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Draft Convention on Assignment of Receivables in International Trade

Compilation of comments by Governments and international organizations

Addendum

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I. Introduction

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

II. Compilation of comments

1. Association of the Bar of the City of New York

[Original: English]

General comments

The Committee on Foreign and Comparative Law (Committee) of the Association of the Bar of the City of New York (Association) submits these comments in connection with the ongoing

work of UNCITRAL regarding assignment of receivables. The Committee has followed closely UNCITRAL's work on this project, and a member of the Committee, has acted as an observer to the Working Group in International Contract Practices for the past several years as the Working Group has continued its efforts to refine the draft Convention on this subject.

The Committee commends the efforts of the Working Group and the Commission on this important project, and looks forward to a continued cooperation with the Commission as the draft Convention moves toward completion and adoption. The Committee is confident the Commission will achieve a Convention acceptable to all delegations that will be successfully adopted by many jurisdictions and will comprise a significant positive contribution to international commerce.

Specific comments

Title*:* The Committee believes that, within the parameters of its final negotiated scope, the Convention should be given the broadest possible interpretation and application. In this regard the Committee believes that the preferred title of the Convention would be the "Convention on Assignment of Receivables".

Article 4, paragraph 1:. The Committee believes that the exclusion of the transfer of negotiable instruments in article 4, paragraph 1, of the Convention should also refer to transfers of negotiable instruments made by book entry in a depository's accounts (without delivery or endorsement) and should include transfers by mail delivery without a necessary endorsement. Appropriate language explicitly including such transfers within the scope of the exclusion should be added to article 4, paragraph 1. The commercial law, both statutory and decisional, of many States governing negotiable instruments, including the assignment thereof, is well-developed. These legal regimes have evolved with commercial practice and contain attributes particularly suited to the unique characteristics of negotiable instruments. The Committee believes that including negotiable instruments within the scope of the Convention would be unnecessarily duplicative of these established legal regimes and perhaps also of other international conventions and projects. Further, the unique attributes of negotiable instruments require specialized rules and approaches that would unnecessarily be disrupted if the Convention were to apply.

Article 4, paragraph 2: The Committee similarly strongly believes that foreign exchange contracts and arrangements, to the extent not already excluded from the scope of the Convention, should be excluded. The Convention would not benefit this market and, given the wide variety of arrangements existing in this market, application of the Convention to this market would have the potential to cause great uncertainty to existing international banking and commercial transactions involving foreign exchange.

The Committee briefly considered whether claims by or against a decedent's estate or otherwise exercisable by means of a will or other testamentary document, which claims would otherwise qualify as "receivables" under the Convention, should fall within its scope. The question is, for example, whether, if a United States resident decides to transfer a claim against her father's estate to her nephew in France, the assignment should be subject to the Convention. Generally speaking, the laws governing estates are expected by participants to be those applicable to probate or intestate administration and under which wills are drafted or estate planning is developed. It would also seem that such receivables would not comprise a significant element of cross-border commerce. Although the Committee has not explored this issue in depth, our initial reaction is that such claims should be excluded from the Convention's scope.

Article 5 (h): In the case of branch offices of banks and other financial institutions that are not separately incorporated or organized from their "parent" institution but are located in a State other than the State of incorporation/organization of the "parent" the issue of branch location is important under the Convention. The Committee believes that branches should be considered located in the State in which they are physically present, notwithstanding the presence of the "parent's" organization in another State. Branches of banks and other financial institutions

located outside of their "home" jurisdictions generally are subject to regulation by the competent authorities of the State in which they are located. Although clarity from a choice-of-law perspective could be accomplished by deeming a branch to be located either in the State of its physical presence or the State of incorporation/organization of its "parent" the Committee believes the better approach would be to deem for purposes of the Convention a branch to be located in the State of its physical presence, both so that the Convention's approach to a branch is consistent with the approach of the relevant regulatory authorities (i.e., authorities of the State of such physical presence) and also so that the Convention treats in the same way all banks and other financial institutions located in a particular State, regardless whether such entities are branches or locally organized subsidiaries.

Consumer protection issues: The Committee believes that the Convention does not need to be explicit in stating that it does not empower a consumer debtor to vary or derogate from a contract with an assignor if such variation or derogation would not be permitted by applicable consumer protection laws. The provisions in the Convention do not lend themselves to such an interpretation and lenders would not accept the risks inherent in such a liberal reading of the text. Nevertheless, if the Commission believes that such a misinterpretation is possible, the Committee believes it is appropriate to address this issue in the commentary, rather than in the text, of the Convention. The Committee believes the foregoing approach is preferable to amendments to the text of the Convention. However, if the Commission believes that changes to the text are necessary, the Committee believes it would be appropriate to address this issue as proposed by the Secretariat by adding text to article 4 and revising articles 21 and 23 (see A/CN.9/491, para. 40).

Article 24, paragraph 1 (b) and (c): Although we are cognizant of the issues raised by certain civil law jurisdictions regarding the separate treatment of receivables and the proceeds thereof under applicable law, the Committee believes it quite important that all proceeds of receivables should be included within the scope of the Convention. Stating it differently, if a receivable is covered by the Convention, any proceeds of such receivable also should be covered by and subject to the Convention. Further, the Committee believes that proceeds of covered receivables should fall within the scope of the Convention even if, by their nature, such proceeds would have been excluded from the Convention if they were simply receivables in their own right (and not proceeds of covered receivables). For example, if a group of trade receivables from a single obligor transferred to a financier were thereafter replaced by a promissory note from the obligor to such financier, such negotiable instrument would nevertheless be within the scope of the Convention.

To the extent the foregoing would raise issues not addressed by the Convention (for example, priority issues relating to negotiable instruments comprising proceeds), such issues could be left to be resolved under law and other treaties specifically applicable thereto. In accordance with the foregoing, the Committee believes that article 24 (b) and (c) are unnecessary and may be deleted from the Convention. As noted above, particular issues left unresolved by this approach (for example, the dispositions of securities held through indirect holding systems) can be left to be resolved by laws outside of the Convention. In this respect the Convention will not be entirely silent, if the Convention (through article 24, paragraph 1 (a)) would look to the law of the State where the assignor is located (which law itself could point to other laws or treaties for resolution of issues).

Articles 24 and 31: Concerns have been raised in the Committee that, although it would not be the best interpretation, articles 24 and 31, in directing that the law of the State in which the assignor is located shall govern certain aspects of the rights of a competing claimant, could be construed to overcome or undo a choice of law made by the assignor and the assignee otherwise applicable pursuant to article 29, paragraph 11 (or perhaps also overcome or undo the law applicable in the absence of such a choice of law pursuant to article 29, paragraph 2). The law applicable to the relationship between third party claimants and assignors, as determined pursuant to articles 24 and 31, should not have an impact on the law applicable to the relationship between assignors and assignees, as determined pursuant to article 29. Although we do not believe that

the text of the Convention needs to be changed, the Committee believes it would be appropriate to add a clarifying statement in the commentary that articles 24 and 31 are not meant to and should not be construed so as to overcome the law applicable as between the assignor and assignee under article 29. We note that this concern may be affected by other potential modifications to article 24, but believe the concern will remain and that the suggested commentary will remain a useful addition.

New provision on form in chapter V: Regarding the question of whether to include in chapter V of the Convention a provision to address the law applicable to the formal validity of the assignment and to the contract of assignment itself, the Committee believes that the inclusion of provisions clarifying the law applicable to such matters would be appropriate. The Committee concurs with the suggestion of the Secretariat (see A/CN.9/491, para. 21) to include language similar to that found in the Convention on Contracts for the International Sale of Goods.

Article 38: The Committee believes that it is inappropriate for it to comment on the prevalence of one international agreement over another, as that seems to be the province of States and not NGOs. We note, however, that as a practical matter, we would prefer to have this Convention prevail over the draft Convention on International Interests in Mobile Equipment and the relevant equipment-specific protocols being prepared by UNIDROIT, as this Convention appears to be less restrictive for both borrower and lender.