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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-NINTH SESSION
(Vienna, 5 - 16 October 1998)

CONTENTS

I. INTRODUCTION

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

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

3. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission discussed three reports prepared by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). Having considered those reports, the Commission concluded that it would be both desirable and feasible to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (where the assignor, the assignee and the debtor are not in the same country) and as to the effects of such assignments on the debtor and other third parties.[3/]

4. At its twenty-fourth session (Vienna, 8-19 November 1995), the Working Group commenced its work by considering a number of preliminary draft uniform rules contained in a report of the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of lower-cost credit (A/CN.9/420, para. 16).

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

6. At its twenty-fifth and twenty-sixth sessions (New York, 8-19 July and Vienna, 11-22 November 1996), the Working Group continued its work by considering different versions of the draft uniform rules contained in two notes prepared by the Secretariat (A/CN.9/WG.II/WP.87 and

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

2/ Ibid., Thirty-fifth Session, Supplement No. 17 (A/35/17), paras. 26-28.

3/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

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

A/CN.9/WG.II/WP.89 respectively). At those sessions, the Working Group adopted the working assumptions that the text being prepared would take the form of a convention (A/CN.9/432, para. 28) and would include private international law provisions (A/CN.9/434, para. 262).

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

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

9. At its thirty-first session (1998), the Commission had before it the report of the twenty-seventh and twenty-eighth sessions of the Working Group (A/CN.9/445 and A/CN.9/447). The Commission expressed appreciation for the work accomplished and requested the Working Group to proceed with its work expeditiously so as to complete its work in 1999 and submit the draft Convention for adoption by the Commission at its thirty-third session (2000). [7/]

10. The Working Group, which was composed of all States members of the Commission, held the present session in Vienna from 5 to 16 October 1998. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Cameroon, China, Colombia, Egypt, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Lithuania, Mexico, Nigeria, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland and United States of America.

11. The session was attended by observers from the following States: Angola, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Canada, Costa Rica, Cuba, Czech Republic, Ecuador, Gabon, Georgia, Greece, Indonesia, Iraq, Ireland, Lebanon, Libyan Arab Jamahiriya, Madagascar, Mali, Morocco, Poland, Portugal, Republic of Korea, Slovakia, Sweden, Switzerland, Turkey, Uruguay and Venezuela.

12. The session was attended by observers from the following international organizations: Association of the Bar of the City of New York (ABCNY), European Bank for Reconstruction and Development (EBRD), European Federation of National Factoring Associations (EUROPAFACTORING), Factors Chain International (FCI), Fédération Bancaire de l'Union Européenne, Hague Conference on Private International Law and International Bar Association (IBA).

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

6/ Ibid., para. 256.

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

13. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Jeffrey Wah-Teck Chan (Singapore).

14. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WG.II/WP.97), a note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing" (A/CN.9/WG.II/WP.96), another note by the Secretariat entitled "Revised articles of draft Convention on Assignment in Receivables Financing: remarks and suggestions" (A/CN.9/WG.II/WP.98), a report of a meeting of experts prepared by the Permanent Bureau of the Hague Conference on Private International Law entitled “Assignment of receivables” (A/CN.9/WG.II/WP.99) and a proposal by the United States of America entitled “Discharge of the Debtor by Payment. Proposed Revision of Articles 5, 16 and 18" (A/CN.9/WG.II/WP.100).

15. The Working Group adopted the following agenda:

1. Election of officers.

2. Adoption of the agenda.

3. Preparation of draft Convention on Assignment in Receivables Financing.

4. Other business.

5. Adoption of the report.

II. DELIBERATIONS AND DECISIONS

16. Recalling that at its previous session for lack of sufficient time the Working Group had not considered draft articles 23 and 24 and in view of the importance of those provisions, the Working Group decided to begin its deliberations by discussing draft article 23. The Working Group considered the following draft articles listed in the order in which they were discussed: draft articles 23, 5(i) to (j), 24, 5(g) to (h), 25 to 33, 41 to 50, the preamble and draft article 1(1) and (2), as set forth in document A/CN.9/WG.II/WP.96.

17. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in Chapters III to V. The Working Group adopted the substance of draft articles 23 to 33, 5(g) to (j), 18(5*bis*), 41 to 50, the preamble and draft article 1(1) and (2), and, with the exception of draft article 1(1) and (2), referred them to a drafting group established by the Secretariat to align the various language versions of the draft articles adopted.

III. DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

Section III. Third parties

Article 23. Competing rights of several assignees

18. The text of draft article 23 as considered by the Working Group was as follows:

> "(1) Priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located.
>
> "(2) Notwithstanding paragraph (1), conflicts of priority may be settled by agreement between competing assignees."

Paragraph (1)

19. The Working Group was generally in agreement with the general principle expressed in paragraph (1), namely that priority should be determined by reference to the law of the State in which the assignor was located. As to the precise formulation of that principle, the Working Group discussed whether paragraph (1), in line with the approach taken in draft article 31, should include a precise reference to the time of the assignment as the point of time which should be taken into account in the determination of the law applicable to priority questions. The discussion focused on whether, in dealing with multiple assignments, paragraph (1) should settle the question as to which law should govern if the assignor moved to a new location after the assignment: the law of the location of the assignor at the time of the first or of a subsequent assignment. A number of suggestions were made, including that words along the lines of "at the time of the first assignment" or "at the time of the transfer of the receivables" should be added at the end of paragraph (1).

20. Another suggestion was to add language along the following lines in draft article 23:

> "Where the assignor changes its location after the assignment, the assignee with priority under the law of the State in which the assignor was initially located retains its priority:
>
> "(a) for a period of [six months]; or
>
> "(b) until priority would have ceased under the law of the State in which the assignor was initially located; or
>
> "(c) by meeting the requirements for obtaining priority under the law of the State of the new location of the assignor before priority ceases under subparagraph (a) or (b) of this article; or
>
> "(d) if it happens to have priority under the law of the State of the new location of the assignor."

In support of the suggested wording, it was recalled that the assignee with priority under the law of the initial location of the assignor should not lose its priority position just because the assignor relocated. On the other hand, the rights of assignees in the new location should not be forever subject to the rights of assignees from other jurisdictions.

21. While support was expressed in favour of both suggestions, it was widely felt that adding either of the suggested wordings might make the rule under paragraph (1) unnecessarily complex in view of the fact that relocation of the debtor between duplicate assignments rarely occurred in practice. The prevailing view was that, depending on whether the term "priority" and the term "location" of the assignor could be defined with sufficient certainty and predictability (draft article 5(i) and (j)), there might be no need to modify the text of paragraph (1).

22. The Working Group went on to briefly consider the definition of the terms "priority" and "location" (draft article 5(i) and (j)).

Definition of the term "priority" (draft article 5(i))

23. It was noted that in some legal systems the term was unknown and that the definition in draft article 5(i) might not provide adequate guidance as to the exact meaning of the term. In addition, it was noted that in some of those legal systems "priority" might be understood as effectiveness of the assignment erga omnes, an understanding which might result in uncertainty as to the consistency among the various provisions of the draft Convention and in particular draft articles 29, 30 and 31.

24. The view was widely shared that the term "priority" was sufficiently clear and that draft article 5(i) should be retained unchanged. It was stated that draft article 17 clarified the rights of an assignee with priority, namely to claim and retain the proceeds of a payment made to another person (for a brief discussion of the meaning of the term "priority", see para. 108 below). After discussion, the Working Group adopted draft article 5(i) unchanged.

Definition of the term "location" (draft article 5(j))

25. The Working Group considered the exact meaning of the term "location", for the purposes of draft article 23 only (for a discussion of the meaning of the term "location", see also paras. 33 to 34, 88 to 89, 107 and 163 to 169 below). While it was stated that it would be more appropriate to adopt a single definition of the term "location" for the purposes of the draft Convention as a whole, the view was widely shared that different rules may be adopted to serve different purposes (i.e. one location rule for the purpose of the application of the draft Convention and a different rule for the purposes of draft articles 23 and 24).

26. As to the exact meaning of the term "location" in the context of draft article 23, diverging views were expressed. One view was that reference should be made to the principal place of business or to a combination of factors, including place of performance, central administration and principal place of business. In support of that view, it was observed that such a flexible approach would be more in line with the trends followed in practice and reflected in existing texts, including the European Union Convention on the Law Applicable to Contractual Obligations (hereinafter referred to as "the Rome Convention"), the European Union Convention on Insolvency Proceedings and the UNCITRAL Model Law on Cross-Border Insolvency. In addition, it was observed that a place-of-incorporation rule would be too simplistic and would fail to achieve its stated goal of uniformity, since it was understood differently in the various legal systems. Moreover, it was stated that a place-of-incorporation rule would inadvertently result in inappropriately subjecting the dealings of a branch office to the law of the country in which the head office was located. It was also

observed that such an approach could have the unintended effect of encouraging forum shopping and allowing parties to subject priority issues to the law of a convenient jurisdiction by incorporating themselves in that jurisdiction.

27. The prevailing view, however, was that reference should be made to the place of incorporation. It was stated that it was of utmost importance for financiers to be able to easily determine the law governing the priority conflicts covered in draft article 23. On that basis, financiers would determine whether to provide credit and at what cost. For that reason, it was observed, reference should be made to a single and easily determinable jurisdiction. Any other criterion, it was said, could have the unintended effect of defeating the goal of the draft Convention to increase the availability of lower-cost credit. In addition, it was stated that guidance could not be drawn from the texts mentioned above, since, unlike the Rome Convention, the draft Convention dealt with the proprietary effects of assignment as against third parties beyond the debtor; and also unlike the texts mentioned above that dealt with insolvency, draft article 23 dealt with forward planning in the financing of a solvent assignor. Moreover, it was said that for the purposes of draft article 23 consistent results could be obtained only if conflicts between assignments made by the head office and assignments made by a branch office of the assignor were subjected to the same law.

28. In response to a question, it was said that a reference to the place of incorporation of the assignor would be more appropriate, since in some countries corporations could have more than one registered office.

29. The Working Group turned to the question of the location of unincorporated businesses, namely legal entities other than corporations (e.g. limited partnerships, trusts). The view was expressed that the matter may not need to be addressed in the draft Convention. In support of that view, it was stated that in many legal systems unincorporated businesses fell into the category of individuals. In addition, it was observed that, in any case, the amount of receivables financing undertaken by unincorporated businesses was negligible and did not need to be addressed. Moreover, it was said that normally lenders would require borrowers to create a corporation before any credit was extended. The prevailing view, however, was that the matter merited attention in the context of the draft Convention. It was stated that there was no reason to exclude financing practices involving unincorporated businesses from the scope of application of the draft Convention. In addition, it was observed that in some countries significant receivables financing practices involved unincorporated businesses.

30. As to the specific way in which the matter should be addressed, a number of suggestions were made. One suggestion was that reference should be made to the location identified by parties in their agreements. That suggestion was objected to on the grounds that such an approach could lead to inconsistent results if different assignments identified different locations, and would inappropriately allow parties to an assignment to affect the rights of third parties by their agreement. Another suggestion was to provide that unincorporated businesses were located at the place where they had their principal place of business. That suggestion failed to attract sufficient support. Yet another suggestion was that those unincorporated businesses for whose establishment a constitutive document had been filed should be considered to be located in the place where that document had been filed, while for any other unincorporated businesses reference should be made to the place in which they had their chief executive office. Broad support was expressed in the Working Group in favour of that suggestion. It was stated that the main advantage of such an approach would be that it would facilitate the identification of a single jurisdiction as the location of an unincorporated business for the purpose of identifying the law governing priority issues. After discussion, the Working Group decided to refer in

draft article 23 to the place of incorporation of the assignor, leaving the exact formulation of that rule to the drafting group.

Paragraph (2)

31. Broad support was expressed in favour of the principle of allowing the assignee with priority to relinquish that priority by agreement. While the view was expressed that paragraph (2) stated the obvious and could be deleted, the Working Group decided to retain it in order to usefully clarify a point that might not be clear in all legal systems. As to the exact formulation of the principle, a number of observations were made, including that the current wording did not provide for subordination agreements made between the assignor and the assignee to the benefit of other persons and did not clarify whether subordination agreements could be concluded only at the time a dispute arose or at a previous time as well. In order to address those points, it was suggested that paragraph (2) should be reformulated along the following lines: "An assignee entitled to priority under paragraph (2) may agree with the assignor or any other assignee at any time to subordinate its priority in favour of that other assignee". After discussion, the Working Group decided that the principle should be expressed in an as broad a way as possible and left the exact formulation of paragraph (2) to the drafting group.

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

32. The text of draft article 24 as considered by the Working Group was as follows:

> "(1) Priority as between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

"(2) Priority as between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located.

"(3) Nothing in this article requires a court to take any action which is manifestly contrary to the public policy of the State in which the court is located.

"(4) In case an insolvency proceeding is commenced in a State other than the State in which the assignor is located,

Variant A

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

Variant B

this Convention does not affect:

(a) any right of creditors of the assignor to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer;

(b) any right of the insolvency administrator,

(i) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment as a fraudulent or preferential transfer,

(ii) to avoid or otherwise render ineffective, or to initiate an action to avoid or otherwise render ineffective, an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding,

(iii) to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original contract, or

(iv) to encumber the assigned receivables with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee;

(c) [if the assigned receivables constitute security for indebtedness or other obligations,] any insolvency rules or procedures generally governing the insolvency of the assignor:

(i) permitting the insolvency administrator to encumber the assigned receivables;

(ii) providing for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding,

(iii) permitting substitution of the assigned receivables for new receivables of at least equal value,

(iv) providing for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured, or

(v) other rules and procedures of similar effect and of general application in the insolvency of the assignor [specifically described by a Contracting State in a declaration made under article 43].

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

Paragraphs (1) and (2)

33. It was noted that the thrust of paragraphs (1) and (2) was to ensure that the law governing priority and the law governing the insolvency of the assignor would be the law of the same jurisdiction by subjecting priority issues to the law of the State in which insolvency proceedings in respect of the assignor were most likely to be commenced. In the case of insolvency proceedings commenced in a jurisdiction other than that in which the assignor was located, it was noted that the basic approach of draft article 24 was to preserve, to a large extent, the rights of the insolvency administrator and of the assignor's creditors existing under law applicable outside the draft Convention. In addition, it was noted that, in order for draft article 24 to establish an appropriate balance between the draft Convention and the applicable insolvency law and for reasons of consistency with other texts, such as the European Union Convention on Insolvency Proceedings and the UNCITRAL Model Law on Cross-Border Insolvency, a different location rule might need to be established in the context of draft article 24 from the place-of-incorporation rule, which was adopted in the context of draft article 23.

34. The view was expressed that conflicts of priority between an assignee and an administrator in the insolvency of the assignor should be subjected to the law governing the insolvency proceeding (lex fori concursus). The prevailing view, however, was that paragraphs (1) and (2) appropriately subjected conflicts of priority to the law of the location of the assignor (i.e. the law of the place of incorporation of the assignor). The Working Group adopted the substance of paragraphs (1) and (2) and referred them to the drafting group on the assumption that the terms "priority" and "location" would be given the same meaning under draft article 24 as under draft article 23, by reference to the definitions contained in draft article 5(i) and (j) (see paras. 23 to 30 above and paras. 88 to 89, 107 and 163 to 169 below).

Paragraphs (3) and (4)

35. The Working Group expressed general support in favour of the principles embodied in paragraph (3) and in the opening words and the text of Variant A. The question was raised as to whether the issue of preferential creditors who, under the law of insolvency applicable in certain countries, would have precedence over assignees was appropriately addressed by draft article 24. The Working Group generally agreed on the principle that the draft Convention should avoid undue interference with applicable insolvency law. Thus, the rights of preferential creditors (e.g. the Government for taxes or employees for wages) that might be established under domestic statutory law for reasons of public policy would need to be preserved so as not to compromise the acceptability of the

draft Convention. Various views were expressed as to how that principle might be embodied in the draft Convention.

36. One view was that the rights of preferential creditors were sufficiently addressed by paragraph (3) through the reference to "the public policy of the State in which the court [was] located". In response, it was stated that the words "public policy" in paragraph (3) should not be misinterpreted as a reference to the domestic public policy of the State where the court was located. Rather, the reference to "public policy" in paragraph (3) was intended to refer to "international public policy", i.e. the restrictive notion of public policy under the rules of private international law, which would not typically include rules such as those intended for the protection of preferential creditors in statutory law in many countries. With a view to clarifying the meaning of paragraph (3), it was proposed that the paragraph should be redrafted along the following lines: "Notwithstanding paragraphs (1) and (2), the application of the provisions of the law of the State in which the assignor is located may be refused by a court to the extent that those provisions are manifestly contrary to the public policy of the State in which the court is located". After discussion, the substance of the proposal was found to be generally acceptable and was referred to the drafting group.

37. Another view was that the issue of preferential creditors might be addressed through redrafting of Variant A of paragraph (4). With a view to preserving "the rights of the assignor's creditors" (which included the rights of preferential creditors), it was suggested that the words "except as provided in this article" at the beginning of Variant A should be deleted. That suggestion was objected to on the grounds that deleting the words "except as provided in this article" would: negate the effect of paragraphs (1) and (2); affect the balance of the entire draft article 24; and make paragraph (4) circular. In addition, the view was expressed that the words "the rights of the assignor's creditors" in the context of "insolvency proceedings commenced in a State other than the State in which the assignor [was] located" might not adequately cover the rights of preferential creditors outside an insolvency proceeding.

38. Yet another view was that the issue of preferential creditors would be appropriately dealt with by way of a declaration under draft article 44. Wide support was expressed in favour of extending the possibility of declarations or reservations in respect of preferential creditors. Such an approach, it was stated, would preserve the necessary flexibility for each Contracting State to establish specific rules for preferential creditors. It was observed that such an approach would also foster transparency by creating an obligation for those States that wished to make specific rules for preferential creditors to make their position known to the world. However, a widely shared view was that the text of draft article 44 as currently drafted was not sufficiently reflective of the suggested approach. In addition, it was said that draft article 44 could be misread as an invitation to States to make a reservation as to the entirety of their insolvency law, a result that would reduce the certainty achieved by draft article 24.

39. In order to better address the rights of preferential creditors, it was suggested that an additional paragraph (4*bis*) in draft article 24 should deal with the issue of preferential creditors along the following lines: "If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any non-consensual right or interest which, under the law of the forum, would have priority over the interest of an assignee, continues to have priority only to the extent that such priority was specified by the forum State in an instrument deposited with the depositary prior to the time when the assignment was made." While wide support was expressed in favour of the proposed new paragraph, a concern was expressed that the need for Contracting States to embody in a declaration all "rights or interests" which, under domestic law, "would have priority over the interest of an assignee"

might adversely affect the acceptability of the draft Convention. A concern of a drafting nature was that, should the draft Convention contain a provision along the lines of the proposed new paragraph, it should be placed within the final clauses and not in the substantive provisions of the draft Convention. After discussion, the Working Group decided that the substance of the proposed new paragraph (4*bis*) should be placed in the text of draft article 24 within square brackets for further consideration at a later stage. The proposed wording was referred to the drafting group.

Paragraph (5)

40. It was noted that paragraph (5) was intended to reflect the principle of non-discrimination against Convention-assignees by ensuring that assignees asserting rights under the law of the State in which the assignor was located would have no less rights as against the assignor's creditors or the insolvency administrator than any assignee asserting rights under law applicable outside the draft Convention. As a matter of drafting, it was suggested that the word "fewer"should be replaced by the word "less". Subject to that change, the Working Group adopted the substance of paragraph (5), and referred it to the drafting group.

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25. Scope

41. The text of draft article 25 as considered by the Working Group was as follows:

"This Convention applies to:

"(a) assignments of receivables by the initial or any other assignee to subsequent assignees ("subsequent assignments") that are governed by this Convention under article 1, notwithstanding that the initial or any other previous assignment is not governed by this Convention; and

"(b) any subsequent assignment, provided that the initial assignment is governed by this Convention

"as if the subsequent assignee were the initial assignee."

Subparagraph (a)

42. It was recalled that subparagraph (a) appeared to be inconsistent with the principle of continuatio juris embodied in subparagraph (b). It was widely felt, however, that it was desirable to cover subsequent assignments that might fall within the scope of the draft Convention even if the initial assignment fell outside its scope (e.g. a subsequent assignment in a securitization transaction may be covered even if the initial assignment was a domestic assignment of domestic receivables).

43. A concern was expressed that, in combination with draft article 27, subparagraph (a) might lead to the unintended result that the debtor paying in accordance with draft article 27 might not be

discharged under the law applicable to the initial assignment. It was generally agreed, however, that draft article 18(5), providing that the debtor could be discharged by paying the right person under law applicable outside the draft Convention, sufficiently addressed that concern. It was stated that draft article 27 was a special rule dealing with the specific issue of multiple notifications relating to subsequent assignments, without precluding the application of the general rules on debtor discharge contained in draft article 18.

44. After discussion, the Working Group found the substance of subparagraph (a) to be generally acceptable and referred it to the drafting group.

Subparagraph (b)

45. It was recalled that subparagraph (b) was intended to reflect the principle of continuatio juris, i.e. that the regime governing the initial assignment should govern any subsequent assignment. In the absence of such a rule, in a chain of assignments parties would not be able to have any certainty as to their rights, since each assignment could be subject to a different legal regime. It was stated that subparagraph (b) could operate well if the initial receivable was international, since any subsequent assignee would be able to predict that the draft Convention would apply to subsequent assignments by virtue of the internationality of the receivable. However, a concern was expressed that, where the initial receivable was domestic, the application of subparagraph (b) might not produce satisfactory results, since a subsequent assignee would not be able to predict the application of the draft Convention to a domestic assignment of a domestic receivable. In order to avoid a situation in which the draft Convention would apply to domestic assignments of domestic receivables, it was suggested that language along the following lines should be added at the end of subparagraph (b): "provided that, if the receivable is a domestic one, a subsequent assignment with the assignor and the assignee being located in the same State as the debtor is not governed by this Convention".

46. It was widely felt that, while the above-mentioned concern should be borne in mind when reviewing the provisions of the draft Convention dealing with the protection of the debtor, subparagraph (b) should be drafted so as to establish a broad sphere of application for the draft Convention, thus maximizing certainty as to the legal regime applicable, in particular to bulk assignments. It was agreed that, in order to better reflect the principle “once international, always international”, subparagraph (b) should be revised to provide that the draft Convention should apply to any subsequent assignment, provided that it applied to the initial or any other assignment prior to the last subsequent assignment. Subject to that amendment, the substance of subparagraph (b) was found to be generally acceptable and was referred to the drafting group.

Article 26. Agreements limiting subsequent assignments

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

> “(1) A receivable assigned by the initial or any subsequent assignee to a subsequent assignee is transferred notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the initial or any subsequent assignor's right to assign its receivables.

"(2) Nothing in this article affects any obligation or liability for breach of such an agreement, but a person who was not party to such an agreement is not liable for its breach."

Paragraph (1)

48. A concern was expressed that paragraph (1) might unduly interfere with public-procurement and other Government-contract practices by disregarding the effect of anti-assignment clauses that might be inserted in those contracts. Thus, under paragraph (1), a Government or other public entity might come under an obligation to pay a party as an assignee, while the public entity might have expressly stipulated that it would not accept to deal with that party. Such an effect of paragraph (1), it was stated, might seriously affect the acceptability of the draft Convention. The Working Group took note of that concern and agreed that it might need to be considered further in the context of draft article 12, which contained the main provisions regarding anti-assignment clauses. After discussion, the substance of paragraph (1) was found to be generally acceptable and was referred to the drafting group.

Paragraph (2)

49. The discussion focused on the extent to which an assignee who was not a party to the agreement containing an anti-assignment clause might be held liable if such a clause was breached. There was general agreement that normally no contractual liability might be binding on the assignee for the obvious reason that the assignee was not privy to the agreement containing the anti-assignment clause. In addition, it was agreed that even in those exceptional situations in which third parties might be held liable under a contract theory, the draft Convention should preclude such liability.

50. With respect to tortious liability, however, various views were expressed. One view was that, if the aim of the draft Convention was to provide easier access to credit, it should avoid burdening the assignees, as potential financiers, with any liability in connection with the breach of an anti-assignment clause. The opposite view was that, under the laws of many countries, certain types of misconduct by the assignee might engage its tortious liability (for example, in the case of a possible inducement of the assignor by the assignee to assign receivables in violation of an anti-assignment clause with the intent to harm the interests of the debtor). It was stated that, to the extent that such tortious liability would only sanction malicious behaviour on the part of the assignee, the domestic tort law should apply. In addition, it was observed that mere knowledge by the assignee of the existence of an anti-assignment clause should not give rise to liability of the assignee, since such a possibility might deter potential assignees from entering into receivables financing transactions.

51. After discussion, the Working Group agreed that paragraph (2) should be redrafted to ensure that an assignee would have no contractual liability for breach of an anti-assignment clause by the assignor, while it would defer to domestic law to sanction manifestly improper behaviour. The Working Group also agreed that draft article 12(2) should be aligned with draft article 26(2) as revised.

Article 27. Debtor's discharge by payment

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

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

53. The Working Group agreed that draft article 27 should deal with the issue of multiple notifications relating to subsequent assignments by allowing the debtor to discharge its obligation only by payment to the person or to the address identified in the notification of the last assignment. It was stated that, by requiring payment to the last assignee, such an approach would facilitate the extension of credit by that assignee and thus promote practices involving subsequent assignments. As a matter of drafting, it was suggested that the title of draft article 27 should be revised to better reflect that content of the article. With regard to situations involving both several notifications relating to the same assignment (dealt with in draft article 18(3)) and several notifications relating to subsequent assignments (dealt with in draft article 27), it was generally agreed that, under a combined application of draft articles 18(3) and 27, the debtor could be discharged only by payment to the person or to the address identified in the first notification of the last assignment. It was stated that, for draft articles 18(3) and 27 to operate well, the debtor receiving several notifications might need to know whether they related to several assignments of the same receivables by the same assignor or to subsequent assignments. The Working Group agreed that that matter could be addressed in the context of draft article 28 dealing with the content of notification in the case of subsequent assignments (see paras. 63 to 66 below).

54. As to any other matter involving the debtor's rights and obligations, it was agreed that the draft Convention should apply whether one assignment only or subsequent assignments as well were involved. The view was widely shared that the result arose from draft article 25, which provided that the draft Convention applied to subsequent assignments "as if the subsequent assignee was the initial assignee". In order to better reflect the understanding that other provisions of the draft Convention applied to subsequent assignments, unless a special rule had been devised for subsequent assignments, it was suggested that draft articles 25 to 28 be placed in the context of the relevant provisions of the draft Convention (draft articles 1, 12, 18 and 16 respectively), rather than in a separate chapter. The Working Group agreed that that matter could be considered in the context of the discussion of those other relevant provisions.

55. Diverging views were expressed as to the question whether the debtor should be discharged by payment to the last assignee, if an assignment in a chain of assignments was invalid, and, in particular, if the debtor knew or had notification of such invalidity. One view was that the debtor should be discharged by payment to the last assignee, even if an assignment was invalid and the debtor knew of the invalidity. In support of that view, it was observed that subjecting the debtor's discharge to the validity of the assignment or to knowledge of the validity would inappropriately place on the debtor the burden of having to establish the validity of the assignment. In addition, it was stated that such an approach would inadvertently result in the debtor requiring of the assignee more than a mere notification of the assignment. Moreover, the issue whether knowledge of the invalidity of the assignment on the part of the debtor constituted fraudulent behaviour which vitiated the payment could be left to law applicable outside the draft Convention.

56. Another view was that if an assignment was invalid, the debtor could not be discharged by payment to the person or to the address identified in the notification, since the "notification" would not be a notification in the sense of draft article 16(3) and "the assignee" would not be an assignee under the draft Convention. In the case of knowledge of the invalidity on the part of the debtor, it was stated,

it would be against any acceptable standards of good faith to allow the debtor to be discharged by payment to the person the assignment to whom was invalid. It was thus suggested that the risk of the invalidity of the assignment should be placed on the debtor.

57. In an effort to strike a balance between the need to protect the debtor paying in good faith a person the assignment to whom was invalid and the need to protect the rights of the rightful owner of the receivables, while preserving acceptable standards of conduct, it was suggested that language along the following lines should be inserted in draft article 27: "A debtor shall be discharged notwithstanding any invalidity of any assignment in a chain of assignments if he/she pays in good faith and without notice of any invalidity of any assignment in the chain of assignments in accordance with the payment instructions set forth in the notification of the last assignment received by the debtor". Some support was expressed in favour of that suggestion on the ground that it could produce the desirable results if combined with draft article 18(4), which entitled the debtor, if notification of the assignment was given to the debtor by the assignee, to request additional information from the assignee. On the other hand, the suggestion was objected to on a number of grounds, including the following: while a good-faith standard of protection of the debtor was justified in the case of a debt which was incorporated in a negotiable instrument, it would not be sufficient for the discharge of a debtor paying a person the assignment to whom was invalid; the principle of good faith might introduce a degree of uncertainty, since its exact meaning was neither absolutely clear nor uniform; and, in view of the fact that the notion of good faith was implicit in a number of other draft articles, to mention it explicitly only in this draft article could inadvertently result in the meaning of other draft articles being questioned.

58. After discussion, the Working Group agreed that the matter of the discharge of the debtor by payment to a person the assignment to whom was invalid arose in exceptional situations only and could be left to law applicable outside the draft Convention. The Working Group noted that the issue of invalidity could also arise in the context of the initial assignment. Accordingly, the Working Group requested the drafting group to prepare a provision to reflect that agreement and to revise draft article 27 or 18 so as to deal with the issue of multiple notifications relating to subsequent assignments.

Article 28. Notification of the debtor

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

> "Notification of a subsequent assignment constitutes notification of [any] [the immediately] preceding assignment."

60. It was recalled that, as mentioned in the context of the twenty-seventh session of the Working Group (A/CN.9/445, para. 46), draft article 28 was one of the most important articles of the draft Convention, in particular from the point of view of financiers involved in international factoring. It was explained that in international factoring the assignor assigned the receivables to an assignee in the assignor's country (export factor) and the export factor assigned the receivables to an assignee in the debtor's country (import factor). In view of the fact that the debtor was normally notified only of the second assignment, it was necessary to provide that such notification constituted notification of the first assignment, in order to ensure the import factor's right to enforce the claim against the debtor. At that session, the Working Group had requested the Secretariat to add in draft article 28 a provision along the lines of article 11(2) of the UNIDROIT Convention on International Factoring (Ottawa, 1988;

hereinafter referred to as “the Ottawa Convention”), which provided that "... notice of the subsequent assignment also constitutes notice of the assignment to the factor" (A/CN.9/445, para. 46).

61. As a matter of drafting, it was generally agreed that the title of draft article 28 needed to be revised to better reflect the contents of the draft article. It was decided that wording along the lines of “Notification of subsequent assignment” should be used. The matter was referred to the drafting group.

62. With respect to the text between square brackets (“[any][the immediately]”), it was widely felt that the rule embodied in draft article 28 should apply broadly to any preceding assignment. That matter also was referred to the drafting group.

63. A concern was expressed that the content of notification in the context of subsequent assignments might need to be different, since the debtor receiving a notification would need to be able to determine whether a series of subsequent assignments or of several assignments of the same receivables by the same assignor were involved. A widely shared view was that such information might be critical to the debtor, since the debtor would discharge its obligation by paying the last assignee in a chain of subsequent assignments (draft article 27), or by paying the first assignee to notify in case of multiple assignments (draft article 18(3)). Various suggestions were made to alleviate that concern. One suggestion, which received little support, was that the draft Convention should establish two separate rules. The general rule regarding discharge of its obligation by the debtor would state that, if notification of the assignment was given by separate assignees, the debtor would be discharged by paying according to the first notification. A separate rule would apply in cases where only one notification was received but that notification disclosed on its face that it related to an assignment that was subsequent in a series of assignments. The debtor would then be discharged by paying the last assignee in the chain.

64. Another suggestion, which received considerable support, was that the notification of a series of subsequent assignments should identify the assignor and all successive assignees, so that the debtor could have certainty as to the right of the last assignee in the chain to receive payment. It was observed that the case where successive assignments were made was comparable to the situation where a bill of exchange had been transferred to successive endorsees. That suggestion was objected to on the grounds that listing all successive assignees would be excessively burdensome, contrary to established practice and potentially confusing for debtors. It was pointed out that, for all practical purposes, information regarding intermediate assignments would be of little interest to the debtor, in particular in the case of a notification given by the assignor or of a single notification.

65. Another suggestion was that the notification of the assignment should only mention the name of the initial assignor, so that the debtor could identify the receivable, and the name of the assignee to whom payment should be made. With regard to that suggestion, the concern was expressed that it would insufficiently protect the debtor, who would have no certainty as to the validity of the assignment. In response, it was pointed out that that concern might be alleviated by the fact that the debtor, being familiar with the law governing discharge by payment to an assignee in the case of an invalid assignment (i.e. the law governing the receivable), would be aware of the risk of not obtaining a valid discharge and could be protected by requesting additional proof from the assignee who notified the debtor (draft article 18(4)). In addition, it was pointed out that reasonable assignees, in order to ensure that payment be made by the debtor according to their instructions, would normally provide sufficient information to the debtor.

66. After discussion, it was generally agreed that, while the notification requirement should be kept as simple as possible for practical reasons, the debtor was sufficiently protected against any uncertainty under draft article 18(4). Should the debtor require proof that a valid assignment had been made, it had a right to obtain such proof from the assignee or to obtain discharge of its obligation by paying the assignor. On that basis, the Working Group adopted the substance of draft article 28 unchanged, and referred it to the drafting group.

CHAPTER VI. CONFLICT OF LAWS

A. General comments

67. It was noted that Chapter VI had become the subject of a discussion at a special meeting of experts organized by the Permanent Bureau of the Hague Conference on Private International Law in cooperation with the Secretariat. The Working Group welcomed that cooperation, which had validated the approach taken by the Working Group on a number of issues, and expressed its appreciation to the Secretariat and the Permanent Bureau of the Hague Conference. It was noted that the report of that meeting, prepared by the Permanent Bureau of the Hague Conference, contained recommendations on some issues, while on other issues no recommendations had been made. In particular, it was noted that specific suggestions had been made by some experts with regard to: the adoption of a rule on the location of the assignor that would be in line with article 4 of the Rome Convention or article 3 of the European Union Convention on Insolvency Proceedings; and the deletion of Chapter VI or, at least, its alignment with the Rome Convention.

68. The Working Group considered the question whether Chapter VI should be deleted altogether. In support of retention of Chapter VI, it was stated that it could usefully operate to expand the territorial scope of application of the draft Convention (under draft article 1(2) and (3) with the bracketed language), to fill gaps with regard to matters covered but not expressly settled by the draft Convention (under draft article 8(2), combined with the opening words of draft articles 29 and 30) or to provide a second layer of harmonization with regard to matters left to law applicable outside the draft Convention, even in the context of transactions not covered by the draft Convention (under draft article 1(3) without the bracketed language).

69. In favour of deleting Chapter VI altogether, it was observed that it might inadvertently result in disunification, since it did not form a comprehensive codification of private international law principles. In addition, it was observed that assignment did not present any special features in terms of the relationship between the assignor and the assignee to warrant the inclusion of private international law rules in a special convention. Moreover, it was stated that, from a legislative- policy point of view, the inclusion of private international law provisions in a substantive law uniform text was not appropriate. Such an approach, it was said, might inadvertently result in inconsistencies between the draft Convention and other international texts, such as the Rome Convention, which might make the draft Convention less acceptable to States. It was also stated that the goal of achieving a greater degree of certainty by including private international law provisions in the draft Convention might be missed if the provisions of the draft Convention were not appropriately formulated. Examples given included problems: in draft article 8(2), which dealt with matters covered but not expressly settled in the draft Convention by reference to general principles underlying the draft Convention without drawing any distinction between principles of substantive and principles of private international law; and in draft articles 29, 30 and 31, which did not appear to be consistent with each other.

70. In response, it was suggested that retaining Chapter VI presented the potential of providing guidance to a number of States that were not parties to well established international texts dealing with private international law issues, and of facilitating access to lower-cost credit. In addition, it was stated that the fact that some States were parties to an international text prepared at a regional level should not preclude a universal body like UNCITRAL from preparing uniform rules on issues covered by such an international text. Moreover, it was observed that even States that were parties to other private international law texts, such as the Rome Convention, could benefit from the provisions of Chapter VI, at least to the extent that Chapter VI would not deviate from well established principles of private international law and would resolve issues that might not have been resolved with sufficient clarity in other texts.

71. As a matter of principle, it was stated that the Commission, rather than aiming at preparing a comprehensive commercial code, normally focused on particular issues raising obstacles to international trade. It was added that whether the Commission would follow in each particular case a substantive or private international law approach depended on the practical usefulness of such rules and not on theoretical or other extraneous considerations. After discussion, the Working Group decided to retain Chapter VI and to engage in a discussion of the substance of the draft articles contained in that chapter.

72. In order to make the draft Convention more acceptable to States that were parties to existing private international law texts, it was suggested that a clause should be included in the draft Convention allowing States to either declare that they wished to be bound by, or enter a reservation with regard to the application of, Chapter VI ("opt-in" and "opt-out" clause respectively). In favour of an opt-in approach, it was stated that it would make the draft Convention more acceptable to States that did not wish to adopt Chapter VI, since those States would not need to take any specific steps to exclude the application of Chapter VI. On the other hand, it was observed that, in view of the fact that the Working Group had decided that Chapter VI would form an integral part of the draft Convention, an opt-out approach would be more in line with normal practice. It was observed that an opt-in approach could have the unintended effect of discouraging States that could benefit from Chapter VI from adopting it. After discussion, the Working Group adopted the working assumption that the draft Convention would allow States to enter a reservation with regard to the application of Chapter VI and referred the matter of the reformulation of draft article 48 (reservations) to the drafting group (see para. 148 below and Annex, draft article 42(*bis*)).

73. With regard to the purpose of Chapter VI, the Working Group noted that it could be used in order to extend the territorial scope of application of the draft Convention (draft article 1(3) with the bracketed language), fill gaps with regard to matters covered but not expressly settled by the draft Convention (under draft article 8(2), combined with the opening words of draft articles 29 and 30) or provide a second layer of harmonization with regard to matters left to law applicable outside the draft Convention, even in the context of transactions not covered by the draft Convention (under draft article 1(3) without the bracketed language). The Working Group decided to defer discussion on the issue of the scope or the purpose of Chapter VI until it had a chance to consider the substance of draft articles 29 to 33 and draft article 1(3).

B. Discussion of draft articles

Article 29. Law applicable to the contract of assignment

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

"(1) [With the exception of matters which are settled in this Convention,] the contract of assignment is governed by the law chosen by the assignor and the assignee. [The parties' choice of law must be express or [evident from the parties' conduct and from the clauses of the assignment contract, considered as a whole] [demonstrated with reasonable certainty by the terms of the contract and the circumstances of the case]].

"[(2) Without prejudice to the validity of the contract of assignment or to the rights of third parties, the assignor and the assignee may agree to subject the contract of assignment to a law other than that which previously governed it as a result of an earlier choice under this article or other provisions of this Convention.]

"(3) In the absence of a choice of law by the assignor and the assignee, the contract of assignment is governed by the law of the State with which the contract of assignment is most closely connected. In the absence of proof to the contrary, the assignment contract is presumed to be most closely connected with the State in which the assignor is located."

Paragraph (1)

75. It was noted that draft article 29 was intended to subject to the same law the contractual rights and obligations of the assignor and the assignee, as well as the transfer of the receivables, but only as between the assignor and the assignee. In addition, it was noted that the language that appeared in paragraph (1) within square brackets was based on article 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994; hereinafter referred to as "the Inter-American Convention") and article 3(1) of the Rome Convention. Moreover, it was noted that paragraph (2) was drawn from article 3(2) of the Rome Convention.

76. Recalling its decision to defer discussion on the issue of the scope or the purpose of Chapter VI until it had a chance to consider the substance of draft articles 29 to 33 and draft article 1(3) (see para. 73 above), the Working Group decided to retain the opening words of paragraph (1) within square brackets.

77. Broad support was expressed in favour of the basic principle of party autonomy embodied in paragraph (1). As to the question of the limits of party autonomy, diverging views were expressed. One view was that the freedom of the parties to choose the law applicable to their contract should be unlimited. Another view was that parties to a contract connected with one country only should, at least, be precluded from choosing the law of another country. It was stated that, as a result of a combined application of draft articles 1(3) and 29(1), parties to a domestic assignment of domestic or international receivables could provide for the application of a foreign law to the contract of assignment, a result that was found to be unacceptable. While it was observed that the matter could be settled in the context of draft article 1(3) or draft articles 32 and 33, for lack of time, the Working Group deferred final determination of that matter until it had a chance to consider those provisions (see para. 116 below).

78. With regard to the question whether the choice of law by the parties should be express or could be implied as well, it was generally recognized that validating an implicit choice of law would be in line with current trends reflected in existing international instruments. On that basis, support was expressed

in favour of both sets of bracketed language included in the second sentence of paragraph (1). On the other hand, it was stated that requiring an express choice of law would be in line with normal practice in financing transactions. In addition, it was observed that both sets of bracketed language included in paragraph (1) might introduce uncertainty.

79. The use of the term "contract of assignment" raised a number of concerns, including the following: it introduced uncertainty, since it was understood differently in the various legal systems; it might inadvertently be understood as covering not only the assignment contract but the underlying financing contract as well, which would run against the principle of the independence of the validity of the former contract from the validity of the latter ("principle of abstraction"); it might be confused with the original contract between the assignor and the debtor; it might exclude a unilateral transfer of receivables; it raised a number of contractual issues that remained unaddressed in draft article 29 (e.g. validity of a choice of law); and its use could produce inconsistent results, since it could be misinterpreted as covering the effectiveness of the assignment as against the debtor and other third parties, matters that were covered in draft articles 30 and 31 and were subjected to laws other than the law chosen by the parties. In order to address those concerns, several suggestions were made, including the suggestions to refer to "the mutual rights and obligations of the parties", to "the assignment" or to "the agreement".

80. Those suggestions failed to attract sufficient support. It was generally thought that, while, for any misinterpretations to be avoided, the term "contract of assignment" might need to be further clarified in a commentary, it should be retained, at least in the absence of any clearer wording. It was stated that the suggested reformulation of paragraph (1) in that regard would not sufficiently address the concerns expressed. It was recalled that the suggested wording had been considered by the Working Group at previous sessions and had not been found to be acceptable.

81. It was recalled, in particular, that a reference to "the rights and obligations of the parties to the assignment", which was used in a previous draft (A/CN.9/412, draft article 8), had been found by the Working Group at its twenty-fourth session to be overly restrictive in that, for example, it failed to address the issue of the time of transfer of the receivables (A/CN.9/420, para. 191) and to be creating uncertainty as to whether the rights stemming from the assignment contract only or from the underlying financing contract as well were covered (A/CN.9/420, para. 192). At that session, the use of the term "assignment" had been objected to on the grounds that it 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. As a result of that discussion, at its twenty-fourth session, the Working Group had agreed that the provision should make 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 (A/CN.9/420, para. 191); and it was limited to the relationship between the assignor and the assignee arising from the assignment, and not from the financing contract (A/CN.9/420, para. 192).

82. In addition, it was recalled that as to the reference to "the mutual rights and obligations of the assignor and the assignee", at its twenty-seventh session, the Working Group had agreed that, while the expression had been drawn from the Rome Convention, clearer wording might be needed to indicate that the law chosen by the parties should govern not only their rights and obligations but also the entire assignment contract, and that it should also reach beyond the contractual sphere to govern the proprietary effects of the assignment as between the assignor and the assignee. At that session, it had

been stated that the Rome Convention might not constitute an appropriate model for drafting since the scope of the Rome Convention was limited to the contractual sphere (A/CN.9/445, para. 60).

83. In the discussion, the suggestion was made that the term "law" should be replaced by the term "rules of law" in order to allow parties to choose principles of contract such as the UNIDROIT Principles on International Commercial Contracts. That suggestion was objected to on the ground that such a reference to general principles of law would introduce uncertainty as to the exact contents of the law applicable.

84. After discussion, the Working Group decided to delete the second sentence of paragraph (1), retaining the reference to an express choice of law by the parties. As to the term "contract of assignment", the Working Group decided to retain it on the understanding that its exact meaning would be sufficiently explained in the commentary to the draft Convention to be prepared in the future. It was agreed that the commentary should clarify in particular that the term "contract of assignment" did not cover the effectiveness of the assignment as against the debtor and other third parties, or the financing contract.

Paragraph (2)

85. There was general support for the principle embodied in paragraph (2) that the assignor and the assignee could agree to change the law applicable to the assignment contract, provided that such a change did not affect the rights of third parties. It was generally agreed, however, that that result could be obtained through paragraph (1) which enshrined the principle of party autonomy with regard to the law applicable to the assignment contract. In addition, the particular formulation of paragraph (2) raised a number of concerns, including the following: the reference to "validity", rather than to "formal validity" only, might give rise to uncertainty as to the law applicable to the contract; and the reference to the rights of third parties might inadvertently create the impression that a choice of law by the assignor and the assignee could affect the rights of third parties. After discussion, the Working Group decided to delete paragraph (2) on the understanding that that deletion should not have a negative implication as to the freedom of the parties to choose or to change the law applicable to the contract of assignment, a principle which was enshrined in paragraph (1).

Paragraph (3)

86. It was noted that paragraph (3) was intended to accommodate certainty as the main criterion and flexibility for dealing with exceptional situations, by referring to the law of the country with which the assignment was most closely connected (i.e. to the law of the country where the party who was to effect the characteristic performance of the contract was located); by creating a presumption that the assignment was most closely connected with the law of the country in which the assignor was located; and by allowing parties to rebut that presumption in exceptional circumstances (A/CN.9/445, para. 64).

87. The Working Group considered the question whether the law chosen by the assignor and the assignee should be set aside if the choice was invalid. It was generally agreed that in the case of an invalid choice of law, the contract of assignment should be governed by the law of the State with which it was most closely connected, as provided in paragraph (3). In view of the decision taken by the Working Group in the context of its discussion of paragraph (1) to require an express choice (see para.

84 above), it was suggested that paragraph (3) should make it clear that it applied only in the absence of a "valid" or "effective" choice of law by the parties. Recalling concerns raised at its twenty-seventh session with regard to the use of those terms (A/CN.9/445, paras. 59 and 64), the Working Group decided not to include such a reference in the text of paragraph (3) but that a commentary to the draft Convention should clarify that a "valid" or "effective" choice of law was meant in paragraph (3).

88. The Working Group then turned to the question of the location rule that should be followed in paragraph (3) (for a discussion of the location rule, see paras. 25 to 32 above, as well as paras. 107 and 163 to 169 below). In that connection, the Working Group was encouraged to follow an approach that would be in line with the approach taken in other international texts and to adopt a rule referring to the place of business, rather than to the place of incorporation, of the assignor. It was stated that such an approach would be more appropriate, since the place of incorporation might have no connection whatsoever with the contract of assignment. While it was agreed that, in the case of more than one place of business, the reference to the principal place of business would not resolve the problem of transactions concluded by a branch office being subjected to the law of the location of the head office, it was stated that such a place-of-business test would be more appropriate in the context of paragraph (3). The concern was expressed that adopting a different definition for the term "location" in the context of paragraph (3) might create uncertainty. In response, it was observed that rather than formulating a different definition, paragraph (3) should refer to the law of the country in which the assignor had its place of business.

89. It was generally agreed that the scope of the rule embodied in paragraph (3) was very limited and dealt with exceptional situations, since the transactions intended to be covered involved professionals who would normally include a choice-of-law clause in their contracts. On that understanding, it was agreed that reference could be made to the place of business or, in the case of more than one place of business, to the principal place of business or, in the case of an individual, to its habitual residence.

90. In the discussion, the view was expressed that the words "in the absence of proof to the contrary" might not be necessary, since the words "it is presumed" sufficiently indicated that a rebuttable presumption was meant. However, the formulation of the second sentence was approved on the understanding that it clarified that a rebuttable presumption was involved and that it had been structured on the basis of article 16(3) of the UNCITRAL Model Law on Cross-Border Insolvency.

91. After discussion, the Working Group adopted the substance of paragraph (3) and referred to the drafting group the matter of the reformulation of the second sentence in order to refer to the place of business or, in the case of more than one place of business, to the principal place of business or, in the case of an individual, to the habitual residence of the assignor.

Article 30. Law applicable to the rights and obligations of the assignee and the debtor

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

> "(1) [With the exception of matters which are settled in this Convention,] the assignability of a receivable, the right of the assignee to request payment, the debtor's obligation to pay as instructed in the notification of the assignment, the discharge of the debtor and the debtor's defences are governed by the law governing the receivable to which the assignment relates.

"[(2) The law governing the receivable is the law governing the contract [or decision or other act] from which the receivable arises.

"(3) The law governing the contract from which the receivable arises is the law of the State with which the contract is most closely connected. A severable part of the contract which has a closer connection with another State may be governed by the law of that other State.

"(4) In the absence of proof to the contrary, the contract is presumed to be most closely connected with the State in which the assignor is located.]"

Paragraph (1)

93. The Working Group was generally agreed that, in order to avoid the possibility of the assignment resulting in a change of the legal regime under which the debtor undertook its original obligation, matters arising in the context of the relationship between the assignee and the debtor should be subjected to the law governing the receivable to which the assignment related. In response to a question, it was observed that the receivable was determined under the original contract between the assignor and the debtor and did not change as a result of any assignment or subsequent assignment.

94. The Working Group considered the particular formulation of paragraph (1). Recalling its decision to defer discussion on the issue of the scope or the purpose of Chapter VI until it had a chance to consider the substance of draft articles 29 to 33 and draft article 1(3) (see para. 73 above), the Working Group decided to retain the opening words of paragraph (1) within square brackets.

95. With regard to the reference to assignability, it was generally agreed that it should be retained, although the question whether paragraph (1) covered both contractual and statutory assignability depended on whether the opening words were retained. It was stated that, if the opening words were retained, draft article 12 (contractual limitations to assignment) would cover contractual assignability, while paragraph (1) would apply to statutory assignability only. If, on the other hand, the opening words of paragraph (1) were deleted, paragraph (1) would cover both contractual and statutory assignability (for a brief reference to the law governing statutory assignability, see paras. 101, 104 and 117 below).

96. With regard to the other items referred to in paragraph (1), the Working Group was generally agreed that a more general formulation along the lines of article 12, paragraph 2 of the Rome Convention would be preferable. It was noted that article 12, paragraph 2, of the Rome Convention provided as follows:

"The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

97. In response to a question, it was observed that the words "the conditions under which an assignment can be invoked against the debtor" referred to the conditions agreed upon by the assignor and the debtor.

98. It was stated that, unlike paragraph (1), which in attempting to list exhaustively all the items to be subjected to the law governing the receivable might inadvertently result in leaving some items unaddressed, the suggested wording would cover unanticipated issues. In addition, it was said that the suggested wording would eliminate the risk of leaving some issues unaddressed, which was increased in paragraph (1) as a result of the use of wording which tracked the language of the substantive provisions of the draft Convention.

99. As to the particular wording of paragraph (1), it was widely felt that: reference to "the right of the assignee to request payment" should not be discussed in connection with the relationship between the assignee and the debtor, but rather in the context of the relationship between the assignor and the assignee; "the debtor's obligation to pay" was sufficiently covered by the general wording suggested above; the reference to "the debtor's discharge" could be misread as excluding the grounds for discharge of the debtor under draft article 18(5); and the reference to "the debtor's defences" would give rise to the question whether it covered waivers of defences (draft article 20), modifications of the original contract (draft article 21) and the recovery of payments made by the debtor to the assignee (draft article 22).

100. After discussion, the Working Group decided that paragraph (1) should be redrafted along the following lines: "[Unless the matter is settled elsewhere in this Convention,] the law governing the receivable to which the assignment relates determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the obligations of the debtor have been discharged".

Paragraphs (2) to (4)

101. The Working Group considered the question whether paragraphs (2) to (4) should be retained. In support of retaining paragraphs (2) to (4), it was stated that those paragraphs might be useful in defining the law governing the receivable. It was observed that, by establishing that the law governing the receivable was the law governing the contract from which the receivable arose, paragraph (2) resolved a matter which was left unaddressed in the Rome Convention and on which uncertainty prevailed as to whether that law was the law governing the original contract (lex contractus) or the law of the debtor's location (lex situs of the debt). In addition, it was said that, by providing for an objective "closest-connection" test, paragraph (3) resolved another issue left unaddressed in the Rome Convention, namely whether the lex contractus was the law chosen by the parties or the law of the country with which the original contract was most closely connected. That approach was said to be appropriate, since: the assignor and the debtor in choosing the law applicable to the original contract would normally not expect that that law governed matters arising in the context of the relationship between the assignee and the debtor; the rights of the assignee would not be negatively affected, since in the case of a domestic receivable the assignee could predict the law applicable, while in the case of an international receivable the assignee would be protected by the rebuttable presumption in favour of the law of the assignor's location established in paragraph (4); and statutory assignability involving matters of public policy or mandatory law should not be subjected to the law chosen by the assignor and the debtor. In that connection, it was stated that paragraph (3) might need to be redrafted, if draft article 30 were to cover contractual assignability, so as to allow party autonomy to operate with regard to contractual assignability. Moreover, it was pointed out that, while paragraph (3) appropriately followed a flexible approach based on the well established "closest-connection" test, paragraph (4) introduced

certainty in that it created a rebuttable presumption that the law "most closely connected" with the contract was the law of the assignor's location.

102. It was widely felt, however, that paragraph (2) to (4) should be deleted. It was observed that it would be inappropriate for basic rules such as those contained in paragraphs (2) to (4) to attempt to provide private international law rules for the wide variety of contracts and practical situations that might be at the origin of a receivable. For example, it was stated that determining the law governing the contract from which the receivable arose might involve dealing with sales transactions, insurance contracts, transactions regarding ships or aircraft, operations of financial markets, and many more situations which might not realistically be dealt with under one single rule for determining the law applicable. In addition, practical examples were given of situations where, depending on the various international conventions and general private international law rules applicable to an international assignment, the presumption set forth in paragraph (4) might result in conflicting laws being applicable. In addition, it was pointed out that paragraphs (2) to (4) were inconsistent with the scope provisions of the draft Convention in that they left unaddressed the issue of the law governing non-contactual receivables. It was generally felt that further extending the scope of the rules contained in paragraphs (2) to (4) would be unreasonable.

103. After discussion, the Working Group decided to delete paragraphs (2) to (4). It was agreed that the commentary to the draft Convention, to be prepared at a later stage, might need to make it clear that draft article 30, rather than attempting to cover all possible issues, was intended to address in a general way the question of the law applicable to matters arising in the context of the relationship between the assignee and the debtor.

104. It was stated that, in view of the deletion of paragraphs (2) to (4) and in order to avoid subjecting statutory assignability to the law chosen by the parties, paragraph (1) should be revised to clarify that it did not address the question of the law applicable to statutory assignability. However, it was generally agreed that that matter could be addressed in the context of draft articles 32 and 33 dealing with mandatory rules and public policy considerations (see para. 117 below).

Article 31. Law applicable to conflicts of priority

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

> "[(1) The priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located at the time of the assignment.
>
> "(2) The priority between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located at the time of the assignment.
>
> "(3) The priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located at the time of the assignment.]"

106. The Working Group considered the question of the relationship between draft articles 23 and 24, on the one hand, and draft article 31, on the other hand. It was stated that, if Chapter VI were to fill gaps with regard to issues governed but not expressly settled in the draft Convention, draft article 31

would not be necessary and could be deleted (for a brief reference to the possible scope or purpose of Chapter VI, see paras. 68 and 73 above). If, however, Chapter VI were to provide a second layer of harmonization covering even transactions falling outside the scope of the draft Convention, draft article 31 should be retained and aligned with draft articles 23 and 24. It was observed that the same approach should be followed if Chapter VI were to expand the territorial scope of application of the draft Convention and apply to international assignments or assignments of international receivables irrespective of whether the assignor was located in a Contracting State. In such a case, it was pointed out, it should be clarified that draft article 31 applied only if Chapter IV, including draft articles 23 and 24, did not apply.

107. Recalling its decision to refer issues of priority to the law of the State in which the assignor was incorporated, taken in the context of the discussion of draft articles 23 and 24 (see paras. 25 to 32 above), the Working Group was agreed that the same approach should be followed in draft article 31. While it was noted that in other international texts dealing with matters of procedural law, reference was made to the centre of main interests of the insolvent debtor, it was stated that a different approach was justified in that context because of the different subject and purpose of the draft Convention. It was stated that, unless the draft Convention were to introduce sufficient certainty with regard to rights of assignees as against third parties, it would fail to achieve its goal of increasing the availability of lower-cost credit. In addition, it was observed that, in most cases, the State of incorporation of the assignor would coincide with the State in which the main insolvency proceeding with regard to the assignor would be opened (i.e., under the UNCITRAL Model Law on Cross-Border Insolvency, the place where the assignor had the centre of its main interests, which, in the absence of proof to the contrary, would be presumed to be the State where the assignor had its registered office). In addition, it was observed that, in those cases in which the insolvency proceeding was opened in a State other than the State where the assignor had its place of incorporation, draft article 24, as revised, would provide sufficient protection to the assignor's creditors and the administrator in the insolvency of the assignor.

108. The concern was expressed that it might not be sufficiently clear that the term "priority" referred to the effectiveness of the assignment as against third parties other than the debtor. As a result, it was said, the debtor paying the assignee with priority under the law specified in draft article 31 (i.e. the law of the assignor's location) may not be discharged under the law specified in draft article 30 (i.e. the law governing the receivable to which the assignment related). In response, it was pointed out that draft article 31 made it sufficiently clear that it dealt with issues arising in the context of conflicts between specified parties, and that the debtor was not one of those parties. In addition, it was observed that, in view of the inclusion in Chapter VI of draft article 30, as revised, no problem would arise in that regard. Moreover, it was stated that, in any case, the meaning of the term "priority" would not give rise to such uncertainty, since it was defined in draft article 5(i) (for a brief discussion of the definition of the term "priority", see paras. 23 to 24 above).

109. In response to a question, it was stated that the law applicable to subsequent assignments was determined with sufficient clarity in draft article 29, as far as the contract of assignment was concerned, and in draft article 31, as far as the relationship between the assignee and the debtor was concerned. In addition, it was pointed out that draft article 31 was sufficient in covering conflicts among several subsequent assignees obtaining the same receivables from the same assignor and conflicts between a subsequent assignee, on the one hand, and the assignor's creditors or the administrator in the insolvency of the assignor, on the other hand, since under draft article 25, as revised, the provisions of the draft Convention would apply to a subsequent assignee as if it were the initial assignee. Moreover, it was

said that, for the same reason, no problem would arise if one of the successive assignees disputed the rights of the last assignee in a chain of assignments.

110. After discussion, the Working Group decided that, pending final determination of the issue of the purpose of Chapter VI (see para. 73 above), draft article 31 should be retained in square brackets, aligned with draft articles 23 and 24 and revised to include a chapeau along the following lines within square brackets: "With the exception of matters settled in chapter IV:".

Article 32. Mandatory rules

111. The text of draft article 32 as considered by the Working Group was as follows:

> "(1) Nothing in this chapter restricts the application of the rules of the law of the forum in a situation where they cannot be derogated from by contract ("mandatory rules") irrespective of the law otherwise applicable.
>
> "(2) With regard to matters settled in this chapter, the forum may decide to apply the mandatory rules of the law of another State with which the contract of assignment has a close connection, if and in so far as, under the law of that other State, those rules must be applied whatever the law applicable."

112. The concern was expressed that draft article 32 might generate uncertainty as to the law applicable to the contract of assignment, since the possible limitations that might derive from the mandatory rules of law of the forum or of another State with which the assignment contract was closely connected would not be known at the time of the assignment. In order to address that concern, it was suggested that draft article 32 should be deleted or, at least, consolidated with draft article 33. That suggestion was objected to on the grounds that draft article 32 was useful in restating a principle recognized in private international law instruments, such as the Rome Convention and the Inter-American Convention, according to which the mandatory rules of the law of the forum or of another State with which the contract of assignment was closely connected might prevail over the applicable law. In addition, it was noted that such a principle had a somewhat broader scope than the exclusion of the provisions of the law applicable that were manifestly contrary to the public policy of the forum under draft article 33.

113. It was generally agreed that the application of the law applicable to the contract of assignment and to matters arising in the context of the relationship between the assignee and the debtor should not restrict the application of mandatory rules of the forum or another State with which the assignment contract was closely connected. On the other hand, it was widely felt that draft article 32 should not operate to set aside the law applicable to priority issues in favour of mandatory rules of the law of the forum or another State. While some hesitation was expressed with regard to taking a different approach as to priority issues, it was widely agreed that a different approach was warranted, since rules dealing with priority issues were of a mandatory nature themselves and setting them aside in favour of the mandatory rules of the forum or another State would inadvertently result in uncertainty as to the rights of third parties, a result that could have a negative impact on the cost and the availability of credit. In order to eliminate the potential conflict between various mandatory rules, it was suggested

that the phrase “nothing in this chapter”, contained in paragraphs (1) and (2) of draft article 32, should be replaced by language along the following lines: “nothing in articles 29 and 30”.

114. It was widely felt that the notion of “mandatory rules”, as currently defined in paragraph (1), was excessively broad in that it referred to rules that could not be derogated from by the parties. It was thus suggested that, in line with the equivalent notions used in other private international law instruments, paragraph (1) should make it clear that it referred to exceptional situations in which rules of fundamental importance were involved, such as consumer protection law or criminal law (loi de police).

115. Subject to the amendments referred to in paragraphs 113 and 114 above, the Working Group adopted the substance of draft article 32 and referred it to the drafting group.

Qualifications to party autonomy with regard to a choice of law under draft article 29

116. Recalling its decision to defer final determination of the matter of possible qualifications to the freedom of the assignor and the assignee to choose the law applicable to the assignment contract until it had a chance to consider draft article 32 (see para. 77 above), the Working Group considered the question whether an assignor and an assignee, by choosing a law that was unrelated to the assignment contract, could derogate from mandatory rules of the law of the State with which the assignment was closely connected. It was generally agreed that, in the case of an assignment connected with one State only (e.g. a domestic assignment), a choice of the law of another State by the assignor and the assignee should not prejudice the application of mandatory rules of the law of the State with which the assignment was connected. The Working Group referred to the drafting group the matter of drafting appropriate language to reflect that agreement. It was widely felt that such a rule would be better placed in the context of draft article 29, which dealt with party autonomy with regard to a choice of law by the assignor and the assignee.

Law applicable to statutory assignability

117. Bearing in mind its earlier decision to delete paragraphs (2) through (4) of draft article 30 (see para. 103 above), the Working Group considered the question whether statutory assignability should be subjected to a law other than the law governing the receivable. It was generally agreed that the assignor and the debtor should not be allowed to evade possible statutory limitations on the assignability of receivables by choosing a convenient law to govern the receivable to which the assignment related. It was observed that such statutory limitations were intended to protect the assignor (e.g. limitations as to the assignment of wages, pensions, life insurance policies), or the debtor (e.g. statutory limitations to the assignment of taxes). However, it was widely felt that no additional provisions were necessary in draft article 30 to reflect that understanding, since statutory limitations to the assignability of receivables would normally flow from mandatory rules, which would be preserved under draft article 32.

Article 33. Public policy

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

> "With regard to matters settled in this chapter, the application of the law specified by this Convention may be refused only if such application is manifestly contrary to the public policy of the forum."

119. It was generally agreed that draft article 33 should be aligned with draft article 24(3) (see para. 34 above). On that understanding, the Working Group adopted the substance of draft article 33 and referred it to the drafting group.

CHAPTER VII. ALTERNATIVE PRIORITY RULES

120. It was noted that Sections I and III of Chapter VII provided two different sets of substantive law rules for resolving priority issues, one based on the time of registration and another based on the time of assignment, while Section II dealt with distinct issues relating to registration. While the whole of Chapter VII was optional (i.e. subject to an "opt-in" clause), it was noted that a number of other options were open to States, including the option to take neither the time-of-assignment nor the registration-based priority rules nor the registration rules, but rather to retain their own domestic rules. It was noted that that approach to law unification had become the subject of criticism in expert group meetings attended by members of the Secretariat. Critics of that approach had noted that the current lack of uniformity was being institutionalized. In addition, it was noted that the registration system foreseen in the current formulation of Section II would be objectionable even to States already following a registration system. In that connection, it was noted that, if Section II were too detailed, it could preclude further developments in the field of registration, while, if it were too general, States would not have enough information to decide whether to adopt the registration system referred to in Section II.

121. While it was recognized that Chapter VII may not be the ideal approach to law unification, the Working Group recalled that Chapter VII was the result of a long debate which had shown that, while agreement could not be reached on one substantive law priority rule, law unification would be served by the draft Convention in several respects. It was pointed out that certainty would be enhanced, whether or not States adopted any of the options offered in Chapter VII, since draft articles 23 and 24 would establish a legal regime in the context of which Contracting States would give effect to foreign priority rules. In addition, it was said that Chapter VII would provide guidance to States that wished to modernize their existing relevant legislation or to introduce new legislation, if they had no such legislation.

122. In that connection, it was emphasized that the registration rules contained in Section II were distinct from the priority rules contained in Section I. It was mentioned that States should be allowed to opt into Section I or II or both (see para. 131 below). Thus, Chapter VII could be used by States in one of the following ways: a State could apply its domestic priority rules based on registration, but use the registration system foreseen by the draft Convention; a State could apply the priority rules of

Section I, but use its own registration system; a State could opt into both Sections I and II but only with regard to assignments within the scope of the draft Convention; and a State might introduce domestic rules based on Sections I and II, to which draft articles 23 or 24 would point, and apply them with regard to all assignments, within or outside the scope of the draft Convention.

123. Moreover, it was stated that the draft Convention would promote transparency, since States would be required to make declarations that would specify the ways in which their national laws modified the priority rules of the draft Convention. The Working Group was agreed that the specific results of that codification effort would have to be left to the marketplace for evaluation and further development. After discussion, the Working Group decided to retain Chapter VII. It was generally agreed that the contents of that Chapter would need to be considered at a later stage, possibly in the light of work done by other organizations with regard to registration.

CHAPTER VIII. FINAL PROVISIONS

Article 41. Depositary

124. The text of draft article 41 as considered by the Working Group was as follows:

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

125. The Working Group adopted the substance of draft article 41 unchanged.

Article 42. Conflicts with international agreements

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

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

127. General support was expressed in favour of the principle of the precedence of the draft Convention over other international instruments, although some hesitation was expressed in view of the possibility that it might be construed as a deviation from the usually more flexible approach reflected in other international instruments. With regard to the formulation of paragraph (1), it was observed that international agreements that might contain provisions on the matters covered by the draft Convention

might not necessarily take the form of international conventions. It was, therefore, agreed to delete the square brackets around the words "or other multilateral or bilateral agreements".

128. It was generally agreed that a State should have the ability to declare, at any time, that the draft Convention would not prevail over international conventions or other multilateral or bilateral agreements entered into by it. Therefore, it was decided to delete the words in square brackets "at the time of signature, ratification, acceptance, approval or accession" and to remove the square brackets around the words "at any time". Furthermore, for the same reasons that had been mentioned in connection with paragraph (1), it was agreed to delete the square brackets around the words "or other multilateral or bilateral agreements".

129. Subject to the changes referred to in paragraphs 127 and 128 above, the Working Group adopted the substance of draft article 42, and referred it to the drafting group.

Article 43. Application of chapter VII

130. The text of draft article 43 as considered by the Working Group was as follows:

> "A Contracting State may declare at [the time of signature, ratification, acceptance, approval, or accession] [any time] that it will be bound either by sections I and II or by section III of chapter VII."

131. The suggestion was made to rephrase draft article 43 in order to allow States to opt into the registration-based priority rules (Section I), or into the registration rules (Section II), or into both (see para. 122 above). However, in view of the fact that the Working Group had not reached a final decision as to the contents of Chapter VII, it was generally agreed to place square brackets around the phrase "sections I and II or by section III of chapter VII" and to revert to the matter at a future stage.

132. In line with its decision as to the formulation of draft article 42 (see paras. 128 and 129 above), the Working Group agreed to delete the words in square brackets "at the time of signature, ratification, acceptance, approval or accession" and to remove the square brackets around the words "at any time", and referred draft article 43 to the drafting group.

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

133. The text of draft article 44 as considered by the Working Group was as follows:

> "A Contracting State may describe at [the time of signature, ratification, acceptance, approval, or accession] [any time] other rules or procedures governing the insolvency of the assignor which this Convention does not affect."

134. The Working Group noted that the purpose of draft article 44 was to enhance certainty and transparency in the application of the draft Convention by requiring that States should indicate those

provisions of their national laws governing the insolvency of the assignor that were not affected by the draft Convention.

135. Diverging views were expressed as to the degree of specificity that should be required in draft article 44. One view was that the declaration foreseen in draft article 44 could not fulfill its purpose of providing certainty and predictability, in particular to third parties, if it was not sufficiently specific. It was stated that requiring a declaration to be specific was necessary to avoid the possibility of such a declaration simply citing the general laws of a State on a particular topic. Another view was that a requirement for specific declarations might place too onerous a burden on States. It was stated that, if such an approach were to be followed, a State would need to make a new declaration each time it changed its domestic law in order to ensure that its own insolvency rules would prevail over draft article 24. Several suggestions were made, including the suggestions to insert language along the following lines: "declare", "declare by describing" and "a Contracting State may, at any time, declare that, notwithstanding the provisions of this Convention, in the event of the insolvency of an assignor over which it has jurisdiction, specific national rules and procedures which are set out in its declaration under this article shall apply". With the exception of the substitution of the word "declare" for the word "describe", those suggestions did not receive sufficient support. In order to align draft article 44 with draft articles 42 and 43 (see paras. 128 to 129 and 132 above), as revised, it was generally agreed that the words "the time ... accession" should be deleted and the words "any time" should be retained without square brackets.

136. As a matter of principle, doubt was expressed as to whether draft article 44 was necessary at all, in view of the decision of the Working Group to retain only Variant A in draft article 24(4) (see para. 33 above). In the same vein, the view was expressed that the rule on the matter had already been laid down in draft article 24 and that all that remained to be clarified by the declarations to be made under draft article 44 was which national rules and procedures remained unaffected by the draft Convention. In any case, it was stated that it would not be advisable to redraft draft article 44 in a manner which would expand the discretion of the Contracting States to preserve their domestic laws beyond the limits provided in draft article 24.

137. The concern was expressed that the words "rules or procedures" might be excessively broad and inadvertently result in States making a declaration to preserve their entire insolvency law. In addition, it was pointed out that those words might make it insufficiently clear whether substantive or procedural rules were meant, or both.

138. The suggestion was made to include a reference to international conventions in the draft article, since the relevant rules of insolvency might derive not only from national laws but also from international conventions. In response, it was observed that international conventions and agreements were already covered under draft article 42(2) and that such an additional reference was not needed in draft article 44.

139. The view was expressed that it was not clear from draft article 44 whether States were required to submit a declaration under draft article 44 or whether such a declaration was optional, as suggested by the use of the word "may" in the draft article. In response, it was pointed out that the purpose of the draft article was not to compel a Contracting State to make a declaration. However, it was stated that, if a Contracting State failed to submit such a declaration, particular national rules or procedures concerning the insolvency of the assignor might be supplanted by the draft Convention.

140. Having considered the various views expressed, the Working Group felt that draft article 44 would need to be reconsidered in the light of advice to be obtained from insolvency law experts and referred it to the drafting group for the minor amendments referred to in paragraph 135 above.

Article 45. Signature, ratification, acceptance, approval, accession

141. The text of draft article 45 as considered by the Working Group was as follows:

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

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

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

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

142. The Working Group adopted the substance of draft article 45 unchanged.

Article 46. Application to territorial units

143. The text of draft article 46 as considered by the Working Group was as follows:

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

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

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

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

144. The Working Group adopted the substance of draft article 46 unchanged.

Article 47. Effect of declaration

145. The text of draft article 47 as considered by the Working Group was as follows:

"(1) Declarations made under articles 42 to 44 and 46 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

"(4) Any State which makes a declaration under articles 42 to 44 and 46 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary."

146. The Working Group adopted the substance of draft article 47 unchanged.

Article 48. Reservations

147. The text of draft article 48 as considered by the Working Group was as follows:

"No reservations may be made to this Convention."

148. The Working Group recalled its decision that States should be allowed to enter a reservation with regard to Chapter VI (see para. 72 above). In addition, it was suggested that the possibility for other reservations should remain open. After discussion, the Working Group decided that a provision should be inserted in Chapter VIII providing for a reservation as to Chapter VI and that draft article 48 should be revised accordingly. The Working Group referred those matters to the drafting group.

Article 49. Entry into force

149. The text of draft article 49 as considered by the Working Group was as follows:

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

"(2) For each State which becomes a Contracting State to this Convention after the date of the deposit of the [fifth] instrument of ratification, acceptance, approval or accession, this

Convention enters into force on the first day of the month following the expiration of one year after the date of the deposit of the appropriate instrument on behalf of that State.

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

150. The Working Group generally agreed that the period of one year for entry into force of the draft Convention was excessively long and that it would be sufficient to provide for an interim period of six months. In addition, it was widely felt that five ratifications should be sufficient for the draft Convention to enter into force and it was agreed to delete the brackets around the word "fifth" in paragraph (2). Subject to those amendments, the Working Group adopted the substance of draft article 49 and referred it to the drafting group.

Article 50. Denunciation

151. The text of draft article 50 as considered by the Working Group was as follows:

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

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

152. The view was expressed that the denunciation of the draft Convention by a Contracting State would be likely to affect the rights of third parties, particularly in the case of assignments of future receivables, and that it might be desirable for the Working Group to consider ways in which the rights of those third parties could be protected from the adverse effects of a denunciation.

153. However, that proposal was objected to on the grounds that the right of a State to denounce an international convention was a sovereign right and that the inclusion of possible limitations to that right, including any obligation of a Contracting State to protect the rights of third parties, might be perceived as restricting the sovereignty of that Contracting State. Moreover, it was stated that the effects of a denunciation on the rights of third parties was a matter which should be better left to the applicable law, since most legal systems had rules governing the effects of changes of law on acquired rights or ongoing transactions.

154. In response, it was pointed out that the proposed amendment of draft article 50 would not restrict the right of Contracting States to denounce the draft Convention. In addition, it was stated that the proposed amendment was solely intended to provide a substantive rule dealing with the effects of a denunciation on the rights of parties located in States other than the State denouncing the draft Convention and to protect them to the extent that they had relied on the application of the draft Convention. Without such a uniform rule, third parties would need to rely on substantive rules on

supervening changes of law provided under various legal systems, which might provide conflicting or unsatisfactory solutions for the situations under consideration.

155. Having considered the various views that had been expressed, the Working Group decided that the issue of the effects of a denunciation on the rights of third parties would require further consideration. Without prejudice to any solution that might be found for that issue at a later stage, the Working Group found the substance of draft article 50 to be generally acceptable, and referred it to the drafting group.

TITLE OF THE DRAFT CONVENTION

156. The Working Group postponed the discussion of the title of the draft Convention until it had completed its review of the draft Convention as a whole.

PREAMBLE

157. The text of the preamble to the draft Convention as considered by the Working Group was as follows:

"The Contracting States,

"*Reaffirming their conviction* that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States,

"[*Considering* that problems created by the uncertainties as to the legal regime

applicable to assignments in international trade constitute an obstacle to transactions in which value, credit or related services is given or promised against value in the form of receivables, including factoring, forfaiting, securitization, project financing and refinancing transactions,]

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

"*Have agreed* as follows:"

158. General support was expressed in favour of including in the preamble a statement of the objectives of the draft Convention. It was widely felt that such a statement could provide useful guidance with regard to the interpretation of the draft Convention, in particular if reference to the preamble was made in the context of draft article 8, which dealt with issues of interpretation of the draft Convention. However, in order to avoid unduly complicating the preamble, it was agreed that a general statement of principles would be sufficient, while further explanations could be given in the commentary to the draft Convention. It was generally agreed that such a commentary could provide useful guidance with regard to the interpretation of the draft Convention and should be prepared by the Secretariat at a later stage.

159. As to the precise formulation of the preamble, it was generally agreed that it could be retained with the addition of a few principles. Principles mentioned in the discussion included: the creation of rules that provided predictability and transparency with a view to facilitating receivables financing; the promotion of modernization and harmonization of domestic and international laws relating to assignment; the facilitation of new practices and the avoidance of interference with current practices; and the avoidance of interference with competition. With regard to the language in the second paragraph of the preamble that attempted to define and list financing practices, the view was widely shared that it should be deleted, since it could inadvertently result in excluding some practices or giving undue preference to other practices. It was generally understood, however, that the deletion of that wording would not prejudice any decision the Working Group might wish to make with regard to draft article 5(d) (definition of the term "receivables financing"). As to the question whether draft article 8 should refer to the preamble, the Working Group postponed the discussion until it had a chance to consider draft article 8. After discussion, the Working Group adopted the substance of the preamble and referred its exact formulation to the drafting group.

CHAPTER I. SCOPE OF APPLICATION

Article 1. Scope of application

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

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

"(2) [The provisions of articles [...] do not apply][This Convention does not affect the rights and obligations of the debtor] unless the debtor is located in a Contracting State [or the rules of private international law lead to the application of the law of a Contracting State to the relationship between the assignor and the debtor.]

"[(3) The provisions of articles 29 to 33 apply to [assignments of international receivables and to international assignments of receivables as defined in this chapter] independently of paragraphs (1) and (2) of this article.]

"(4) Chapter VII applies in a Contracting State which has made a declaration under article 43. [If a Contracting State makes such a declaration, the provisions of articles 23(1) and 24(1), (2) do not apply in this State.]"

Paragraph (1)

161. The Working Group confirmed its decision, taken at its twenty-seventh session, that the territorial scope of application of the draft Convention did not need to be expanded by reference to private international law rules along the lines of 1(1)(b) of the United Nations Convention on Contracts for the International Sale of Goods (A/CN.9/445, para. 139). It was widely felt that the territorial scope of the draft Convention was sufficiently broad, since paragraph (1) required that, for the draft Convention to apply, only the assignor should be in a Contracting State. In addition, the view was widely shared that such a reference to the private international law rules of the forum could create uncertainty, since the parties would not know at the time of the assignment the forum in which a dispute might be adjudicated, unless they had agreed on a jurisdiction clause.

162. The Working Group noted that, under draft article 3, for a receivable to be international, it had to be international at the time it arose. As a result, it was noted, in the case of an assignment of future receivables, the assignor and the assignee would not know at the time of assignment whether the draft Convention would apply. In order to address that problem, it was suggested that paragraph (1) be reformulated along the following lines: "This Convention applies to international assignments if, at the time of the assignment, the assignor is located in a Contracting State", while draft article 3 should be revised as follows: "An assignment is international if, at the time of the assignment, any two of the following parties are located in different States: assignor, assignee, debtor". That suggestion failed to attract sufficient support. The Working Group agreed that the problem could be addressed in the context of draft article 3.

163. The Working Group next turned to the question of the meaning of the term "location" in the context of draft article 1 (see paras. 25 to 32, 88 to 89 and 107 above). Differing views were expressed. One view was that, in order to be consistent with the location rule adopted in the context of draft articles 23 and 24 and in order to achieve certainty, the same location rule should be adopted in the context of draft article 1. It was stated that, if a different approach were to be followed, while an assignment would be covered by the draft Convention, issues of priority might not be covered, in the case of a corporation located in a State other than its place of business which was not in a Contracting State. In addition, it was observed that any other approach would increase uncertainty as to the application of the draft Convention, a result which could affect the cost and the availability of credit since assignees might not be able to determine with relative ease and certainty the place of business of the assignor.

164. Another view was that reference should be made in paragraph (1) to the place of business of the assignor. It was stated that that term was well known and established in various international instruments and in case law. In addition, it was observed that use of that term would facilitate the application of a law which had a real connection to the relevant transaction and would appropriately address the problem of transactions made through a branch office. In that regard, it was pointed out that the place of incorporation was often a fictitious place which had no link to the place in which a corporation carried on its business. It was also said that a reference to the place of incorporation could inadvertently result in subjecting transactions concluded by a branch office to the law of the State where the head office was located.

165. While it was observed that normally the place of business and the place of incorporation would coincide, in order to bridge the differences existing for the situations in which the two places differed, the suggestion was made that reference could be made to a combination of criteria, including the place of incorporation and the place of business. Language along the following lines was proposed: "An individual is located in the State in which it has its habitual residence. A company is located in the State in which it has its registered office or such other place of business the assignment is most closely connected with". That suggestion was modified to refer directly in paragraph (1) to those criteria, without introducing yet another location rule in addition to that adopted for the purposes of draft articles 23 and 24 ("This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this chapter if, at the time of the assignment, the assignor has either its place of incorporation, or its registered office, or its place of business to which the assignment is most closely connected in a Contracting State"). In response to a question, it was explained that the "closest connection" test was intended to apply only to the place of business.

166. A number of suggestions were made to improve the proposed wording. One suggestion, which received broad support, was to delete the reference to the assignor's registered office. Another suggestion was that greater certainty could be achieved by referring to the assignor's "principal" place of business. That suggestion was objected to on the grounds that it could create problems with organizations which often acted through their branch offices. Yet another suggestion was that the reference to the place of business should be qualified by the words "from which the assignment arises", in preference to the words of the original proposal "to which the assignment is most closely connected". It was pointed out that, while those tests had the same effect, they both had the potential to create uncertainty, since it would not be easy for third parties to establish the place of business with the closest connection to the assignment. Yet another suggestion, which was broadly supported, was that, with regard to natural persons, reference should be made to the habitual residence.

167. Broad support was expressed in favour of that suggestion. It was pointed out that that formulation combined the certainty of the place of incorporation with the flexibility of the place of business, while providing a solution to difficulties arising in relation to branch offices. In addition, it was observed that the tests were disjunctive so that all that was required in order for the draft Convention to apply was that one of the tests be satisfied. Moreover, it was observed that there was sufficient precedence for such an approach in other international instruments.

168. However, a number of concerns were expressed. One concern was that such an approach might be too flexible and introduce an unacceptable degree of uncertainty. Another concern was that a rule along those lines could inadvertently result in bringing within the scope of the draft Convention domestic assignments of domestic receivables (i.e. assignments in which the assignor, the assignee and the debtor had their places of business in the same State). In response, it was pointed out that, if the

assignor was incorporated in a State other than the State in which it had its place of business, such an assignment would be an international assignment. It was mentioned, however, that that matter may be approached differently depending on whether, under the applicable company law, a foreign company would be subject to the law of the place of incorporation or to the law of the place of registration.

169. After discussion, in view of the importance of the matter and of the lack of sufficient time, the Working Group adopted the substance of paragraph (1), on the understanding that the issue of location would need to be revisited at the next session of the Working Group in the light of the various suggestions made and of the definition of internationality contained in draft article 1(3).

Paragraph (2)

170. While some support was expressed in favour of the first set of bracketed language contained in paragraph (2), the prevailing view was that it should be deleted and that the paragraph should begin with the words: "This Convention does not affect the rights and obligations of the debtor". In response to a question, it was observed that "the rights and obligations of the debtor" were those arising under the original contract and the law governing that contract.

171. As to the reference to the application of the rules of private international law, differing views were expressed. One view was that it should be deleted, since it gave rise to uncertainty. Another view was that it should be retained, in order to avoid a situation where, by virtue of the private international law rules of the forum, if the assignor were located in a Contracting State, the domestic law of the assignor's location rather than the draft Convention would apply. While some doubt was expressed as to whether the result in the situation referred to would be as described, the view was widely shared that the debtor could be deprived of the protection afforded by the draft Convention, a result that should be avoided. It was thus suggested that reference should rather be made to the law governing the receivable being the law of a Contracting State. The suggestion received broad support. It was stated, however, that the debtor protection provided in the Convention may not be of a higher standard than the protection afforded by domestic law, and it may therefore be preferable to apply domestic law in some cases.

172. After discussion, the Working Group agreed that paragraph (2) should read as follows: "This Convention does not affect the rights and obligations of the debtor unless the debtor is located in a Contracting State or the law governing the receivable is the law of a Contracting State".

Paragraphs (3) and (4)

173. Owing to the lack of sufficient time, the Working Group decided to defer consideration of paragraphs (3) and (4) to its next session.

IV. REPORT OF THE DRAFTING GROUP

174. The Working Group requested a drafting group established by the Secretariat to review the preamble and draft articles 5(g) to (j), 18(5*bis*), 23 to 33 and 40 to 50, with a view to ensuring consistency between the various language versions.

175. At the close of its deliberations, the Working Group considered the report of the drafting group and adopted the substance of the preamble and draft articles 5(g) to (j), 18(5*bis*), 23 to 33 and 40 to 50, as revised by the drafting group. The text of those revised articles, as adopted by the Working Group, is reproduced in the annex to the present report.

176. With respect to the phrase in the second paragraph of the preamble that attempted to define the transactions covered by the draft Convention, the suggestion was made that it should be reintroduced in the preamble. That suggestion was objected to on the grounds that such an approach could inadvertently result in excluding certain transactions or expressing an undue preference for other transactions. The Working Group took that decision on the understanding that the elimination of that phrase in the preamble should not prejudice the Working Group's approach to draft article 5(d) (definition of "receivables financing").

177. The view was expressed that reference to the term "court" alone was too narrow, given that insolvency proceedings may be conducted by a body other than a court. It was agreed that that term should be replaced with the phrase "court or other competent authority" which was more complete and consistent with the UNCITRAL Model Law on Cross-Border Insolvency (article 4), and that the text should be amended accordingly in draft articles 5(h), 24(3) and 33.

178. It was agreed that where the text contained the terms "forum", "forum State" and the phrase "State in which the court is located", the term "forum State" should be used throughout in order to achieve consistency (draft articles 24(3) and (5), 31, 32(1) and 33).

179. With respect to draft article 26, it was suggested that it should not be adopted until a decision had been reached with regard to draft article 12. However, the Working Group decided to adopt the substance of draft article 26 on the understanding that it could be revisited, if necessary, after the Working Group had a chance to discuss draft article 12.

180. As to draft article 29, it was agreed that where the text contained the terms "assignment contract" and "contract of assignment", only the latter term should be used throughout for the sake of consistency. With regard to draft article 42, it was agreed that it should be aligned with draft articles 42*bis*, 43 and 44, which did not refer to the declaration taking effect, since that matter was covered in draft article 47. Moreover, it was agreed that in draft articles 42*bis*, 43 and 44, reference should be made to a "State", rather than to a "Contracting State", in order to cover situations in which a declaration was made at the time of signature.

181. With regard to draft article 50, it was agreed that language should be prepared by the Secretariat to address transitional issues and effects on third parties for the consideration of the Working Group at a later stage.

V. FUTURE WORK

182. A number of issues were suggested for consideration during the next session of the Working Group. Those included: the scope of the draft Convention, in particular the definition of the terms "assignment" and "receivable"; the form of assignment; contractual limitations to assignment; and debtor's discharge by payment. As to the order of work, the suggestion was made that the Working Group might wish to select a few important issues and address them first, without necessarily following the order of the articles in document A/CN.9/WG.II/WP.96. However, general preference was expressed in favour of the Working Group beginning its deliberations at the next session with draft article 1 and proceeding on the basis of the order in which the draft articles appeared in document A/CN.9/WG.II/WP.96. It was widely felt that such an approach, in addition to being the normal way to proceed, would allow the Working Group to consider at its next session crucial issues, such as scope, form and contractual limitations to assignment. Moreover, it was pointed out that, following the order of the draft articles in document A/CN.9/WG.II/WP.96 would not result in undue delays, since the Working Group could settle the less important provisions of the draft Convention without a long debate.

183. It was noted that the next session of the Working Group was scheduled to take place in New York from 1 to 12 March 1999.

Annex

DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING

PREAMBLE

The Contracting States,

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

Considering that problems created by the uncertainties as to the content and choice of legal regime applicable to assignments in international trade constitute an obstacle to financing transactions,

Desiring to establish principles and adopt rules relating to the assignment of receivables that would create certainty and transparency and promote modernization of law relating to receivables financing, while protecting existing financing practices and facilitating the development of new practices,

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

Have agreed as follows:

...

CHAPTER II. GENERAL PROVISIONS

Article 5. Definitions and rules of interpretation

For the purposes of this Convention:

...

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

(h) “Insolvency proceeding” means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;

...

(i) “Priority” means the right of a party in preference to another party;

(j) For the purposes of articles 23 and 24, an individual is located in the State in which it has its habitual residence; a corporation is located in the State in which it is incorporated; a legal person other than a corporation is located in the State in which its constitutive document is filed; and any other person is located in the State in which it has its chief executive office.

...

CHAPTER IV. RIGHTS, OBLIGATIONS AND DEFENCES

...

Section II. Debtor

Article 18. Debtor’s discharge by payment

...

[(5 *bis*) Nothing in this Convention affects any ground on which the debtor may be discharged by paying a person to whom an invalid assignment has been made.]

...

Section III. Third parties

Article 23. Competing rights of several assignees

(1) Priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located.

(2) An assignee entitled to priority may at any time voluntarily subordinate its priority in favour of a competing assignee, whether or not that competing assignee is then in existence. [The subordination may be unilateral or may occur by agreement with the assignor, the competing assignee or any other person.]

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

(1) Priority between an assignee and the assignor's creditors is governed by the law of the State in which the assignor is located.

(2) Priority between an assignee and the insolvency administrator is governed by the law of the State in which the assignor is located.

(3) Notwithstanding paragraphs (1) and (2), the application of a provision of the law of the State in which the assignor is located may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

(4) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, except as provided in this article, this Convention does not affect the rights of the insolvency administrator or the rights of the assignor's creditors.

[(5) If an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any non-consensual right or interest which under the law of the forum State would have priority over the interest of an assignee has such priority notwithstanding paragraph (2) but only to the extent that such priority was specified by the forum State in an instrument deposited with the depositary prior to the time when the assignment was made.]

(6) An assignee asserting rights under this article has no less rights than an assignee asserting rights under other law.

CHAPTER V. SUBSEQUENT ASSIGNMENTS

Article 25. Scope

(1) This Convention applies to:

(a) assignments of receivables by the initial or any other assignee to subsequent assignees ("subsequent assignments") that are governed by this Convention under article 1, notwithstanding that any prior assignment is not governed by this Convention; and

(b) any subsequent assignment, provided that any prior assignment is governed by this Convention.

(2) This Convention applies as if the subsequent assignee were the initial assignee.

Article 26. Agreements limiting subsequent assignments

(1) A receivable assigned by the initial or any subsequent assignee to a subsequent assignee is transferred notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the initial or any subsequent assignor's right to assign its receivables.

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

Article 27. Multiple notifications

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

Article 28. Notification of subsequent assignments

Notification of a subsequent assignment constitutes notification of any prior assignment.

CHAPTER VI. CONFLICT OF LAWS

Article 29. Law applicable to the contract of assignment

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

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

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

Article 30. Law applicable to the rights and obligations of the assignee and the debtor

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

[Article 31. Law applicable to conflicts of priority

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

(a) priority among several assignees of the same receivables from the same assignor is governed by the law of the State in which the assignor is located;

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

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

[(d) if an insolvency proceeding is commenced in a State other than the State in which the assignor is located, any non-consensual right or interest which under the law of the forum State would have priority over the interest of an assignee has such priority notwithstanding subparagraph (c), but only to the extent that such priority was specified by the forum State in an instrument deposited with the depositary prior to the time when the assignment was made;]

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

Article 32. Mandatory rules

(1) Nothing in articles 29 and 30 restricts the application of the rules of the law of the forum State in a situation where they are mandatory irrespective of the law otherwise applicable.

(2) Nothing in articles 29 and 30 restricts the application of the mandatory rules of the law of another State with which the matters settled in those articles have a close connection if and in so far as, under the law of that other State, those rules must be applied irrespective of the law otherwise applicable.

Article 33. Public policy

With regard to matters settled in this chapter, the application of a provision of the law specified in this chapter may be refused by a court or other competent authority only if that provision is manifestly contrary to the public policy of the forum State.

...

CHAPTER VIII. FINAL PROVISIONS

Article 41. Depositary

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

Article 42. Conflicts with international agreements

(1) Except as provided in paragraph (2) of this article, this Convention prevails over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning the matters governed by this Convention.

(2) A State may declare at any time that the Convention will not prevail over international conventions or other multilateral or bilateral agreements listed in the declaration, which it has entered or will enter into and which contain provisions concerning the matters governed by this Convention.

Article 42*bis*. Application of chapter VI

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

Article 43. Application of chapter VII

A State may declare at any time that it will be bound either by [sections I and II or by section III] of chapter VII.

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

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

Article 45. Signature, ratification, acceptance, approval, accession

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

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

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

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

Article 46. Application to territorial units

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

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

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

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

Article 47. Effect of declaration

(1) Declarations made under articles 42 to 44 and 46 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

(4) Any State which makes a declaration under articles 42 to 44 and 46 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification of the depositary.

Article 48. Reservations

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

Article 49. Entry into force

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

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

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

Article 50. Denunciation

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

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

* * *