recognition of bulk assignments combined with complete freedom of assignment of future receivables might allow a business entity to assign all its

"future" and "hypothetical" claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries. However, it was stated that although such public policy considerations might be raised in the context of transactions involving consumers, they might be less relevant in the context of international business transactions. As an example of a text dealing with international business practice, it was noted that article 5 of the Factoring Convention recognized assignments of future receivables without distinguishing between various types of future receivables.

55. Noting that the issue would be discussed further at a future session, particularly with respect to "conditional" and "hypothetical" receivables, the Working Group decided that, pending such further discussion, no limitation would be brought to the draft uniform rules as to the general recognition of assignment of "future receivables".

"they can be identified as receivables to which the assignment relates"

56. There was general agreement that identification of the receivables by linking them to the assignment to which they related should be the main criterion for determining the validity and effectiveness of their assignment.

Paragraph (2)

57. It was noted that paragraph (2) addressed three questions: the time at which future receivables would be transferred; whether future receivables would be acquired directly by the assignee or indirectly through the assignor, which was of particular importance were the assignor declared insolvent at the time the receivables would come into existence; and whether a new act of transfer was necessary when the receivables came into existence. It was further noted that paragraph (2) differed in two respects from article 5(b) of the Factoring Convention. One was the broader scope of the draft provision, in that the transfer under paragraph (2) was deemed effective not only as between the assignor and the assignee but also as against the debtor and other third parties. The other difference was the reference in the present draft to the direct acquisition of the future receivables by the assignee, namely, that the receivables were deemed to enter into the possession of the assignee without passing through the assignor.

58. In line with the intention to consider two variants of paragraph (1), one recognizing the validity of bulk assignments only as between the assignor and the assignee, and the other providing for the effectiveness of bulk assignments as against all parties, the Working Group agreed that a revised version of paragraph (2) should also include two variants along the same lines. However, a note of caution was struck to the effect that limiting the effects of assignment to the relationship between assignor and assignee might not be appropriate, since, in view of the fact that assignment was defined in draft article 1(2) as the transfer of property in the assigned receivables, assignment was bound to produce effects against all parties.

59. The view was expressed that it might not be appropriate to treat all future receivables in the same way, since they differed in the degree of certainty, a matter which was reflected in the varying amounts of credit made available on the basis of various types of future receivables. That aspect was reflected in the reference in the paragraph (2), within square brackets, to "conditional" receivables. The view was expressed that, in line with the distinction suggested above (see para.

53), paragraph (2) should cover "fixed" receivables only and not "conditional" or "possible" receivables.

60. After discussion, the Working Group agreed that, subject to further discussion, paragraph (2) should be revised so as to refer to "fixed", "conditional" and "possible" receivables, though the latter two types would for the time being be left in square brackets.

E. No-assignment clauses

61. The Working Group based its discussion on a draft article, which read as follows:

"Draft article 4. No-assignment clauses

"(1) Subject to article 9, the assignment of receivables shall be effective notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment.

"(2) Subject to article 10(2), nothing in paragraph (1) of this article shall affect any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of the original contract."

Paragraph (1)

62. There was broad acceptance of including a provision along the lines of paragraph (1), which provided for effectiveness of assignments in spite of no-assignment clauses in the original contract between the assignor and the debtor. However, differing views were exchanged as to the possibility that such a provision might not be accepted by a number of States as part of a draft convention without the option of a reservation. It was noted in this regard that a similar provision in the Factoring Convention provided for a reservation, with the effect that an assignment made in contravention of a no-assignment clause would be ineffective if the debtor were from a reserving State. That approach reflected the position that giving effect to no-assignment clauses in such contexts ran counter to established legislation in some States.

63. Proponents of the reservation approach referred to the importance of respecting the freedom of contract of the parties to agree on a no-assignment clause and preserving good faith in the implementation of agreed contract terms. Reference was made to the possible increase in inconvenience or difficulties to the debtor that could result from having to pay to foreign assignees, especially if the debtor were a consumer. Examples cited included increased postage costs, having to deal with notifications received in a foreign language, possible increased litigation costs, and the possibility of having to pay the receivables in an unanticipated and potentially unavailable currency. It was stated that the latter consideration in particular would affect debtors in developing countries where there may be a shortage of foreign exchange and for which therefore at least some notice needed to be built in. Reference was also made to the possibility that the above considerations could affect in particular consumer debtors. The view was also expressed that special consideration may have to be given to debtors that were State entities.

64. In support of avoiding a reservation clause, it was stressed that the interests of the debtor that underlay the discussion could be adequately dealt with in provisions on debtor protection. It was

stated that a debtor-protection principle, which would alleviate the potential difficulties that had been raised, could be formulated along the lines that the debtor should be placed under no greater financial or other obligation by virtue of the assignment than the debtor would have been under if no assignment had been made.

65. Such an approach, it was stated, could encompass consumer protection concerns and would make it unnecessary to provide for a reservation, or to exclude consumer receivables, which risked limiting the extent to which the goal of facilitating receivables financing would be achieved. The Working Group was urged to bear in mind that, as a practical matter, the availability of consumer receivables for assignment constituted an important source for contemporary receivables financing and that imposing a requirement of individual notification and authorization would render assignments of consumer receivables impracticable. It was suggested that techniques could be found that would not encumber assignment of consumer receivables to a point of possible impracticability, for example, providing for payment to a specific account or post box.

Paragraph (2)

66. The Working Group noted that paragraph (2) was intended to ensure that the assignment effected in contravention of a no-assignment clause did not affect any rights that the debtor might have against the assignor for breach of the no-assignment clause. The question was raised whether the current formulation, which referred to an "assignment made in breach of the original contract" was appropriate, since it might be read as expressing a rule to the effect that such an assignment was indeed a breach of contract. It was pointed out that in fact the provision intended to leave to other applicable law the question of whether an assignment effected despite a no-assignment clause constituted a breach of contract and, were it to be considered such a breach, what the consequences of the breach would be. It was suggested that that point could be made clearer if paragraph (2) were to use more neutral language, avoiding reference to breach of contract.

67. It was suggested that another alternative, a more assertive approach, might be considered by the Working Group, one in effect invalidating no-assignment clauses. It was suggested that such an approach, found in some national laws, would be more effective in facilitating receivables financing since the possibility that a debtor would have a contractual claim against an assignor for violation of a no-assignment clause would create an undesirable degree of uncertainty in receivables financing. It was suggested that this potential jeopardy would be further heightened to the extent that there might be a ruling under applicable contract law that a violation of a no-assignment clause constituted a breach justifying termination of the contract between the assignor and the debtor.

68. Hesitation was expressed, however, as to the acceptability of including a rule invalidating no-assignment clauses. It was suggested that an assignment effected despite a no-assignment clause would in many legal systems fall within the broad category of breach of contract and that it would therefore be futile to attempt simply to invalidate no-assignment clauses. The view was expressed that the degree to which a less ambitious approach would harm the aims of the work was minimal, since the notion that contract termination was only justified in the face of a "fundamental" breach of contract was widely accepted, and since the violation of a no-assignment clause was unlikely to be regarded as such a fundamental breach. It was further pointed out that the assignor in such a case would be liable to the debtor only to the extent of damages actually incurred and proven, thus diminishing the potential impediment to receivables financing that might result from leaving the matter to other applicable law.

F. Transfer of security rights

69. The Working Group engaged in a general discussion of the effect that should follow from the assignment of receivables with respect to the rights that might have been created for the purpose of securing payment of those receivables to the assignor. In its deliberation, the Working Group took into account the relevant provisions of other uniform law texts, such as article 7 of the Factoring Convention and article 18 of the EBRD Model Law on Secured Transactions.

70. It was noted, at the outset, that the legal issues of establishment and transfer of security rights involved a variety of requirements of administrative and regulatory nature under existing domestic laws and were therefore complex. It was generally agreed that the draft uniform rules should not attempt to deal with all the details of the substantive law of security rights. Similarly, matters such as the procedural steps to be taken to secure the valid transfer of any given security right should continue to be dealt with by relevant domestic law. The draft uniform rules should be limited to establishing a general principle as to whether the assignment of receivables had automatic effect on the corresponding security rights.

71. As to the substance of that general principle, it was suggested that a distinction should be drawn between "accessory" and "non-accessory" or "independent" security rights. "Accessory rights", as existing under many national laws, were defined as security rights that could not exist or be transferred independently from the receivable, the payment of which they were intended to secure. Such "accessory rights" should thus be transferred automatically with the receivable to which they were linked. "Non-accessory" or "independent" security rights, such as independent bank guarantees, were defined as rights that might exist or be transferred independently, and should thus require a separate act of transfer. It was stated that relying on a distinction between "accessory" and "independent" security rights would avoid the difficulties that might result from any attempt to enumerate or describe the various types of security rights intended to be covered by the draft uniform rules. After discussion, it was agreed that the draft uniform rules should be drafted so as not to prevent the use of a distinction between "accessory" and "independent" security rights in those legal systems where that distinction was in use. It was widely felt, however, that embodying the suggested distinction in the draft uniform rules might not be helpful and that it might run counter to the general policy decision not to deal with all the details of the substantive law of security rights. It was noted that a distinction between "accessory" and "non-accessory" or "independent" security rights might not be acceptable to all legal systems. Moreover, even those national laws under which the distinction was recognized as meaningful, might vary considerably as to the definitions and contents of the "accessory" and "independent" categories of security rights.

72. The discussion focused on whether the transfer of a security right should automatically follow from the assignment of the secured receivable or whether it could only result from express agreement between the parties to the assignment. While it was generally agreed that the draft uniform rules should recognize party autonomy, it was pointed out that, from a practical point of view, addressing the issue of transfer of security rights merely by recognizing party autonomy on the matter of transfer of security rights might be seen as encouraging a formalistic approach that might prove to be excessively burdensome, depending on the nature of the assignment. For example, while a rule relying exclusively on party autonomy might be appropriate in the context of project financing, or other types of assignment involving an elaborate contractual framework, it might be less acceptable in the context of certain types of bulk assignments that were typically concluded without a specific contract being negotiated. It was also said that automatic transfer of

security rights would be more in line with the general purpose of the draft uniform rules, which was to facilitate financing through assignment of receivables.

73. As to how party autonomy should be recognized by the draft uniform rules, it was agreed that the general principle should be drafted so as to avoid being misinterpreted as making other rules of domestic law, possibly of a mandatory nature, subject to contractual agreements between the parties. For example, the draft uniform rules should not displace domestic law regarding mortgages, or other types of "accessory" security rights, that would, in all circumstances, be regarded as transmitted automatically with the secured receivable.

74. After discussion, the Working Group decided that the uniform rules should embody the principle of automatic transmission of rights securing the assigned receivables, subject to contrary agreement between the parties and to other rules of domestic law regarding the validity of such a transmission.

G. Form of assignment

75. The Working Group engaged in a discussion of the form of assignment, based on a draft article, which read as follows:

> "Draft article 5. Form
>
> "An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

76. Differing views and concerns were expressed regarding draft article 5. One concern was that the general principle of a form-free assignment expressed in the draft article was not acceptable for those States whose legislation would require a contract for the assignment of receivables to be concluded in, or to be evidenced by, writing. It was noted that the draft article was modelled on article 11 of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention") and that article 96 of that Convention entitled those States to declare that article 11 did not apply where any party to the contract had its place of business in one of those States.

77. In response to that concern, it was stated that the purpose of the draft uniform rules was not to change the requirements and standards applicable to existing types of assignment contracts under domestic law but rather to create a new type of assignment. Thus, even in those countries where a writing was required for validity or for evidence purposes, the draft uniform rules should not be interpreted as an attempt to do away with general form requirements. The draft uniform rules were said to be merely intended to establish a limited exception to those requirements, in order to reflect modern international practice regarding assignment of receivables, which, in many instances, did not rely on written documents. For example, it was stated that it was essential that a provision along the lines of draft article 5 be included in the draft uniform rules to accommodate the use of electronic means of communication. Attention was drawn to the fact that the draft convention on international interests in mobile equipment, which was currently being prepared by UNIDROIT, was likely to require written form for any agreement creating such an interest. The purpose of such form would be to make clear that the parties intended to create an international, rather than a particular type of domestic, interest. In that regard, the view was expressed that account should be

taken of the proposed rule in preparing the draft uniform rules, in particular since certain receivables that might be covered by the draft uniform rules, such as receivables arising from lease contracts, might also fall within the scope of the UNIDROIT draft convention.

78. Another concern was expressed with respect to the substance of the principle of a form-free assignment embodied in the draft article. It was stated that, while complete freedom regarding the form of an assignment was acceptable as between the assignor and the assignee, it might insufficiently protect the interests of third parties. For example, it was stated that recognizing the validity of a purely oral assignment might create opportunities for abuse or fraudulent collusion between the assignee and the assignor, particularly in situations where the assignor might become insolvent. It was suggested that an exception should be made to the general principle of a form-free assignment, to the effect that purely oral assignments could not be opposed to third parties. In response, it was stated that the interests of third parties should not be addressed by imposing restrictions as to the form of the assignment but by establishing an obligation to notify third parties of the assignment. It was suggested that the discussion should be resumed after the Working Group had completed its consideration of other draft provisions, such as draft article 9, which established the principle of a notification for purposes of debtor protection.

79. After discussion, the Working Group postponed its decision until it had completed its review of the draft uniform rules and its general discussion of the issues of third-party protection. The Secretariat was requested to prepare a revised draft article, including variants reflecting the above-mentioned views and concerns. It was pointed out that, should the draft uniform rules establish form requirements to apply in the context of relationships involving third parties, they should also clarify the effects of non-compliance with those form requirements. For example, the draft uniform rules could either make a purely oral assignment ineffective vis-a-vis third parties or, alternatively, leave such an assignment outside the scope of the draft uniform rules. It was agreed that those options should also be provided among the variants to be considered by the Working Group at a future session.

H. Warranties between assignor and assignee

80. The Working Group engaged in a discussion of warranties that might be undertaken by the assignor towards the assignee based on a draft article, which read as follows:

> "Draft article 6. Warranties
>
> "(1) Unless otherwise agreed between the assignor and the assignee [in the contract of assignment], the assignor warrants to the assignee that the assigned receivables exist.
>
> "(2) For the purposes of paragraph (1) of this article, the receivables shall be considered as existing if the assignor is the creditor, has a right to transfer the receivables and has no knowledge, at the time of assignment, of any fact that would deprive the receivables of value.
>
> "(3) Unless otherwise explicitly agreed between the assignor and the assignee [in the contract of assignment], the assignor does not warrant towards the assignee that the debtor will pay."

81. It was noted that, while the types of warranties given as to the receivables by the assignor towards the assignee were a matter of contract, it might be advisable to address the question of warranties in view of their importance for the allocation of risk between the assignor and the assignee for hidden defences of the debtor and in view of the potential impact that the breach of such warranties might have on the transfer of receivables.

Paragraph (1)

82. The Working Group felt that paragraph (1) reflected a sound principle that could facilitate receivables financing by recognizing party autonomy in the allocation of risk between the assignor and the assignee for unknown defences of the debtor and by properly allocating that risk in the absence of an agreement.

83. As to the exact formulation of paragraph (1), a number of concerns were expressed. One concern was that the assignor and the assignee should not be allowed to vary the content of the warranty as to the existence of the receivables, which flowed from the basic obligation to act in good faith. The suggestion was made that at least the warranty should be varied only by way of an explicit agreement between the assignor and the assignee (see para. 88 below). Another concern was that the words "in the contract of assignment", which appeared within square brackets in paragraph (1), could prejudge the context or manner in which assignment might take place and should be deleted. Yet another concern was that the term "warrants" was not sufficiently clear. In that connection, it was noted that, while it was difficult to identify an equivalent term, in the United Nations Convention on International Bills of Exchange and International Promissory Notes, the term "represents" had been used in order to refer to the warranties given by the transferor of an instrument to the holder.

84. Yet another concern was that the word "assignee" might introduce an inappropriate restriction, to the extent that the assignor might be seen to give the warranty to the immediate assignee only and not to any subsequent assignee. It was pointed out that, as a result of the present formulation, the subsequent assignee might be able to turn only to the immediate and not to the initial assignor. It was stated that the initial assignor would presumably have to reimburse the subsequent assignee, but only pursuant to a series of subsequent actions and provided that the chain of assignors would not be interrupted by the insolvency of one of them. Yet another concern was that the words "that the assigned receivables exist" might be interpreted as not encompassing future receivables.

Paragraph (2)

85. Several observations were made as to the formulation of paragraph (2), regarding the content of the warranty that the assigned receivables existed. One observation was that the words "a right to transfer" introduced some uncertainty, since a right to transfer did not exist in case of a no-assignment clause, though an assignment in contravention of such a clause might be considered effective (see paras. 62-65). It was pointed out that those words were intended to address situations in which the assignor might not have the right to assign certain receivables, because it might have already assigned them or because of general reasons relating to lack of capacity or authorization. In response, it was suggested that the former problem was covered by the requirement that the assignor be the creditor, while problems of the latter type were beyond the scope of the present work of the Commission.

86. Another observation was that the reference to the assignor having no knowledge of any legal defects of the receivables placed on the assignee the risk of defences of the debtor that were unknown to the assignor, which could often occur in practice, in particular in cases where the assignor was the seller of goods manufactured by a third party. It was pointed out that that way of allocating the risk would result in the increase of the cost of credit and, in addition, was inappropriate, since the assignee was not a party to the original contract and could not do anything to reduce the risk.

87. Yet another observation was that the reference to deprivation of "value" could be understood as referring to economic value, which would place on the assignor the risk of a change in general economic conditions or in the economic position of the debtor. In order to address that concern, it was suggested that it should be clarified that the term "value" was intended to refer to hidden legal defences of the debtor.

Paragraph (3)

88. There was broad support in the Working Group for the principle expressed in paragraph (3) that the assignor did not warrant that the debtor would pay. It was noted that this reflected a rule known in most legal systems. It was also noted that, in view of the fact that the warranty in paragraph (3) involved a risk higher than that foreseen in paragraph (1), it could be varied only by way of an explicit agreement.

I. Breach of financing contract

89. The Working Group considered the effects of breach of the financing contract by the assignor on the basis of a draft article, which read as follows:

> "Draft article 7. Assignor's breach of financing contract
>
> "(1) When so agreed, and in any event if the assignor defaults on its obligation to pay in accordance with the financing contract, the assignee is entitled to notify the debtor pursuant to article 9 to pay the assignee.
>
> "(2) In an assignment by way of sale, unless otherwise agreed by the assignor and the assignee, the assignee may retain any surplus, and the assignor is not liable for any deficiency.
>
> "(3) In an assignment by way of security, unless otherwise agreed by the assignor and the assignee, the assignee must account to the assignor and return any surplus, and the assignor is liable for any deficiency."

Paragraph (1)

90. The discussion suggested a general accord with the substantive rule of paragraph (1), to the effect that a breach of the financing contract would entitle the assignee to collect the proceeds of

the receivables. It was also noted that the intent of the paragraph was to refer to a variety of financing situations, some of which might not be linked to a default by the assignor as the event triggering the assignee's rights with respect to the receivables, and to acknowledge the freedom of contract of the assignor and the assignee to define the effects of breach of the financing contract. Questions were raised, however, as to the extent to which the current formulation of the draft article expressed those basic principles on which the Working Group was in agreement and distinguished between different categories of cases intended to be covered.

91. Comments of such a drafting nature were directed in particular at the words at the beginning, "when so agreed". It was noted that as presently drafted those words might inadvertently suggest the need for a specific agreement beyond the contract of assignment in order to vest in the assignee the rights inherent in the assignment. It was noted that the intent of those words was merely to refer flexibly to the freedom of contract of the parties to define the terms of the assignment, including the point of time when the right to collect the proceeds of the receivables would be triggered other than upon a default under the financing contract.

92. An example cited in this connection was the type of financing structures in which the debtor received notification of the assignment, but was instructed that payment should continue to be made to the assignor until subsequent notice directing otherwise. Another example was the case in which the lender (assignee) at the outset notified debtors and sought to collect on receivables, which had been assigned as security, though collection may involve payment to a post office box or account to which only the lender had access. Reference was also made to the existence of financing structures that did not require notification of the debtor, with payment continuing to be made to the assignor.

93. Views were also expressed to the effect that the expression referring to the entitlement of the assignee "to notify" the debtor to pay might create some uncertainty by perhaps being unnecessarily indirect. It was stated that the effect of breach of the financing contract would ordinarily be to entitle the assignee, as the new creditor of the receivables, to collect the proceeds of the receivables.

94. Other observations concerning the formulation of paragraph (1) were directed at the appropriateness of the reference to "default on its obligation". The appropriateness of that expression was questioned for the context of sale of receivables, as a result of which the assignee presumably would be the owner of the receivables. The expression was also questioned because it used different wording than the corresponding expression in the United Nations Sales Convention, phrased in terms of "failure to perform".

Paragraphs (2) and (3)

95. Several observations were also made as to the content and formulation of paragraphs (2) and (3), which dealt with the questions of surpluses and shortfalls between the amount paid by the assignee to the assignor in return for the assigned receivables and the amount paid to the assignee by the debtor. One observation was that the attempt to draw a clear distinction between assignment by way of sale (dealt with in paragraph (2)) and assignment by way of security (addressed in paragraph (3)) might be problematic. It was pointed out that, because of the variety of different forms of transfers of receivables and because of differences that existed among legal systems as to classifications of transfers, some transfers of receivables that might be denominated as transfers by way of security could in fact possess attributes of transfers by way of sale. The Working Group

acknowledged that concern and expressed its understanding that there may be cases in which, in an assignment by way of security, the transfer of property in the assigned receivables could be involved.

96. Some doubt was also expressed in this context as to the rules set forth in paragraphs (2) and (3), as it was observed that the parties would not necessarily wish to be bound in a manner that might leave uncertain the net economic effect of collection of receivables merely because of the form or category into which a transfer might fall. It was suggested that such an approach might suggest a speculative or profit-making dimension in assignment of receivables that might not be congruent with the basic financing purpose of the transaction. It was pointed out in response, however, that the rules set forth in the two paragraphs, which were subject to party variation by contract, were merely intended to be default rules or starting points of reference aimed at eliminating the need to negotiate in all cases the allocation of risk referred to if the parties were not inclined to negotiate solutions other than those provided in the draft uniform rules.

97. As a drafting matter, the Working Group noted that certain terms used in paragraphs (2) and (3), in particular "surplus" and "deficiency" were undefined and might not be properly understood. It was also noted that the title of the article "breach of financing contract" might not fully correspond to its content, in particular since paragraph (2) did not involve a breach of the financing contract.

J. Effects of assignment towards the debtor

1. Debtor's duty to pay

98. The Working Group engaged in a discussion of the debtor's duty to pay based on a draft article, which read as follows:

"Draft article 9. Debtor's duty to pay

"(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

"(2) The debtor is under a duty to pay the assignee if the debtor has not received notification in writing of a prior assignment, of a judgement attaching the assigned receivables [or of the insolvency of the assignor] and:

(a) the debtor receives [an unconditional] notification in writing of the assignment by the assignor or by the assignee with the assignor's authority; and

(b) the notification reasonably identifies the receivables assigned and the assignee to whom or for whose account the debtor is required to make payment.

"(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

"(4) 'Notification in writing' means a notification provided in a form that the information contained therein is accessible so as to be usable for subsequent reference, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

"(5) Irrespective of whether the assignment is in writing or not, a summary statement in writing about the assignment in accordance with paragraph (2) of this article constitutes notification in writing under paragraph (4) of this article.

"(6) Payment by the debtor to the assignee shall discharge the debtor from liability if made in accordance with this article or other applicable law."

Paragraph (1)

99. Views were exchanged as to the question whether actual knowledge of the assignment by the debtor should have the same result as notification, namely to preclude the debtor from paying the assignor in order to be discharged.

100. One view was that "knowledge" of the assignment by the debtor should be an alternative way of triggering the debtor's obligation to pay the assignee. In support of that view, it was observed that the need to preserve acceptable standards of conduct in practice made it necessary to counterbalance, on the one hand, the need for certainty and, on the other hand, regard for ethical conduct by the parties. It was argued that it would run counter to good faith to allow the debtor to pay the assignor in cases in which the debtor actually knew of the assignment. Moreover, it was stated that paragraph (1), as presently formulated, appeared to positively allow the debtor to pay the assignor even if the debtor had actual knowledge of the assignment, possibly overriding domestic law good faith requirements.

101. Another view was that the duty of the debtor to pay the assignee should be triggered only by notification rather than, as was proposed, also by knowledge of the assignment in the absence of notification. It was stated that a notification approach was essential for the protection of the debtor, which was the main purpose of the draft article, in particular in order to ensure that there was no doubt as to whom the debtor should pay in order to be discharged. In that connection, the view was expressed that a related principle, which was of paramount importance for the protection of the debtor and should be explicitly stated in this draft article, was that the debtor should not be disadvantaged as a result of the assignment.

102. In addition, it was stated that a rule along the lines of paragraph (1) was a useful indication of what would be the proper behaviour of the debtor before notification and was in line with normal business practice. It was said that in practice parties normally intended the debtor to continue making payments to the assignor until notification was given. The example was given of securitization transactions in which it was customary for the debtor to have knowledge of the assignment but to continue making payments to the assignor and not to the assignee, which was a special corporation established for the sole purpose of issuing and selling securities without having a structure geared to receiving payments of the assigned receivables.

103. Moreover, it was stated that, while making business practice conform to good faith standards was an important goal, this should not be at the expense of certainty, which would be the case if knowledge of the assignment were to trigger the debtor's duty to pay the assignee. In that regard, it

was noted that a number of questions would need to be addressed, including what constituted knowledge, who had to prove knowledge, what the content of knowledge would have to be and how knowledge of the assignment should be treated in case of several conflicting assignments.

104. After deliberation, the prevailing view was that "knowledge" of the assignment by the debtor should not be made a sufficient condition for the debtor to pay the assignee, while cases in which bad faith or fraud on the part of the debtor might be involved could be left to the applicable domestic law.

105. The Working Group then turned to the question of whether notification should be a condition for the effectiveness of assignment towards the debtor or merely a defence of the debtor in case the assignor challenged the payment made by the debtor to the assignee. It was noted that paragraph (1), read in conjunction with paragraph (1) of draft article 7, which provided that bulk assignments were effective upon their conclusion, gave the debtor, who knew of an assignment but had no notification of it, an option to pay the assignor or the assignee and be discharged.

106. The concern was expressed that allowing the debtor the choice of paying more than one person in order to be discharged could give rise to uncertainty. Another concern was that it might be inconsistent to provide that a bulk assignment was effective towards the debtor upon its conclusion and, at the same time, that the debtor may refuse to pay to the assignee before notification of the assignment.

107. In response to those concerns, it was stated that such an approach in effect would mean that the debtor before notification of the assignment could pay the assignor and be certain that it would be discharged; if the debtor chose to pay the assignee, and the assignor challenged that payment, the risk of proving the assignment would be on the debtor.

108. While the explanation given was considered to be to some extent satisfactory, the suggestion was made that, if that was the intention of paragraph (1), it should be explicitly stated that, while before notification the debtor was entitled to pay the assignor, it could also pay the assignee and be discharged. That suggestion was objected to on the ground that a clear discharge rule for the debtor in case of payment to the assignee before notification could have a negative impact on certain transactions, including securitization, in which the debtor was expected to continue making payments to the assignor. The view was expressed that it would be preferable to provide a clear rule for debtor discharge by payment to the assignor before notification, while leaving the question whether the debtor could be discharged by paying the assignee to other applicable law.

109. In the discussion, the suggestion was made that the Working Group may wish to consider the extent to which the assignee should be bound by modifications in the original contract entered into by the assignor and the debtor after the assignment but before notification of the debtor.

110. After deliberation, the Working Group agreed that paragraph (1) as presently formulated was acceptable in principle.

Paragraphs (2) and (3)

Chapeau

"if the debtor has not received notification in writing of a prior assignment"

111. It was noted that pursuant to paragraph (2) the debtor was under a duty to pay the assignee in order to be discharged if it had received notification of the assignment to that assignee, without having received notification of a prior assignment. Doubts were expressed as to whether the chapeau of paragraph (2), as presently drafted, covered situations in which a multiplicity of notifications of several assignments were involved.

112. The view was expressed that, if paragraph (2) were intended to address situations in which one assignment was involved, it would be acceptable in principle. If, however, paragraph (2) were to cover cases in which several notifications of conflicting assignments were made by adopting the rule that the debtor should pay the first assignee to notify, some tentativeness should be attached to that formulation, since such a rule could prejudge the answer to the question which of several conflicting assignees had priority.

113. Another view was that the question of multiple notifications was one involving the debtor's protection and not the question of priority among several conflicting assignees, and should therefore be addressed in the context of paragraph (2). In that regard, it was stated that the principle that the debtor should be discharged by paying the first assignee to notify was a sound one and could be accepted, since it provided certainty as to whom the debtor should pay in case of multiple notifications. The question whether, as among multiple assignees themselves, the first assignee to notify the debtor, having received payment by the debtor, could retain that payment was a different one and could be dealt with in the context of the issue of priorities among several conflicting assignees.

114. While the Working Group found the substance of the chapeau of paragraph (2) to be acceptable, it agreed that the matter of multiple notifications should be revisited after the Working Group had an opportunity to consider draft article 14 (priorities) and draft article 15 (subsequent assignments).

"of a judgement attaching the assigned receivables or of the insolvency of the assignor"

115. General support was expressed in the Working Group in favour of exempting from the debtor's duty to pay the assignee cases of attachment judgements and of insolvency of the assignor. The view was also widely shared that the chapeau should be expanded to cover other steps of the judicial, or non-judicial, process (e.g., attachment before judgement, other measures resulting from operation of law or from orders issued by a non-judicial body). With regard to insolvency of the assignor, reference was made to taking into account the work of the Commission on cross-border insolvency. The view was also expressed that insolvency of the assignor raised different issues from the issues arising in the context of attachment of receivables and should be looked at in more detail.

Subparagraph (a)

"[unconditional] notification"

116. It was noted that the term "unconditional", which appeared within square brackets, was intended to protect the debtor from uncertainty by addressing situations in which the debtor might receive a notification which did not contain a clear payment request. The view was expressed that the term "unconditional" was unnecessary, since an "unconditional" notification would not meet the requirements of subparagraph (b), namely, reasonable identification of the receivables and of the person to whom the debtor should pay. In addition, it was pointed out that the term "unconditional" could introduce some uncertainty since it was not universally understood.

117. While the view was expressed that the term "unconditional" might not be absolutely clear, it was observed that there was a need in case of a multiplicity of notifications to minimize the confusion to the debtor by rendering ineffective those notifications that were "conditional" in the sense that they notified the debtor of an assignment without, however, including a clear request for payment. In order to address that concern, the suggestion was made that subparagraph (b) could be revised in order to make it clear that a notification should include an unequivocal designation of the person to whom the debtor should make payment. After discussion, the Working Group agreed that the term "unconditional" could be deleted, subject to the preceding suggested revision of subparagraph (b).

"writing"

118. There was general agreement in the Working Group that for reasons of certainty notification of assignment should be in writing. At the same time, the Working Group agreed that, in order to accommodate modern means of communications, a flexible definition of writing should be adopted along the lines of paragraph (4), which was based on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication.

"by the assignee with the assignor's authority"

119. Views were exchanged as to whether the assignee should be able to notify the debtor on its own without being given authority by the assignor to do so. It was noted that paragraph (2), as presently drafted, provided that notification could be given by the assignor or by the assignee with the assignor's authority. It was also noted that that approach, which was followed in article 8(1)(a) of the Factoring Convention, was intended to protect the debtor from the uncertainty as to whether the person notifying the debtor was the rightful creditor.

120. One view was that, in order to protect the debtor from uncertainty as to whom to pay, it was important to relate the notification to the contractual partner with whom the debtor was familiar, namely the assignor. As to the question of "authority" of the assignee to notify, it was stated that the interests of the assignee in this respect were adequately addressed in draft article 7 dealing with the breach of the financing contract, which provided that the assignee could notify the debtor "when agreed" or in case of failure of the assignor to perform the underlying receivables financing contract.

121. Another view was that subjecting the ability of the assignee to give notification to authorization by the assignor might create problems in case the assignor refused, or was unable, to give such authority to the assignee, since, for example, the assignor, subsequent to the assignment, might have been declared insolvent. In support of that view, it was pointed out that draft article 7 might not be sufficient in that the assignor and the assignee might have inadvertently failed to indicate in their agreement when the assignee may notify independently and in that, in case of sale of receivables, the assignee might have an interest in notifying irrespective of the assignor's failure to perform the underlying financing contract. In addition, it was stated that paragraph (3) could address the need to protect the debtor from the uncertainty as to whether the assignee notifying was the rightful assignee, since the debtor, if in doubt, could request the assignee to provide adequate proof of the assignment.

122. The Working Group agreed that, in order to address the concerns that had been raised, paragraphs (2)(a) and (3) should be linked more closely. It was noted that the revised text should provide for a right of the assignee to notify the debtor independently and, at the same time, for a right of the debtor, if it wished, to request from the assignee, adequate proof of the assignment. However, the attention of the Working Group was drawn to the need to avoid placing on the debtor the burden of having to request additional proof or the risk of misjudging the facts and having to pay twice. In addition, a note of caution was struck that combining paragraphs (2)(a) and (3) might inadvertently lead to restricting the situations in which the debtor would have a right to request additional information only to situations involving independent notification by the assignee.

Subparagraph (b)

123. In line with the decision of the Working Group in its consideration of draft article 4 dealing with bulk assignments that future receivables could be assigned, provided that they could be identified as receivables to which the assignment related, it was agreed that the notification should not necessarily have to identify the receivables in completely exact terms. However, some concern was expressed as to whether the words "reasonably identified" properly conveyed that message, in particular in view of the fact that the term "reasonably" might not be universally understood. Although the suggestion was made that this term should be deleted or replaced by a clearer term, it was generally felt that it could be retained, so as to accommodate the case of future receivables, which could not be identified in exact terms, and for consistency in terminology with the Factoring Convention. As a drafting matter, it was suggested that the word "the assignee" should be replaced by a more general reference to "person". Subject to the observation referred to in paragraph 117 above, the Working Group found the substance of subparagraph (b) acceptable.

124. Upon concluding its consideration of paragraphs (2) and (3), the Working Group considered an additional question, namely, whether notification of the debtor should relate only to receivables arising from contracts existing at or before the time of notification, a limitation found in article 8(1)(c) of the Factoring Convention.

125. The view was expressed that, if such a rule were adopted, notification relating to future receivables arising from contracts concluded after notification would not constitute part of the notification, and, as a result, the debtor would not be under a duty to pay the assignee in respect of such receivables. It was pointed out that such an approach would be particularly undesirable since it could result in curtailing a number of important receivables financing practices, and, for that reason, the Working Group chose not to incorporate such a limitation.

Paragraph (4)

126. It was recalled that paragraph (4) was modelled on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication, which established the functional equivalent of "writing" in an electronic environment. The Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

127. With respect to the opening words of paragraph (5) ("Irrespective of whether the assignment is in writing or not"), it was noted that the draft provision had been formulated on the assumption that the draft uniform rules would not impose any form requirement on assignments. In view of the deliberations of the Working Group regarding the issue of form of assignment (see paras. 75-79 above), it was noted that paragraph (5) might need to be redrafted to reflect the variants to be prepared on that issue.

128. As regards the substantive rule contained in paragraph (5), there was general agreement that the main purpose of the paragraph was to avoid burdening parties with a duty to notify the entire contract of assignment. The minimum acceptable content of "notification in writing", as stated in paragraph (2), was a written statement as to the existence of the assignment, which should clearly identify the assigned receivables and the person to whom the debtor should pay. As a matter of drafting, it was generally felt that the reference to the minimum conditions established in paragraph (2) should be made more explicit.

Paragraph (6)

129. Various views were expressed in favour of total or partial deletion of paragraph (6). Under one view, paragraph (6) merely stated the obvious and, for that reason, should be deleted. Another view was that paragraph (6) should be deleted in line with a suggestion that had been made not to include in the draft uniform rules provisions on private international law issues (see paras. 185-187 below). Yet another view was that the reference to "other applicable law" at the end of paragraph (6) might lend itself to misinterpretation in that it might be confused with a reference to the rules of private international law. In line with that view, it was suggested that the words "or to other applicable law" should be deleted from paragraph (6).

130. It was widely felt, however, that a provision along the lines of paragraph (6) would be needed, since the discharging effect of payment should be recognized by the draft uniform rules. As to the exact way in which that issue should be addressed, it was noted that paragraph (1), which dealt with the option given to the debtor to pay the assignor, expressly mentioned that discharge would result from payment to the assignor. Paragraph (2) did not mention such a discharge in the case where payment was made to the assignee after the debtor had received notification of the assignment. It was suggested that a reference to that effect might be inserted in paragraph (2).

131. The view was expressed that, although the above-suggested references to discharge of the debtor in paragraphs (1) and (2) might be helpful, they might not sufficiently clarify the issue of discharge under the draft uniform rules. For example, in a situation where the debtor knew of the

assignment although it had not received notification and chose to pay the assignee, a situation discussed in the context of paragraph (1), the question of discharge would remain unsettled. Furthermore, it was stated that a general reference to the possibility of obtaining discharge on legal grounds outside the draft uniform rules was essential to avoid creating the risk that the discharge mechanisms established by the draft uniform rules might be misinterpreted as being exclusive. It was noted that the words "Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability" had been included in article 8(2) of the Factoring Convention for that reason. A suggestion was made that wording along the same lines might be considered for insertion in the draft uniform rules. After discussion, the Working Group agreed that the revised text to be prepared should deal with the discharging effects of payment by the debtor to the assignee under the draft uniform rules, without excluding other grounds on which the debtor paying the assignee might be discharged.

2. Defences of the debtor and setoff

132. The Working Group considered the question of defences of the debtor, based on a draft article, which read as follows:

> "Draft article 10. Defences of the debtor
>
> "(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.
>
> "(2) Notwithstanding paragraph (1), defences that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.
>
> "(3) The debtor may assert against the assignee any right of setoff in respect of claims existing against the assignor in whose favour the receivable arose and available to the debtor at the time notification of assignment conforming to article 9 was given to the debtor."

Paragraph (1)

133. Broad support was expressed in favour of paragraph (1), which reflected a principle considered essential for the debtor's protection in the context of receivables financing, namely, the principle that the debtor's legal position should not be negatively affected as a result of the assignment.

Paragraph (2)

134. Concerns similar to those raised in the context of the Working Group's discussion of paragraph 2 of draft article 4 (no-assignment clauses) were raised with regard to paragraph (2) of this article (see paras. 66-68 above). In addition, the view was expressed that paragraph (2), as presently drafted, would not protect the assignee from defences raised by the debtor on the basis of tortious breach of contract. It was suggested that the debtor should have against the assignee

defences based on tortious breach of the original contract by the assignor, if domestic law so provided. The view was expressed that that problem would be resolved if the text to be prepared were to include a provision invalidating no-assignment clauses, though the Working Group, it was recalled, had not generally rallied around the inclusion of such a provision at an earlier stage of the discussion (see paras. 67-68 above). The Working Group agreed that paragraph (2) should be revisited at a later stage in the light of a revised draft provision on no-assignment clauses.

Paragraph (3)

135. While paragraph (3) was found to be acceptable in principle, a number of questions were raised. One question was whether it was necessary to limit the right of setoff of the debtor against the assignee to those rights existing at the time of notification. In response, it was stated that this approach was necessary in order to protect the assignee from dealings between the assignor and the debtor of which the assignee had no knowledge. It was added that that result was particularly desirable from the standpoint of practices in which a multiplicity of lenders financed receivables arising from the same contract or in which one lender financed a multiplicity of contracts between certain parties. Another question was whether the debtor receiving notification should be obliged to make its defences known to the assignee. Yet another question went to the content of a right of setoff, a matter on which legal systems differed widely. In that connection, it was observed that setoff might be left to national law, in view of its complexity and the fact that it was clear in private international that the law applicable to setoff was the law governing the receivables to which the assignment related.

3. Waiver of defences

136. The Working Group considered the question of waiver by the debtor of its defences relating to the original contract between the assignor and the debtor on the basis of a draft article, which read as follows:

> "Draft article 11. Waiver of defences
>
> "A waiver by the debtor of the defences that the debtor could raise against the assignee under article 10 shall be valid [in respect of defences the availability of which the debtor knew or ought to have known at the time of waiver]."

137. The Working Group noted that waivers by debtors of defences relating to the original contract constituted an important potential source of greater certainty for creditors in the context of receivables financing. The Working Group then went on to consider several aspects of the above draft provision.

138. One matter considered was whether the provision should specify the point of time at which such a waiver would be made. The suggestion in this regard was to refer to waivers taking place at the time of the conclusion of the original contract between the debtor and the assignor. It was reported that that was typically the point of time at which a waiver was made by the debtor, and that such timing was instrumental in determining the credit terms that the assignee could make

available to the assignor, which in turn could affect the credit terms offered to the debtor. It was noted, however, that there were cases in practice, not necessarily infrequent, in which a waiver would be made, or an earlier waiver modified, subsequent to the conclusion of the original contract between the debtor and the assignor. There was no reason, it was agreed, to preclude such practices.

139. A suggestion was made to include in the draft provision reference to the notion of "acceptance" of the assignment by the debtor. It was suggested that such a step, which might be introduced as an option rather than as a requirement, could be appropriate for the case of a single receivable, though it was unlikely to be feasible in the case of a bulk assignment involving a multiplicity of debtors. The rationale behind such an acceptance was to provide a technique for heightening for the assignee the degree of certainty surrounding an assignment of receivables, thereby increasing the utility of assignment of receivables as a financing tool.

140. It was reported that there were divergent views in practice as to the effect of such an acceptance. One was that the acceptance involved the effectiveness of the waiver itself, while another view was that the acceptance was merely an acknowledgment of the waiver. The concern was also expressed that including a reference to acceptance by the debtor could potentially compromise the utility of a provision recognizing the effectiveness of waivers of defences.

141. A similar concern was expressed with respect to the bracketed language at the end of the draft provision, limiting the waiver to defences that the debtor knew or ought to have known about at the time of the waiver. It was felt that such a reference would inject an undesirable degree of uncertainty and subjectivity and would perhaps place the assignee into the undesirable position of having to investigate the question of the knowledge possessed by the debtor, which would have an adverse impact on the cost of credit.

142. In the discussion, the question was raised whether a waiver of defences was "final" or, in other words, "irrevocable". In response, the Working Group expressed its understanding that, in order to have commercial utility and to provide legal certainty, a waiver should be deemed final or irrevocable. It was pointed out that such an understanding was necessitated by the fact that credit extended on the basis of an assignment of receivables often relied on a waiver of defences. The view was expressed that the attribute of irrevocability could usefully be clarified in the text.

143. From a drafting standpoint, a proposal was made to add a reference to the waiver as being "explicit". Another proposal was to refer to waivers as being "admissible", rather than using the word "valid", so as to avoid inadvertently giving the impression that the provision was intended to deal with the question of validity of a waiver of defences.

144. The attention of the Working Group was drawn to the fact that article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes exempted from the protection afforded to the protected holder instances such as those involving fraud and duress. It was suggested that the present text should not afford the assignee greater protection in such cases than that afforded to the protected holder by the above Convention. Support was expressed for such an understanding of the provision, which would exclude from the debtor's waiver of defences those of the type related to fraud or duress. Reference was made in this connection to the understanding expressed above that the text was not intended to override other applicable law dealing with questions of validity of a waiver of defences.

4. Recovery of advances

145. The Working Group engaged in a discussion of recovery of advances paid by the debtor to the assignee on the basis of a draft article, which read as follows:

> "Draft article 12. Recovery of advances
>
> "Without prejudice to the debtor's rights under article 10, non-performance or defective or late performance of the original contract by the assignor shall not by itself entitle the debtor to recover a sum paid by the debtor to the assignee, provided that the debtor has a right to recover that sum from the assignor."

146. The Working Group lent its support to the approach embodied in the above provision, according to which the debtor should not be able to recover advances paid to the assignee prior to performance by the assignor of the original contract merely because of failure in performance by the assignor. It was noted that the draft provision did not include exceptions to the rule of the type included in the comparable provision of the Factoring Convention (art. 10). Those exceptions included the case in which the assignee had not paid or loaned money to the assignor as required in the financing contract, and the case in which the assignee was aware of the assignor's failure in performance of the original contract. It was understood that exceptions of that type were peculiar to the specific case of factoring, in which it was typical for a guarantee of performance to be given by the factor, and that reflecting them in the general text being prepared would create obstacles to a variety of financing structures used in practice.

147. It was also noted that the general approach in the current text, which was acceptable to the Working Group, was that the debtor, after the assignment, would still be left with its remedies against the assignor, and that it was not necessary to add to those remedies a remedy against the assignee.

148. The Working Group then considered the proviso at the end of the draft provision, which preserved a remedy for the debtor to obtain from the assignee return of advances paid in the face of failure in contract performance by the assignor where no remedy would be available against the assignor. The Working Group felt that it would be preferable to affirm separately and positively a rule to the effect that the debtor was entitled to obtain from the assignor the amount of advances paid to the assignee.

K. Effects of assignment towards third parties

149. The Working Group engaged in a discussion of the effects of assignment on third parties, based on a draft article, which read as follows:

"Draft article 14. Priorities

"(1) Variant A

The first assignee has priority over subsequent assignees, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant B

The first assignee to notify the debtor in accordance with article 9 has priority over subsequent assignees, over earlier assignees who failed to notify or notified later, over the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant C

The first assignee to register a summary statement at a public register located in the place of business of the assignor, which reasonably identifies the assignor, the assignee and the assigned receivables, has priority over subsequent assignees and earlier assignees who failed to register or registered later, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant D

The first assignee, or the first assignee to notify the assignment to the debtor, or the first to register a summary statement thereof in a public registry will have priority over subsequent assignees and the assignor's creditors, depending on the law of the State where the [assignor] [debtor] has its place of business.

"(2) The rule of paragraph (1) does not apply in the following cases:

....."

Paragraph (1)

General remarks

150. It was noted, at the outset, that assignment as a means of transferring property in receivables might have effects towards third parties, such as several conflicting assignees, the assignor's creditors and the trustee in the insolvency of the assignor. A conflict of priorities might arise in two main situations. One was the situation of a conflict between several assignees, due to multiple assignments of the same receivables because of fraud or an unconscionable act of the assignor. The other was the situation of a conflict between the assignee and the assignor's creditors, including the trustee in the insolvency of the assignor. While it was generally agreed that the possibility of receivables being fraudulently assigned to more than one assignee needed to be addressed in the

draft uniform rules, the discussion focused on the situation where the assignor became insolvent, a situation raising particularly serious concerns in assignment practice.

151. The view was expressed that, when dealing with issues of priorities, whether by way of a registration mechanism or by relying on a system of notification, the draft uniform rules should seek to establish that the assignee would be accorded the status of a secured creditor for the purposes of the insolvency proceedings. While it was felt that such a result might be desirable for fostering financing through assignment of receivables, it was suggested that it might not be feasible. On the one hand, the disparities in the status of secured creditors under existing rules of domestic law and the existence of administrative law and public policy considerations would make it impossible for the draft uniform rules to refer merely to the status of secured creditors under domestic law. On the other hand, any attempt to create a uniform status of secured creditors in the draft uniform rules would be faced with the same administrative law and public policy considerations and might greatly jeopardize the acceptability of the draft uniform rules. After deliberation, it was agreed that the status of an assignee in the context of insolvency proceedings might need to be further discussed at a future session, particularly in view of the work undertaken by the Working Group on Insolvency Law.

152. It was noted that legal systems differed as to whether the effects of assignment towards third parties arose from the assignment itself or depended upon an additional act, such as notification of the debtor or registration of the assignment, which was reflected in the variants presented. Variant A provided a simple rule, which, however, had the disadvantage that it afforded very little or no protection to third parties; Variant B raised difficulties since third parties would need to identify the debtors in order to obtain information about possible assignments, which could involve considerable difficulty in particular in the context of receivables financing; Variant C was based on an adequate publicity system, which allowed third parties a considerable degree of certainty and predictability as to whether they would be able to rely on receivables in deciding to extend credit while it raised the question of feasibility of establishing an international registration system; and Variant D in effect provided a private international law rule based either on the place of business of the assignor or on the place of business of the debtor.

153. The Working Group engaged in a general exchange of views. It was generally agreed that an adequate publicity system was essential for an efficient legal framework for receivables financing. It was stated that uncertainty with regard to the issue of priorities would increase the risk of the assignee not being able to obtain payment, which in turn would have an impact on the cost of credit. As a result, the assignee would have to pass that cost to the assignor and the assignor to the debtor. It was also stated that an adequate publicity system was essential to ensure access of small and medium-sized businesses to international financial markets.

Variants A to D

154. As to what might constitute an adequate publicity system, the Working Group based its deliberations on the text of the variants. Some support was expressed in favour of Variant A; it was stated that a rule giving priority to the first assignee (in actual time) had the advantage of simplicity. Should such an approach be followed, third parties would tend to be protected by the general knowledge that they possessed about receivables financing contracts in the relevant market. Some support was also expressed in favour of Variant B. It was stated that various jurisdictions followed a "first to notify the debtor" rule. The view was expressed, however, that a drawback of

such an approach was that it, in effect, utilized the debtor as a registry of notifications. While no support was expressed in favour of Variant D, it was generally felt that it should not be deleted at this stage and that the merits of an approach based on private international law mechanisms might need to be reviewed at a later stage.

155. Support was expressed in favour of a registration mechanism, such as envisaged in Variant C. It was stated that a rule based on registration would have the advantage of providing a system of notice to third parties, with the effect that the first assignee to register would have priority. The assignee would prevail over the assignor's creditors if the registration was effected before attachment, and, subject to the applicable insolvency law, over the insolvency trustee if registration was effected before the opening or effect of the insolvency proceedings.

156. However, a number of concerns were expressed with respect to the adequacy of a registration system. One concern was that in some countries the concept of registration of assignments might not be acceptable. In response, it was stated that, while registration might be objected to on theoretical grounds, it would have to be considered in view of the potential it presented for increasing the amount of credit available based on receivables and the number of parties having access to such credit. Another concern was that the costs involved in a registration system might constitute an obstacle to its use by smaller businesses. In response, it was pointed out that the use of electronic technology in recent years had considerably reduced the costs of using registration systems. It was also pointed out that, under the current draft provision, only a summary statement had to be registered, thereby avoiding costs that might result, for example, from an obligation to register the details of each assignment. Yet another concern was that, in a number of practical situations, parties might not be willing to make use of a registration system. Such situations involved, for example, certain short-term transactions concluded for refinancing purposes, where the assignment was concluded for only a few hours or a few days. Another example was the situation where parties might not wish to register with a view to preserving the confidentiality of the assignment. With respect to the latter example, support was expressed for a suggestion that the draft uniform rules should limit the right to access the registered information to interested parties.

157. In view of the possibility that parties might choose not to use a register, it was felt that, should a registration mechanism be established by the draft uniform rules, a specific provision should clarify the status of assignments that had not been registered. In particular, the draft uniform rules would need to make it clear whether registration was a condition of validity of the assignment or merely a way of evidencing the assignment and of settling the issues of priorities. In that respect, support was expressed for a suggestion that the draft uniform rules, while providing the option of a registration should not make the validity of the assignment conditional upon registration. According to that suggestion, an assignee that registered a summary statement would have priority over an assignee that failed to register or registered later. As a default rule, in the absence of a registration, the first assignee would have priority.

158. With regard to the question whether a publicity system should be based on an international registry or whether it should rely on existing national registries, preference was expressed in favour of an international registry. It was noted that an international registry could facilitate both registration and access to registered information, while a system based on national registers linked with an international communications system would not make registration easier, though it could facilitate access to registered information.

159. The view was expressed that the Working Group did not have sufficient information on the legal issues and the technical details (e.g., cost and manner of operation) involved in the establishment of a world registry. In that regard, it was noted that, while registration had been briefly dealt with in document A/CN.9/397 (paras. 43-51), the Secretariat was preparing a study on registration, which was relevant to the work of both the Working Groups on International Contract Practices and on Electronic Data Interchange. It was agreed that the discussion of registration issues would need to be resumed at a later stage, in view of the contents of that study. With regard to a world registry, a note of caution was struck that, while it could be acceptable if the instrument to be prepared were to cover assignments of international receivables, an attempt to cover international assignments of domestic receivables could create problems. It was also observed that the legal framework for a world registry would in all likelihood need to be established by way of a convention rather than a model law.

160. The Working Group was informed of work undertaken by UNIDROIT for the preparation of a draft convention on international interests in mobile equipment. It was observed that the draft convention would create a new international interest in mobile equipment, the effectiveness of which against third parties was intended to be based on international registration. It was also stated that a study group had been set up to consider issues related to that kind of registration. While coordination of work with UNIDROIT was said to be desirable, the view was widely shared that registration of interests in mobile equipment of the type envisaged in the UNIDROIT project presented different legal and practical issues from registration of assignments of receivables.

Paragraph (2)

161. It was noted that paragraph (2) was intended to allow for exclusion from a priority rule of certain special cases in which it might not be appropriate to afford preference to an assignee on the basis of some type of priority in time. The example was given of the seller who retained title to the goods sold until full payment of their price and who, at the same time, was the assignee of the future proceeds that might arise from the further sale of the goods by the buyer in the course of its business.

162. Differing views were expressed as to whether paragraph (2) should be retained. In support of retention of the paragraph, it was stated that the concept of priority was not useful in all cases and some exceptions would need to be listed (e.g., the conflict between a supplier of materials and a bank providing credit). As a drafting matter, it was suggested that, if paragraph (2) were retained, it should be made clear that the exclusions referred only to the rule in paragraph (1) and would not result in excluding in those cases the application of domestic law, even if the domestic law contained the same priority rule as in paragraph (1).

163. In support of deletion of paragraph (2), it was stated that such a provision ran the risk of compromising the certainty of a priority rule in paragraph (1) to the extent that cases would be left to the applicable domestic law, which could differ widely from country to country. In addition, it was pointed out that an approach based on a list of exclusions from the priority rule in paragraph (1) would result in decreased predictability as to which assignee would be afforded priority, which would result in an increase in the cost of credit to the assignor and ultimately to the debtor. Moreover, such exclusions were said to be inappropriate since they might have a negative impact on practices in which credit might be extended to a seller in reliance on the receivables. It was suggested that, instead of listing excluded cases such as those in which a conflict of priority arose

between a supplier of materials and a bank, a priority rule should be devised to provide that, for example, the supplier should inform the bank in order to enable it to avoid providing credit to the seller on the basis of the receivables assigned to the supplier.

164. Moreover, it was observed that a provision along the lines of paragraph (2) would raise the difficulty of having to classify claims in terms of special categories other than priorities (e.g., "privileges"), a task which should be left to the applicable domestic law. In the same vein, the suggestion was made that conflicts of priority between several assignees should be distinguished from conflicts between the assignee and the assignor's creditors, which could include Government revenue claims and employee wage claims. In that connection, it was noted that it should be made clear that the draft uniform rules were not intended to enter into the field of classification of claims or to cover revenue or wage claims.

L. Subsequent assignments

165. The Working Group engaged in a discussion of subsequent assignments, namely assignments by the initial or any subsequent assignee and several assignments of the same receivables by the assignor based on a draft article, which read as follows:

> "Draft article 15. Subsequent assignments
>
> "(1) These rules apply to any assignment of the same receivables by the assignor to several assignees or by the first or any other assignee to subsequent assignees, provided that the [first] [such] assignment is governed by these rules.
>
> "(2) In case of subsequent assignments by the assignor, the debtor is discharged from liability by payment to the first assignee to notify under article 9 and has against the assignee the defences provided for under article 10.
>
> "(3) In case of subsequent assignments by the first or any subsequent assignee, the provisions of articles 9 to 12 apply as if the subsequent assignee were the first assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee.
>
> "(4) Any subsequent assignment by the first assignee or by any subsequent assignee shall be effective notwithstanding any agreement between the first assignor and the first assignee or between any of the subsequent assignees prohibiting or restricting such assignment.
>
> "(5) Subject to the provisions of article 9, the invalidity of an intermediate assignment renders the final assignment invalid."

Paragraph (1)

166. It was generally felt that paragraph (1) reflected the sound principle of perpetuatio juris, namely that a succession of assignments should be covered by the same rules. However, it was noted that paragraph (1) referred to different cases of subsequent assignments, including those made by the initial or any subsequent assignee for refinancing purposes ("successive assignments"), as

well as those made by the assignor to several assignees because of fraud or an unconscionable act ("dual assignments").

167. The view was widely shared that successive assignments should be the subject of paragraph (1), and that the question of dual assignments should be dealt with separately. In addition, the view was expressed that fraudulent or unconscionable assignments by the assignor to two or more assignees essentially raised an issue of priority or of validity since after the initial assignment the assignor had no longer the right to assign the receivables.

168. The question was raised whether assignments of distinct parts of a pool of receivables or of undivided interests in pools of receivables by the same assignor to several assignees should be covered (e.g., assignments in which the claim for the capital of a loan was assigned to one assignee while the claim for the interest was assigned to another). It was noted that the definition of "receivables" could be revised so as to include parts of receivables. However, in view of the highly specialized context of refinancing transactions in which such assignments took place, it was suggested that further consideration would have to be given as to whether the assignment of partial or undivided interests in receivables should be addressed in the draft uniform rules (see paras. 180-184).

Paragraph (2)

169. It was noted that paragraph (2) addressed the issue of the debtor's protection in case of multiple notifications of dual assignments by several assignees. The Working Group found paragraph (2) to be acceptable in that the debtor could not be required to determine which of several assignees had priority and should have a simple and clear indication of whom to pay to discharge its obligation. As a matter of drafting, it was suggested that paragraph (2) should be aligned or consolidated with the revised paragraph (2) of draft article 9 on the debtor's duty to pay, so as to avoid any overlap.

Paragraph (3)

170. It was noted that paragraph (3) dealt with the debtor's protection in case of successive assignments by the initial or any subsequent assignee by adopting the principle that the debtor's legal position should neither be worsened nor improved as a result of a subsequent assignment.

171. A question was raised as to the appropriateness of the exclusion of rights of setoff that the debtor might have against an "earlier assignee". In response, it was explained that, based on paragraph (3) of draft article 10 dealing with defences of the debtor, the debtor had the right to setoff against a subsequent assignee claims arising against the initial assignor. It was added that, if a debtor could accumulate defences based on its separate dealings with various assignees in a chain of successive assignments, defences of which the ultimate assignee would have no way of knowing, this would adversely affect the commercial utility of subsequent assignments. The view was expressed that the debtor should be given the right to setoff against the assignee demanding payment claims arising from the debtor's contracts with the immediately preceding assignee who was at the same time the final assignor. The widely shared view, however, was that such an approach would not be desirable since it could inadvertently result in increasing the risk that the

assignee might not be able to collect, thus affecting the cost of credit, and in unnecessarily improving the debtor's legal position.

172. Another question was whether the subsequent assignee should follow the same procedure for establishing priority as would be imposed on the initial assignee. The concern was expressed in that regard that the present wording of draft article 14 dealing with priorities might not sufficiently cover multiple notifications or multiple registrations by subsequent assignees, and the suggestion was made that the matter should be clarified.

173. After deliberation, the Working Group found the substance of paragraph (3) to be generally acceptable, subject to further consideration at a future session of the Working Group.

Paragraph (4)

174. It was noted that, in line with the approach taken in draft article 4 regarding no-assignment clauses agreed upon between the assignor and the debtor in the original contract, paragraph (4) provided that subsequent assignments for refinancing purposes in contravention of no-assignment clauses agreed upon between the assignor and the initial assignee or between any of the subsequent assignees, were effective. Differing views were expressed as to whether no-assignment clauses included in refinancing contracts should be treated in the same way as no-assignment clauses agreed upon between the assignor and the debtor in the original contract.

175. One view was that for the same reasons mentioned in the Working Group's discussion of draft article 4, paragraph (4) should also be subject to a reservation by States (see paras. 62-65 above). In that regard, the question was raised whether the draft uniform rules should include a provision along the lines of article 12 of the Factoring Convention, which provided that the Convention did not apply to a subsequent assignment which was prohibited by the terms of the factoring contract. In response, it was noted that article 12 of the Factoring Convention was introduced to meet the needs of a particular jurisdiction in which receivables that had already been assigned could not be assigned validly a second time. It was recalled that, in that jurisdiction, factoring contracts routinely contained a clause whereby the factor undertook not to reassign the receivables; in order to avoid, in the context of international factoring, that the export factor would have to assign the assigned the receivables a second time to the import factor, the assignor assigned the receivables directly to the import factor in the State in which the debtor had its place of business.

176. After deliberation, the prevailing view was that paragraph (4), as presently formulated, was acceptable. It was pointed out that there was no reason to follow a reservation approach since, while upholding no-assignment clauses contained in the original contract between the assignor and the debtor was considered in some countries as a matter of public policy, this was not the case for no-assignment clauses agreed upon in the context of refinancing transactions, in which subsequent assignments were normal practice. In addition, it was stated that it was not necessary to introduce a provision along the lines of article 12 of the Factoring Convention, since assignments under the draft uniform rules differed from the factoring contract, which was a contract based on the close relationship between the assignor and the factor, and in the context of which subsequent assignments were normally not effected for refinancing purposes.

177. The view was expressed that paragraph (4) should include a rule on the consequences of the breach of no-assignment clauses along the lines of paragraph (2) of draft article 4, which would

mean in effect that a possible liability of an assignee assigning the receivables further, despite the fact that it had agreed with its immediately preceding assignor not to do so, would not be affected by the rule in paragraph (4).

178. After deliberation, the Working Group found the substance of paragraph (4) to be acceptable along its present lines.

Paragraph (5)

179. The Working Group agreed with the principle reflected in paragraph (5) that invalidity of an intermediate assignment rendered the following assignments invalid. As a matter of drafting, it was suggested that the opening words of paragraph (5) might be revised so as to avoid giving the impression that notification of the debtor cured the invalidity of a subsequent assignment. The suggestion was also made that paragraph (5) should be revised so as to reflect the idea that the invalidity of an intermediate assignment could invalidate all following assignments and not only the "final" assignment, as presently formulated.

M. Assignments of partial or undivided interests in receivables

180. In the discussion of draft article 15 dealing with subsequent assignments, the question arose whether assignments of distinct parts of receivables or of undivided interests in pools of receivables should be covered by the draft uniform rules (see para. 168 above).

181. At the outset, it was observed that such assignments often formed part of highly complex financing transactions and raised a number of difficult issues that needed to be examined carefully in order not to upset existing practices, which varied widely. One example given referred to loan participations, in which undivided interests, usually in large loans, were sold to different financing institutions for the purpose of spreading the risk involved. Another example cited was securitization, which also involved the assignment of undivided interests in receivables, although for a different purpose, namely, to decrease the cost of credit by converting the receivables into securities and making them available to the investment market.

182. It was widely felt that the above types of assignments merited further consideration with a view to determining whether or how they should be addressed in the draft uniform rules.

183. As to the particular questions that may need to be considered, a number of suggestions were made, including: the definition of "parts" of receivables, or the minimum units, that could be assigned; the debtor's protection, in particular the question whether the debtor's consent was necessary for such an assignment to be effective and whether the debtor should be able to discharge its debt by depositing the amount owed in a bank account or by mailing it to a post box office; the assignee's protection from creditors of the assignor; the possible exclusion of receivables in the form of negotiable instruments; and the extent to which it would suffice, in order to cover such assignments, to revise the definition of "receivable" so as to include partial or undivided interests in receivables, coupled with the application to such cases of the draft uniform rules being prepared.

184. Further questions were raised with regard to transactions such as loan participations and securitization, including whether both types of transactions could be addressed by the same rules

and whether a criterion could be found to distinguish the undivided investment interest in a loan participation, that could be covered, from investment securities that were subject to a different regulatory regime and would presumably not be covered.

N. Private international law issues

1. General remarks

185. A question was raised as to whether the Working Group had the mandate to discuss issues of private international law in the context of the preparation of the draft uniform rules. In response, it was recalled that the Commission, at its twenty-eighth session, had taken the decision to assign the report prepared by the Secretariat and the draft uniform rules contained therein to the Working Group with a view to preparing a uniform law on assignment in receivables financing. As to the private international law aspects of assignment, it had been agreed at that session that the difficulty in addressing them should not result in their exclusion from future work of the Commission on the topic, but should rather lead to closer cooperation with the Hague Conference on Private International Law, for example, by the holding of joint meetings of experts on issues of common interest related to assignment of receivables.[5]

186. Views were exchanged as to whether it was appropriate to consider inclusion of provisions on issues of private international law in the body of the draft uniform rules. It was stated that, under an approach taken in some countries, it might be regarded as inappropriate for a text of substantive law to include rules on private international law issues governing its own applicability. It was stated in response that provisions on conflicts of laws had been included in previous UNCITRAL texts, without negatively affecting their applicability.

187. Another preliminary question was whether it was appropriate to discuss private international law issues in the context of the preparation of the draft uniform rules before agreement had been reached as to the substantive rules. It was generally agreed that, at this stage, the Working Group could only have a very tentative discussion on the basis of the draft provisions embodied in the draft uniform rules with respect to private international law, namely draft article 8 (law applicable to the relationship between assignor and assignee, draft article 13 (law applicable to the relationship between assignor and debtor) and Variant D of paragraph (1) of draft article 14 (priorities). It was felt, however, that, although private international law issues would need to be further discussed as the work on the substantive provisions of the draft uniform rules would progress, a preliminary exchange of views on those issues might be useful at this stage.

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[5] 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. 379 and 380.

2. Law applicable to the relationship between assignor and assignee

188. The Working Group engaged in a discussion of possible rules on the law applicable to the relationship between assignor and assignee, based on draft a article, which read as follows:

"Draft article 8. Law applicable to the relationship between assignor and assignee

"(1) [With the exception of matters which are expressly settled in these rules,] the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,] are governed by the law the choice of which is:

(a) Stipulated in the assignment; or

(b) Agreed elsewhere by the assignor and the assignee.

"(2) (a) In the absence of a choice by the parties, the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables], and with the exception of matters which are expressly settled in these rules, are governed by the law of the State in which the assignor has its place of business.

(b) For the purposes of subparagraph (a), in case the assignor has more than one place of business, the place of business is that which has the closest relationship to the assignment, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the assignment."

Paragraph (1)

"[With the exception of matters which are expressly settled in these rules,]"

189. The view was expressed that the opening words of paragraph (1) created the impression that the draft uniform rules established a distinction between the general application of domestic law, which would be determined by a private international law rule, and certain provisions of the draft uniform rules, which would apply in abstracto with no regard to domestic law. It was stated that the draft uniform rules would either be in the form of a model law, in which case they would be enacted as domestic law and carry out their international effects through a private international law rule, or as a convention, which would determine its own scope of application. In response, it was stated that, while the opening words of paragraph (1) might need to be redrafted to avoid misinterpretation, they were intended mainly as a reference to draft articles 6 (warranties) and 7 (breach of the financing contract), which were the only provisions in the draft uniform rules dealing with issues related to the contract of assignment. As a matter of drafting, it was suggested that the opening words of paragraph (1) might be replaced by a reference to draft articles 6 and 7. In that context, it was also recalled that support had been expressed for the deletion of paragraph (1)(b) of draft article 1 so as to reduce uncertainty inherent in reliance on the rules of private international law regarding assignment.

190. A concern was expressed about a possible side-effect of the reference to "matters expressly settled in these rules". It was stated that relying on private international law to solve all matters not expressly settled in the draft uniform rules might detract from the main goal of the draft uniform rules, which was to provide uniform substantive solutions to the issues raised by receivables financing. While certain questions would undoubtedly have to be left to domestic law, with the inherent uncertainty and diversity as to the solutions to be provided, other questions, though not expressly settled by the draft uniform rules, might be settled better by reference to the principles on which the draft uniform rules were based or to trade custom or to other source of uniform law. A suggestion was made that the word "expressly" should be deleted. With reference to the principles on which the draft uniform rules were based, another suggestion was that a provision on interpretation along the lines of article 7 of the United Nations Sales Convention might be included. The view was expressed, however, that such a provision could only operate in the context of an international convention. Other examples included texts of international origin that allowed jurisdictions to apply general principles, trade custom, "lex mercatoria" or other standards developed internationally.

"the rights and obligations of the assignor and the assignee"

191. The view was expressed that the reference to "rights and obligations" of the parties to the assignment might overly restrict the scope of the draft provision. For example, it was stated that the time of transfer of the assigned receivables, while not falling strictly under the category of "rights and obligations" of the parties, was intended to be subject to the law applicable to that relationship. A suggestion was that the matter might be addressed by appropriate explanations in a commentary on the draft uniform rules, that might be possibly prepared at a later stage, with a view to broadening the scope of the notion of "rights and obligations" for the purposes of the draft uniform rules. Another suggestion was to replace the reference to the notion of "rights and obligations of the assignor and the assignee" by a reference to "the assignment". That suggestion was objected to on the grounds that such a reference would open too widely the scope of the draft provision, in that it would also cover the effects of the assignment in the context of the relationship between the assignee and the debtor, which were currently covered by draft article 13. After discussion, it was agreed that the provision would need to be redrafted to make it clear that it covered the relationship between the assignor and the assignee, including such issues as validity of the assignment and transfer of the assigned receivables as between the assignor and the assignee.

192. Another concern was that the reference simply to the "rights and obligations" of the parties left it unclear whether the rights and obligations to be taken into consideration were only those stemming from the assignment contract or also those originating from the underlying financing transaction. The view was expressed that this might not be an appropriate distinction since it might be regarded that the rights and obligations of the assignor and the assignee were not separable but themselves arose from the underlying financing transaction. However, it was observed that assignment clauses created distinct rights and obligations of the parties (e.g., warranties), apart from the rights and obligations stemming from the underlying transaction. After discussion, it was generally agreed that it should be made clear that the scope of the draft provision was limited to the relationship between the assignor and the assignee arising from the assignment.

"[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,]"

193. There was general agreement that matters regarding time and validity of the transfer of the assigned receivable should not be affected by agreement between the parties. It was also agreed that the provision might need to indicate more clearly that it was not intended to override any provision of insolvency law.

"are governed by the law the choice of which is:

"(a) Stipulated in the assignment; or

"(b) Agreed elsewhere by the assignor and the assignee."

194. As to the substance of the private international law rule, there was general agreement on the need to recognize party autonomy. As a matter of drafting, the view was expressed that the reference to "the law the choice of which is agreed elsewhere" might need to be redrafted to indicate more clearly that it intended to cover any law chosen by the parties outside the contract of assignment itself. The provision should not be misinterpreted as interfering with any procedural law that might apply, in the context of certain domestic laws, as to where or when such a contract might be concluded by the parties. As a drafting suggestion, it was stated that subparagraphs (a) and (b) should be merged to read along the following lines: "stipulated in, or for the purposes of, the assignment".

Paragraph (2)

195. Various views were expressed as to the private international law rule that should apply in the absence of a choice by the parties. One view was that a rule based on the contract of assignment being governed by the law of the place of business of the assignor had the advantage of simplicity and predictability. However, such a rule was objected to on the grounds that it was inappropriate to provide for a fixed rule to apply to the wide variety of practical situations, in the various types of financing transactions to be covered by the draft uniform rules. For example, while the law of the place of business of the assignor might be appropriate in the context of a sale of receivables, the law of the place of business of the assignee might be preferable in case of a loan, where the characteristic performance would be performed by the assignee. In the discussion, the suggestion was made that paragraph (2) should apply also in cases in which the parties' choice of law was invalid.

196. Another view was that a rule based on the notion of "closest relationship" was preferable, along the lines adopted in the Rome Convention. Inherently more flexible, such an approach could result in the application of the law of the assignor's place of business (e.g., in an assignment by way of sale), or the law of the assignee's place of business (e.g., in recourse factoring in which the factor might perform bookkeeping and collection functions). That approach was objected to on the grounds that such a rule would have the disadvantage of reduced predictability. While support was expressed in favour of introducing a degree of flexibility in the choice-of-law rule, to reflect the variety of the situations encountered in practice, it was generally felt that the issue needed to be considered further at a future session of the Working Group.

3. Law applicable to the relationship between assignee and debtor

197. The Working Group then turned to a discussion of a possible rule on the law applicable to the relationship between assignee and debtor based on a draft article, which read as follows:

"Draft article 13. Law applicable to the relationship between the assignee and the debtor

"With the exception of matters which are expressly settled in these rules, any matter arising between the assignee and the debtor shall be governed by the law [governing the receivable to which the assignment relates.] [of the State where the debtor has its place of business. In case the debtor has more than one place of business, the place of business is that which has the closest relationship to the transfer of receivables, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the contract.]"

198. It was noted that the above draft provision presented a choice for consideration by the Working Group between two possibilities, the law governing the receivable to which the assignment related (the law of the original contract) and the law where the debtor had its place of business. The tendency of the Working Group, at least at the present stage of its deliberations, was to favour the former approach, namely a rule referring to the law of the original contract. Views expressed in support of such an approach included that it would be more in line with the general approach of the draft uniform rules as they had been considered thus far and that it would provide greater protection to the debtor. The latter advantage was linked to the fact that the debtor would have chosen or at least acquiesced in the choice of the law governing the original contract. It was also suggested that a presumed advantage of the second approach, greater predictability due to being based on the place of business of the debtor, might be less than would appear since the debtor's place of business might not be known at the time of assignment or the debtor might relocate to another jurisdiction after the conclusion of the assignment. At the same time, the view was expressed that it would be premature at this stage to make a final decision as to which of the two approaches to follow.

199. As to the scope of the provision, the questions raised included whether the reference to "any matter arising between the assignee and the debtor" might be undesirably broad. A related matter was whether the question of the assignability of a receivable would be categorized as an issue between the debtor and the assignee, or one that perhaps might be considered as an issue of validity to be dealt with under the draft provision dealing with the law applicable to the assignor-assignee relationship. Observations made in regard to that question included that it did not relate to the question of admissibility of no-assignment clauses, and that in some countries the question of assignability may be dealt with as a question of the validity of the original contract. A further question raised was whether consideration should be given to including a reference to the contractual freedom for the parties to vary the rule set forth in the draft provision.

200. By way of a drafting suggestion, it was noted that the provision being considered at present, as well as paragraph (2)(b) of the draft article 8 (law applicable to the relationship between assignor and assignee), both identified the decisive place of business in the event that the party concerned in each of those provisions had more than one place of business. It was suggested that

those provisions might be consolidated in a single place in the text, perhaps in a provision containing general definitions.

201. Prior to closing for the present stage its discussion of applicable law questions, the Working Group recalled that Variant D of paragraph (1) of draft article 14 on priorities contained a reference to the law of the State of the place of business of either of the assignor or of the debtor, the two constituting a choice presented to the Working Group within that Variant. While some doubt was expressed as to the utility of Variant D, it was agreed to retain it for the time being for possible further consideration at a later stage.

IV. FUTURE WORK

202. Having concluded the above deliberations on various possible issues and draft provisions to be included in draft uniform rules on assignment in receivables financing, the Working Group noted a number of comments concerning the work accomplished at the current session and concerning the next steps to be taken. It was observed that the session had provided a productive exchange of views, including on various approaches and formulations that might be reflected in the draft uniform rules with a view to facilitating the development of global financial markets. A number of suggestions were made of issues for particular attention during the upcoming deliberations of the Working Group. Those included: the question of the international assignment of domestic receivables, with a particular view to providing adequate assurance of the protection of the debtor in such contexts (e.g., regarding new risks for the debtor; currency implications); the extent to which emphasis could be placed on finding solutions by way of substantive law, rather than through private international law rules; examination of the feasibility of relying on a registry approach; coverage of "conditional" and "possible" receivables; and compatibility of the draft uniform rules with national laws.

203. In connection with the above issues, reference was made to the relevance and utility of information, in particular regarding the experiences and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group by the Secretariat, as well as by the members of the Working Group themselves as a result of consultations.

204. The Working Group requested the Secretariat to prepare a revised version of the draft uniform rules that had been considered at the present session, taking into account its deliberations and decisions. It was noted that the next session of the Working Group to be devoted to the subject of assignment in receivables financing was scheduled for 8 to 19 July 1996, those dates being subject to confirmation by the Commission at its twenty-ninth session.

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