

AN INTERNATIONAL LEGAL REGIME FOR RECEIVABLES FINANCING: UNCITRAL'S CONTRIBUTION

SPIRO V. BAZINAS*

I. INTRODUCTION

Receivables, claims for the payment of money, play an extremely important role in the overall scheme of asset-based financing. In developed countries, the bulk of corporate wealth is locked up in receivables. Assignments provide the primary legal framework for receivables financing, yet the legal regime governing assignment is either uncertain, fragmentary or outdated. Thus, in 1995 the United Nations Commission on International Trade Law (UNCITRAL)¹

*J.D., Athens School of Law; LL.M., University of Miami School of Law. Mr. Bazinas is a Legal Officer in the International Trade Law Branch of the United Nations Office of Legal Affairs. He is currently the Secretary of the UNCITRAL Working Group on International Contract Practices. The views expressed in this Article are the personal views of the Author and do not necessarily reflect the views of the Organization.

1. UNCITRAL was established by the General Assembly of the United Nations in 1966. See G.A. Res. 2205, U.N. GAOR, 21st Sess., Supp. No. 16, at 99, U.N. Doc. A/6316 (1966). UNCITRAL is the core legal body of the U.N. system in the field of international trade law and has the mandate of "further[ing] the progressive harmonization and unification of the law of international trade." G.A. Res. 2102, U.N. GAOR, 20th Sess., Supp. No. 14, at 91, U.N. Doc. A/6014 (1965). The Commission is composed of thirty-six member States elected by the General Assembly. See *United Nations Commission on International Trade Law* (visited Mar. 30, 1998) < <http://www.un.or.at/uncitral/>>. Membership in the Commission is structured to be representative of the world's various geographic regions and its principal economic and legal systems. See *id.* All member States of the United Nations, as well as all interested international governmental organizations and international non-governmental organizations are invited to attend UNCITRAL meetings as observers. See *id.* The Commission has established three working groups, each of which is composed of all member States of the Commission. See *id.* Texts prepared by UNCITRAL include the United Nations Convention on Contracts for the International Sale of Goods, *opened for signature* Apr. 11, 1980, Doc. A/Conf. 97/18, Annex I (Vienna 1980) (entered into force Jan. 1, 1988); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, *opened for signature* Dec. 11, 1995, U.N. GAOR, 50th Sess., Supp. No. 17, Annex I, U.N. Doc. A/50/17 (1995); the UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17 Annex I, at 81-93 (1985); the UNCITRAL Model Law on International Credit Transfers, G.A. Res. 47/34, U.N. GAOR, 47th Sess., Supp. No. 17, at 48-60, U.N. Doc. A/47/17 (1993); the UNCITRAL Model Law on Electronic Commerce, U.N. Doc. A/51/Supp. 17, Annex 1, at 16-17 (1996); and the UNCITRAL Model Law on Cross-Border Insolvency, U.N. Doc. A/CN.9/WG.V/WP.48 (1997).

undertook work in the field of assignment of receivables.² The Working Group on International Contract Practices of UNCITRAL (hereinafter Working Group) has been working on this topic since November of 1995.³ The purpose of this Article is to set out the progress achieved so far by the Working Group (in its journey towards a utopia where credit is plentiful and inexpensive!⁴), identify

2. See 26 U.N. Comm'n on Int'l Trade L.-Y.B., paras. 374-381 (1995), U.N. Doc. A/50/17.

3. To date, the Working Group has met four times: November 1995, July 1996, November 1996 and October 1997. The report of the first meeting is published in 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420. The reports of the second and third meeting are contained in U.N. Docs. A/CN.9/432 and A/CN.9/434 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)). The report of the fourth meeting is contained in U.N. Doc. A/CN.9/445 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). The next meeting of the Working Group is scheduled to take place in New York in March 1998. At this meeting, the Working Group is expected to consider a revised version of the draft Convention on Assignment in Receivables Financing.

As this Article was going to press, the Working Group was concluding its March 1998 session. During that session, the Working Group considered and adopted the substance of draft Articles 14 to 22 dealing with the relationships between the assignor and the assignee and with the protection of the debtor. The Working Group also had an initial exchange of views on draft Articles 25 to 28 dealing with subsequent assignments (assignments from the initial assignee or any other assignee to any subsequent assignee).

In the context of its discussion on draft Article 18(3) that deals with several notifications relating to multiple assignments of the same receivables by the same assignor, the Working Group was asked to reconsider its decision that notification should identify the payee. Some members of the Working Group explained that in the case of several notifications relating to one and the same assignment, draft Article 18(3), could not work because it requires the debtor to pay the payee identified in the first notification. The assignee should be able to change payment instructions, whether it was the assignee or the assignor who notified the debtor. In that context, it was suggested that the notification should identify the assignee or the person authorized to issue payment instructions and not the payee.

The proposal did not attract sufficient support for two reasons. First, a formal distinction between notification and request for payment might confuse the debtor, in particular the consumer-debtor. This problem is further compounded where the debtor might receive several notifications and several payment instructions. Second, an explicit reference to payment instructions might give the impression that the assignee might change the payment terms of the original contract under which the assigned receivables arise. Under the current text, the assignee may identify the person to whom or the account or address to which payment is to be made, but cannot change the country and the currency of payment. See draft Convention, *infra* note 4, arts. 7(2), 16(3). The report of the Working Group from this last meeting will be issued as U.N. Doc. A/CN.9/447 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). The next meeting of the Working Group is scheduled to take place in Vienna, Austria from 5 to 16 October 1998.

4. The current version of the draft Convention prepared by the Secretariat is contained in the Convention on Assignment in Receivables Financing, U.N. Doc. A/CN.9/WG.II/WP.96 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)) [hereinafter draft Convention]. References to draft Articles in this Article relate to the current version of the draft Convention. The objectives of the Convention are "to facilitate the development of international trade and [sic] promote the availability of credit at more affordable rates." See *id.* at Preamble. Previous

unsettled issues, and suggest possible ways to address them.

The Commission undertook the receivables project in response to suggestions made in May 1992 at the UNCITRAL Congress⁵ and after considering three reports prepared by the Secretariat.⁶ One suggestion made at the Congress was for the Commission to resume its earlier work on security interests.⁷ This work had been discontinued in 1980 when UNCITRAL concluded that “worldwide unification of the law of security interests . . . was in all likelihood unattainable.”⁸ The reasons that seem to have led UNCITRAL to this conclusion were the complexity of the subject, the wide differences existing among legal systems, the connection of the subject with other areas of law (such as bankruptcy law), and the work carried out by other organizations on retention of title and factoring.⁹

However, these abstract reasons, coupled with the lack of detailed discussion on the topic, are not entirely convincing. For example, the existence of wide differences among legal systems actually might have led the Commission to decide to undertake work in this area of law. Moreover, the reports prepared by the Secretariat, which the Commission does not seem to have considered at its 1979 and 1980 sessions in any detail, appear to have established both the desirability and the feasibility of work on security interests.¹⁰

versions of the draft Convention are contained in 26 U.N. Comm’n on Int’l Trade L.-Y.B. (1995); U.N. Doc. A/CN.9/412; and U.N. Docs. A/CN.9/WG.II/WP.87 and A/CN.9/WG.II/WP.89 (to be published in 27 U.N. Comm’n on Int’l Trade L.-Y.B. (1997)); and U.N. Doc. A/CN.9/WG.II/WP.93 (to be published in 28 U.N. Comm’n on Int’l Trade L.-Y.B. (1998)).

5. See *Uniform Commercial Law in the Twenty-First Century: Proceedings of the Congress of the United Nations Commission on International Trade Law* [hereinafter *Congress Proceedings*], U.N. GAOR Comm. on Int’l Trade L., 25th Sess., at 271, U.N. Doc. A/CN.9/SER.D/1 (1992).

6. Those reports are contained in 24 U.N. Comm’n on Int’l Trade L.-Y.B. (1993), U.N. Doc. A/CN.9/378/Add.3; 25 U.N. Comm’n on Int’l Trade L.-Y.B. (1994), U.N. Doc. A/CN.9/397; and 26 U.N. Comm’n on Int’l Trade L.-Y.B. (1995), U.N. Doc. A/CN.9/412. The discussion of those reports in the Commission is reflected respectively in 24 U.N. Comm’n on Int’l Trade L.-Y.B., paras. 297-301 (1993), U.N. Doc. A/48/17; 24 U.N. Comm’n on Int’l Trade L.-Y.B., para. 208-214 (1994), U.N. Doc. A/49/17; 26 U.N. Comm’n on Int’l Trade L.-Y.B., paras. 231-234 (1995), U.N. Doc. A/50/17.

7. See *Congress Proceedings*, *supra* note 5, at 159. For a full list of the documents of this earlier project, see text accompanying note 2 in 24 U.N. Comm’n on Int’l Trade L.-Y.B. (1993), U.N. Doc. A/CN.9/378/Add.3.

8. 11 U.N. Comm’n on Int’l Trade L.-Y.B., para. 28 (1980), U.N. Doc. A/35/17.

9. See *id.* at paras. 26-27.

10. See 11 U.N. Comm’n on Int’l Trade L.-Y.B. (1980), U.N. Doc. A/CN.9/165 (dealing with the feasibility of uniform rules on security interests); see also 11 U.N. Comm’n on Int’l Trade L.-Y.B. (1980), U.N. Doc. A/CN.9/186 (setting forth the issues to be considered in a

Thus, it can be assumed that other reasons led UNCITRAL to discontinue its work on security interests, such as the desire to give priority to other items on the program of future work or to avoid duplicating the work carried out by other organizations. Even assuming that there were strong substantive reasons for UNCITRAL not to undertake work on security interests in 1980, those reasons did not preclude the Commission from deciding in 1992 to undertake work on assignment in receivables financing, although the suggestion for the Commission to resume its earlier work on security interests was once again not seriously considered.¹¹

As mentioned above, in 1992 the Commission decided to undertake work on assignment in receivables financing after considering three reports prepared by the Secretariat.¹² Those reports suggest that the disparity of laws and the lack of any modern, comprehensive rules in the field of assignment gave rise to legal obstacles to receivables financing, and thus to international trade generally.¹³ The Commission recognized that a uniform law on assignment could help remove such obstacles.¹⁴

In many civil law countries, such as Germany, the provisions of the civil code governing assignments present gaps which are filled by courts applying general principles of law.¹⁵ For example, in the

uniform law on security interests).

11. While a comprehensive regime governing security rights in all types of assets might have been preferable, see 25 U.N. Comm'n on Int'l Trade L.-Y.B. (1994), U.N. Doc. A/CN.9/397, paras. 8-9, the Commission was precluded from taking such an approach for a number of reasons. The International Institute for the Unification of Private Law (UNIDROIT) had announced its intention to prepare a model law on secured transactions and that the feasibility of such an ambitious project had not been established. See generally *International Institute for the Unification of Private Law* (visited Mar. 30, 1998) <http://ra.irv.uit.no/trade_law/organizations/unidroit.html>. At the same time, the need for unification in the field of receivables financing was pressing. For example, the need for an increase in the availability of credit and the increased importance of receivables as security for credit required the removal of such legal obstacles to the free marketability of receivables. It may be true that a piecemeal approach may not be fully satisfactory to the extent that it may reproduce the disparity of law that it set to address in the first place. However, such an approach is better than leaving problems unresolved—the choice often is between something or nothing. Critics of the law unification process who underline the fact that uniform laws are often not as comprehensive as they should ideally be, tend to underestimate this hard reality.

12. See *supra* text accompanying note 6.

13. See *id.*

14. See 24 U.N. Comm'n on Int'l Trade L.-Y.B. (1993), U.N. Doc. A/CN.9/378/Add.3; 25 U.N. Comm'n on Int'l Trade L.-Y.B. (1994), U.N. Doc. A/CN.9/397, paras. 52-56; and 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1995), U.N. Doc. A/CN.9/412, paras. 83-85.

15. See, e.g., Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] [Supreme Court] 149, 90 (F.R.G.); BGHZ 72, 94; BGHZ 257, 94; BGHZ 97, 86.

absence of a French provision dealing with the conflict between the supplier of materials on credit and reservation of title terms and a financing institution obtaining a “global assignment” of all present and future receivables, courts applied the principle of good faith to invalidate the global assignment. The court held that the financing institution is considered to know or able to know about assignments to suppliers, and by concluding a global assignment, the financing institution places the assignor in a position where the assignor has to breach its obligations under an assignment to a supplier. Similarly, in the absence of a provision dealing with conflicts arising among several assignees who obtained the same receivables from the same assignor, courts usually apply the general principle “he who hath not cannot give” (*nemo dat quod non habet*) to recognize that only the first-in-time assignee has obtained rights in the receivables. In still other countries, gaps in civil codes relating to assignment or problems regarding complex receivables financing transactions are addressed through special legislation.¹⁶

In some common law countries, uncertainty prevails because of a lack of “any uniform policy or set of rules.”¹⁷ It is recognized that the law of assignment has evolved over a long period of time and often needs to be “adjusted” by courts trying to address problems arising in modern receivables financing practices.¹⁸ This situation has led to a number of legislative initiatives, which unfortunately have not yet come to fruition.¹⁹ It is interesting to note that even in common law countries that have a comprehensive set of rules on security interests, there is still a need to further modernize the existing legislation.²⁰ In

16. See, e.g., Law No. 81-1 of January 2, 1981, Journal Officiel de la République Française [J.O.], Jan. 3, 1981, at 150, La Semaine Juridique [JCP] 1997, III, 570 (Fr.). This French law is more commonly known as the “loi Dailly.” See generally Jean Stoufflet, *Cession et Nantissement de Creances par Remise d'un Bordereau*, JCP 1997, III, 570 (for a brief analysis of this most interesting law).

17. R. M. GOODE, *COMMERCIAL LAW* 728 (2d ed. 1995); see also FIDELIS ODITAH, *LEGAL ASPECTS OF RECEIVABLES FINANCING* 177 (1991).

18. See generally Jeremy Goldring, *It Floats*, 7 BUTTERWORTHS J. INT'L BANKING & FIN. L. 330 (1996); see also Richard Calnan, *Security Over Deposits After Re BCCI*, 3 BUTTERWORTHS J. INT'L BANKING & FIN. L. 111 (1996) (briefly describing problems related to floating charges and security interests in deposit accounts).

19. See generally Law Reform Commission, *Personal Property Securities*, Report No. 64 (1993) (Austl.); Law Commission, *A Personal Property Securities Act for New Zealand*, Report No. 8 (1989) (N.Z.); GOODE, *supra* note 17, n.184 (referring to the Diamond Report).

20. A study group by the Permanent Editorial Board for the Uniform Commercial Code of the United States of America [hereinafter UCC] published in December 1992 a report calling for major changes in Article 9 of the UCC. See General Comment of National Conference of Commissioners on Uniform State Laws and the American Law Institute, *reprinted in* SELECTED COMMERCIAL STATUTES (West 1994); RICHARD E. SPEIDEL ET AL.,

still other countries, the law on assignment is either outdated or incomplete.²¹

Problems are compounded at the international level since an assignment valid and effective when concluded in country A may be unenforceable against the debtor in country B, because, for instance, the notification requirements set forth by the law in country B were not followed. Alternatively, this same assignment may be of no value if challenged by the creditors of the assignor in country C because the requirements of the law in country C for the assignment to be effective as against creditors of the assignor may have not been followed.²² Meeting the requirements of the law of a number of countries for the assignment to be valid *inter partes* and effective *erga omnes* normally involves considerable time and cost, and may often be impossible—mainly because the identity of the debtor or third-party creditor may not be known at the time of the assignment as in the case of an assignment of future receivables.

In light of the above, the Commission wanted a uniform law that would enhance certainty and predictability in receivables financing—thus potentially decreasing the cost while at the same time increasing the availability of credit based on receivables, as well as supplementing, rather than supplanting, what has been achieved internationally to date in this field of law.²³

COMMERCIAL LAW 6 (West 4th ed. 1987); Barkley Clark, *Revision of UCC Article 9: The 1992 Final Report*, 26 UCC L.J. 307 (1994). The report recommends enlarging the scope of Article 9 to cover property presently not covered by the UCC, to improve the system for filing of security interests with appropriate offices, to facilitate the perfection of security interests in, *inter alia*, letters of credit, and to clarify the rights and duties of the secured creditor towards the debtor and other secured creditors. See generally Bruce Bernstein & James Clark, *Report on U.S. Legislative and Judicial Developments in Secured Financing in 1995*, 8 J. INT'L BANKING L. 143 (1996) (concerning the ongoing revision of UCC Article 9).

21. For example, in those Islamic countries in which assignment is subject to Islamic law principles, the debtor has to give its consent for the assignment to be valid. See generally Arabische Staaten, *Das Recht der Forderungsabtretung*, in BUNDESSTELLE FUER AUSSENHANDELSINFORMATION 10 (1996).

22. For the purposes of the draft Convention, "assignor" is the old creditor of the assigned receivable (the borrower in the financing transaction; the debtor in UCC Article 9 terminology), "assignee" is the new creditor (the lender) and "debtor" is the person who owes payment of the assigned receivable (the account debtor in UCC Article 9 terminology).

23. See 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 14-18. This reference relates to the UNIDROIT Convention on International Factoring. See UNIDROIT Convention on International Factoring, May 28, 1988, 27 I.L.M. 943 (1988) (entered into force May 1, 1995) [hereinafter Ottawa Convention]. While a detailed comparison of the two texts goes beyond the scope of this Article, it is worthy to note that while the draft Convention adopts certain provisions of the Ottawa Convention (for instance, debtor's defenses), it differs from the Ottawa Convention in two important respects. First, the

II. SCOPE OF WORK

A. Assignment

The draft Convention applies to assignments of receivables and avoids any reference to or inference with any other aspect of the financing contract. An assignment is defined as the transfer of a receivable by agreement “provided that the transfer is made against value, credit or related services.”²⁴ Thus, the focus is on the transfer of property rights in receivables rather than on the agreement to assign, although both will be covered.²⁵

The reference to “value or credit”²⁶ is intended to ensure that both outright assignments (in which value is given for the transfer of receivables) and assignments by way of security (in which credit is extended and the receivables serve as security) are included.²⁷ The draft Convention states explicitly that it is to apply both to outright transfers of property, as well as to transfers of security rights, in receivables.²⁸ The reference to “related services”²⁹ is intended to ensure that modern transactions in the context of which only financing-related services are offered will be covered by the draft

scope of this draft Convention is much wider than the Ottawa Convention. Second, this draft Convention addresses assignment not as a contract valid between the parties but as a transfer of property effective *erga omnes*. Thus the draft Convention contains a number of provisions on the effects of the assignment on the debtor and other third parties (for example, the creditors of the assignor and the administrator in the insolvency of the assignor). See draft Convention, *supra* note 4, art. 42. The draft Convention allows Contracting States to determine the convention to which they wish to give precedence in order to resolve potential conflicts between the draft Convention and the Ottawa, or any other, Convention.

24. Draft Convention, *supra* note 4, art. 2(1). Thus, emphasis is placed on assignments for financing purposes (gifts and other assignments that are not made for financing are excluded). Consideration refers to the transfer and not to the contract of assignment. This approach seeks to circumvent the problem raised by the abstraction principle prevailing in some jurisdictions according to which the contract of assignment is independent of the transfer and does not require consideration.

25. While the main goal is to validate the transfer of property rights in receivables, the agreement to assign needs to be validated as well to the extent that the invalidity of the agreement may invalidate the transfer or give rise to a cause of action based on the principle of unjust enrichment.

26. Draft Convention, *supra* note 4, art. 2(1).

27. However, because of both the wide divergences existing among legal systems and the need to preserve the flexibility for the parties to structure their transactions in order to meet changing needs, the Working Group avoided drawing an exact distinction between outright assignments and assignments by way of security, leaving the matter to the parties and to domestic law. See generally 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420.

28. See draft Convention, *supra* note 4, art. 2(1).

29. *Id.* (such as accounting or insurance services).

Convention.

B. Receivables

Under the presently broad definition of the term “receivable,”³⁰ the draft Convention applies to a wide variety of transactions (e.g., factoring, forfaiting, securitization, assignment of future income-stream in project finance and refinancing transactions), including transactions involving the transfer of tort receivables, insurance policies and deposit accounts.

The Working Group has decided to focus on receivables financing transactions, including factoring and securitization. Thus the draft Convention covers both assignments of international receivables (mainly trade receivables assigned in the context of factoring transactions) and international assignments of domestic receivables (consumer receivables often assigned in the context of securitization transactions).³¹ While some reservations have been expressed about including international assignments of domestic receivables, no good reason other than avoiding any interference with consumer-protection law has been proposed to date for excluding them or treating them differently.³²

In addition, the Working Group has accepted, in principle, the possibility of the draft Convention applying to transactions that are not of a financing nature. To this end, the Working Group concluded that the draft Convention should refer to assignment of receivables in general and then list possible exceptions.³³ The main reason for adopting this approach was the Working Group’s belief that the draft Convention should be as comprehensive as possible in order to achieve the desirable degree of uniformity. Furthermore, the

30. See *id.* (defining “receivables” as “right to payment of a monetary sum”).

31. U.N. Doc. A/CN.9/434, para. 43 (to be published in 27 U.N. Comm’n on Int’l Trade L.-Y.B. (1997)).

32. U.N. Doc. A/CN.9/445, paras. 125-130 (to be published in 28 U.N. Comm’n on Int’l Trade L.-Y.B. (1998)).

33. See draft Convention, *supra* note 4, art. 4(4). This approach was followed in Article 2 of the United Nations Convention on Contracts for the International Sale of Goods. See Final Act of the United Nations Conference on Contracts for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF.97/18 (1980), reprinted in S. TREATY DOC. No. 98-9 (1983) and 19 I.L.M. 668. The exceptions include assignments made for personal, family or household purposes (i.e., assignments made by consumers, but not assignments of receivables owed by consumers), assignments made by endorsement or delivery of a negotiable instrument, and assignments made as part of the sale of the business out of which the assigned receivables arose.

Working Group found that any explicit reference to “financing” would give rise to uncertainty, since this term is subject to varying interpretations in different jurisdictions and it would be difficult, or even inappropriate, to attempt to reach a uniform definition on a term of practice that is constantly developing.³⁴

However, the Working Group may need to reconsider this far-reaching approach. Some practices may not need to be covered because they are sufficiently regulated and effective (e.g., the assignment of rights under independent guarantees and stand-by letters of credit).³⁵ Furthermore, while an all-encompassing approach is desirable from the point of view of uniformity of law, it may not be acceptable to States, at least to the extent that it requires a wholesale revision of assignment law contained in civil codes. Moreover, such an approach, if finally adopted, would necessitate special rules for certain practices.

C. Internationality Test

The draft Convention applies only to assignments with some international element.³⁶ While a convention on assignment in general is more desirable, it appears that at least presently it would not be acceptable to States.³⁷

As to the exact nature of internationality, the Working Group has tentatively decided that it could relate to the assignment or to the

34. See U.N. Doc. A/CN.9/432, paras. 14-18 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

35. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit deals both with the transfer of the beneficiary's right to demand payment and the assignment of proceeds. See United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, *supra* note 1, arts. 9-10.

36. See draft Convention, *supra* note 4, art. 3.

37. States represented in the Working Group do not appear to be prepared to accept a convention covering domestic assignments of domestic receivables (there is indeed considerable opposition to covering even international assignments of domestic receivables). In addition, it remains to be seen whether the broad approach followed so far as to the types of assignments to be covered will be finally adopted by the Working Group. An all-encompassing approach may be more feasible in the context of a model law on secured transactions, which States could adjust to fit their needs. Such a model law would be compatible with a convention on assignments in receivables financing in the same way that such a convention is compatible with currently existing law on secured transactions. It should be noted that the existence of a modern and complete law on secured transactions would not render a convention on assignments obsolete to the extent that, even if widely adopted, a model law cannot produce the same degree of uniformity a convention can achieve. In addition, drafting a model law on secured transactions may take many more years and the process of its adoption by States may well exceed the time needed for the completion and entry into force of the draft Convention on Assignment in Receivables Financing.

receivable.³⁸ By contrast, in the Ottawa Convention, internationality relates only to receivables.³⁹ Thus, assignments (domestic or international) of international receivables and international assignments of domestic receivables are included within the scope of the draft Convention.

The central reason for widening the applicability of internationality is to cover not only international factoring and discounting transactions (which normally involve international trade receivables assigned in bulk) but also securitization transactions, which may involve a high volume of small-amount domestic consumer receivables (a practice of growing importance that is believed to have the potential of giving consumers increased access to lower-cost credit) and refinancing transactions which may involve individual large-amount receivables.⁴⁰

The internationality test considers the location of the parties involved (i.e., their registered office or place of incorporation or, in the case of individuals or persons without a registered office, their habitual residences).⁴¹ Thus, an assignment is international if the assignor and the assignee are located in different countries. Likewise, a receivable is international if the assignor and the debtor are located in different countries.⁴² For the determination of internationality of the assignment, the relevant point of time for the assignment is the time at which the contract of assignment is concluded (but not performed);⁴³ for the receivable, it is the time at which it arises.⁴⁴ The Working Group may need to reconsider its

38. See *id.* art. 3.

39. See *supra* text accompanying note 23.

40. See 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 26-29 and U.N. Doc. A/CN.9/432, paras. 19-23 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)). In order to facilitate refinancing transactions, the draft Convention adopts the principle that a subsequent assignee has the rights of the initial assignee. See draft Convention, *supra* note 4, art. 25. A subsequent assignment is covered by the draft Convention if the initial assignment falls within the draft Convention's scope, or if the subsequent assignment itself falls within the draft Convention's scope even if the initial assignment falls outside the draft Convention's scope. See *id.* Under such an approach, a domestic assignment of a domestic receivable may be brought under the scope of the draft Convention, if it forms part of a chain of assignment. See generally Steven L. Schwarcz, *The Alchemy of Asset Securitization*, 1 STAN. J. L. BUS. & FIN. 133 (1994).

41. See draft Convention, *supra* note 4, art. 5(j).

42. See *id.* art. 3.

43. See *id.* art. 3, 5(k).

44. See *id.* art. 3. For the purposes of the draft Convention, a contractual receivable "arises at the time when the original contract is concluded." *Id.* art. 5(b). A non-contractual receivable "arises at the time it is confirmed or determined in a decision of a judicial or other

approach as to the time at which the internationality of a receivable is determined in order to avoid a situation in which the parties to a domestic assignment of future international receivables may not be in a position to determine, at the time of the assignment, the international character of the receivables and, therefore, whether the draft Convention applies.

D. Territorial Scope of Application

The territorial scope of application of the draft Convention has been the subject of detailed discussions in the Working Group.⁴⁵ While some States have expressed the view that all parties directly involved in an assignment (the assignor, the assignee and the debtor) should be located in a Contracting State, the prevailing view has been that it would be sufficient only if the assignor were located in a Contracting State.⁴⁶

However, with respect to the provisions of the draft Convention that deal with the rights and obligations of the debtor, the Working Group has tentatively decided that the debtor too must be located in a Contracting State for those provisions of the draft Convention to apply.⁴⁷ Such an approach enhances predictability with regard to the debtor without unduly limiting the scope of application of the draft Convention as a whole.⁴⁸

The Working Group has also tentatively decided that any reference to conflict-of-laws rules should be avoided in the context of the provisions dealing with the scope of application of the draft Convention because it could raise uncertainty to the extent that the conflict-of-laws rules on assignment are not uniform.⁴⁹ However, the problem of uncertainty cannot be resolved by deleting all reference to the conflict-of-laws rules, since such rules apply nonetheless by virtue of law outside the draft Convention. Such an omission also

authority." *Id.* Unliquidated claims are not covered due to the uncertainty which characterizes them.

45. See U.N. Doc. A/CN.9/445, paras. 131-136 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)); U.N. Doc. A/CN.9/434, paras. 19-24 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); U.N. Doc. A/CN.9/432, paras. 29-32 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); and 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 30-31.

46. See draft Convention, *supra* note 4, art. 1(1); U.N. Doc. A/CN.9/445, para. 132. (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

47. See draft Convention, *supra* note 4, art. 1(1).

48. See U.N. Doc. A/CN.9/445, para. 134 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

49. See *id.* at para. 139.

creates an additional problem: If the law of a Contracting State is applicable by virtue of the conflict-of-laws rules of the forum, the forum may apply the domestic law of that State and not the draft Convention. Assuredly, the problem of uncertainty raised by providing for the application of the draft Convention by virtue of conflict-of-laws rules would be better addressed by including in the draft Convention uniform conflict-of-laws rules.⁵⁰

E. Party Autonomy

The question of party autonomy arises with regard to the choice of law that would govern a particular assignment and in relation to the mandatory or non-mandatory character of the provisions of the draft Convention. The current version of the draft Convention recognizes the right of the parties to the assignment, or to the contract from which the assigned receivable arises, to exclude the application, or to vary certain provisions, of the draft Convention.⁵¹

This approach is based on the assumption that, while the parties to a contract should be able to choose the law applicable to that contract, or to structure their mutual rights and obligations as they wish, their choice should not affect the rights of the debtor and other third parties such as the creditors of the assignor and the administrator in the insolvency of the assignor.⁵² Allowing parties to opt out of the draft Convention entirely would inadvertently result in depriving the debtor of the protection afforded by the draft Convention and would jeopardize the certainty sought by the draft Convention with regard to the rights of third parties. For the same

50. The draft Convention contains such rules. However, several States have reservations as to whether those rules should be included in the final text of the draft Convention, mainly because of the possibility that such rules may create conflicts between the draft Convention and other international conventions dealing with the subject. One such conflict would be with the Rome Convention. See *generally* Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 1, *reprinted in* 19 I.L.M. 1492 (1980). For a summary of those reservations, see U.N. Doc. A/CN.9/445, paras. 52-55 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). See also *infra* text accompanying note 217.

51. See draft Convention, *supra* note 4, art. 6. However, the question whether the parties have to exclude the relevant provisions of the draft Convention explicitly, or whether they may do so implicitly (by choosing, for example, the law of a non-Contracting State), is not addressed in the current version of the draft Convention.

52. Under draft Convention Article 5(g), an "insolvency administrator" is "a person or body, including one appointed on an interim basis, authorized to administer the reorganization or liquidation of the assignor's assets." Draft Convention, *supra* note 4, art. 5(g); see also UNCITRAL Model Law on Cross-border Insolvency, art. 2(d), U.N. Doc. A/CN.9/WG.V/WP.48 (1997), adopted by UNCITRAL at its 1997 session.

reasons, allowing parties to vary the provisions dealing with the protection of the debtor or the rights of third parties would be inappropriate.

As to the application of the draft Convention by explicit agreement of the parties that the draft Convention should apply to their relationship (“opt in” agreement), the view has been expressed that it would make the draft Convention more acceptable to States, since currently existing national law would not be affected and the draft Convention would apply only if the parties chose to make a “UNCITRAL assignment.”⁵³ Nevertheless, such an opt-in approach runs the risk of unduly limiting the cases to which the draft Convention applies. Furthermore, as previously mentioned, the law on international receivables financing is complicated enough to merit some unification effort, before resorting to the easy way out of establishing yet another legal regime.

It should be noted that the draft Convention may replace national law that creates obstacles to receivables financing in that the draft would validate an assignment that would be invalid under national law. However, the draft is not intended to invalidate an assignment that would otherwise be effective under national law.⁵⁴

III. FORM AND EFFECT OF ASSIGNMENT

A. Form

The Working Group has debated at some length but has not yet reached an agreement on whether the assignment should be in writing.⁵⁵ In favor of a form-free assignment, it has been argued that a rule introducing written form would run counter to the approach taken in many legal systems and would raise the transaction cost.⁵⁶ On the other hand, some States argue that introducing written form

53. See U.N. Doc. A/CN.9/434, para. 36 (to be published in 27 U.N. Comm’n on Int’l Trade L.-Y.B. (1997)).

54. See, e.g., draft Convention, *supra* note 4, art. 6(3). However, if the Working Group finally decides in favor of requiring written form for the assignment to be effective, draft Article 6(3) would need to be revised.

55. Under the draft Convention, “writing” means “any form of communication that is accessible so as to be usable for subsequent reference and provides identification of the sender . . . by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.” Draft Convention, *supra* note 4, art. 5(e); see also UNCITRAL Model Law on Electronic Commerce, *supra* note 1, arts. 6-7.

56. See U.N. Doc. A/CN.9/445, para. 207 (to be published in 28 U.N. Comm’n on Int’l Trade L.-Y.B. (1998)); U.N. Doc. A/CN.9/434, para. 103 (to be published in 27 U.N. Comm’n on Int’l Trade L.-Y.B. (1997)).

would simply codify a good practice followed all over the world, since, in any case, assignments made in a financing context are put in writing.⁵⁷

However, written form is not required to protect the assignor and the assignee, since parties to financing transactions are sophisticated enough not to need written form as a warning with regard to the obligations they undertake.⁵⁸ Rather, written form should be required in order to protect third parties, such as creditors of the assignor and the administrator in the insolvency of the assignor, from possible fraudulent behavior of the assignor, in collusion with the assignee (aimed, for example, at changing the order of priority among several conflicting claimants).

Reflecting the lack of agreement so far in the Working Group, the current version of the draft Convention contains three alternatives.⁵⁹ Under the first alternative, written form is a condition for the validity of the assignment.⁶⁰ This provision is based on the assumption that assignments made in the context of a financing contract are normally in writing.⁶¹ However, in order to avoid imposing on the transacting parties an additional form requirement (which would increase stamp duty costs), an exception is established whereby an oral assignment is valid if it is made pursuant to a written financing contract.⁶² Under the second alternative, an oral assignment, although not in writing, may still be valid if it complies with the requirements of the applicable law—the law of the assignor's location.⁶³ Under the third alternative, written form requirements are left to the applicable law—the law of the assignor's location.⁶⁴ The second and the third alternatives constitute an effort to accommodate the concern that requiring the assignment to be in writing would

57. See generally U.N. Doc. A/CN.9/434, paras. 102-106 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); U.N. Doc. A/CN.9/432, paras. 82-86 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 75-79.

58. See draft Convention, *supra* note 4, art. 12 remark 4.

59. See *id.* art. 9(1).

60. See *id.*

61. See generally U.N. Doc. A/CN.9/434, para. 104 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

62. See draft Convention, *supra* note 4, art. 9(1). In order to simplify the assignment and to avoid raising its cost, the draft Convention also provides that several future receivables may be assigned on the basis of one and the same written "master agreement." See *id.* art. 9(2).

63. See *id.* art. 9(1).

64. See *id.*

invalidate national assignment practices where no writing is required.⁶⁵ However, a better approach might be to require a writing for the assignment to be effective as against third parties and to allow States concerned about oral practices to enter a reservation as to the application of such a rule if the assignor is located in their territory.

B. Transfer of Receivables

As mentioned above, assignment under the draft Convention results in the transfer of property rights in receivables.⁶⁶ A significant consensus reached by the Working Group is the recognition of the validity of the assignment of future receivables and of receivables that are not individually identified but are rather assigned in bulk.⁶⁷ Under the draft Convention, bulk assignments are valid if the receivables to which the assignment relates—the debtor and the amount owed—can be identified at the time agreed upon by the assignor and the assignee or, in the absence of such an agreement, at the time the receivables arise.⁶⁸ The recognition of bulk assignments is intended to facilitate receivables financing in a number of countries where the validity of the assignment of future receivables is questionable.⁶⁹

Another consensus reached by the Working Group is that the time of transfer of future receivables is the time agreed upon by the assignor and the assignee or, in the absence of such an agreement, the time of the conclusion of the contract of assignment.⁷⁰ The Working Group believed that the closer the time of transfer is to the time of

65. See U.N. Doc. A/CN.9/445, paras. 207-209 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). Such practices include those involving a so-called "prolonged reservation of title" in goods with a clause extending title to the proceeds from the sale of the goods, which amounts to an assignment clause. See generally 4 ROLF SERICK, EIGENTUMSVORBEHALT UND SICHERUNGSÜBERTRAGUNG (1976) (providing a detailed analysis of "prolonged reservation of title" issues under German law).

66. See discussion *supra* Part II.A.

67. See draft Convention, *supra* note 4, art. 10(1)(b). This means recognition of the effectiveness of assignment, without prejudice to the rights of third parties. See *id.* art. 10(1) (stating that article 10(1) is subject to articles 23 and 24). On the question of priority, see *id.* arts. 23-24.

68. See *id.* art. 10(1)(b).

69. See generally Hein Kötz, *Rights of Third Parties—Third Party Beneficiaries and Assignment*, INT'L ENCYCLOPEDIA OF COMP. LAW, vol. VII, ch. 13, at 70-72 (1992). The restrictions as to the assignability of future receivables may be direct, see, e.g., CÓDIGO CIVIL art. 1529 (Spain), or indirect, such as when assignment requires the notification of the debtor, the identity of whom may not be known, at the time of assignment, in the case of future receivables, see Jean Ghestin, *La transmission des obligations en droit positif français*, in LA TRANSMISSION DES OBLIGATIONS 4 (Journées d'études juridiques Jean Dabin ed., 1980).

70. See draft Convention, *supra* note 4, art. 11(1).

the assignment, the more certainty could be achieved as to the rights of the assignee—a fact that should have a beneficial effect on the cost and the availability of credit based on receivables.⁷¹

C. Anti-Assignment Clauses

Anti-assignment clauses, which are routinely included in contracts, often result in the invalidation of assignments.⁷² As a result, the creditor (e.g., in a sales transaction) may not be able to obtain financing on the basis of its receivables or may only obtain financing at a higher cost—a fact that has an impact on the availability and the cost of credit to the debtor as well. On the other hand, anti-assignment clauses are intended to protect the debtor from adverse effects resulting from a change in the identity of the creditor.⁷³

The current version of the draft Convention attempts to reach a balance between the interest of the assignor in raising credit on the basis of its receivables—which, in a credit economy, may be in the interest of the debtor as well—and the interest of the debtor in maintaining its legal position.⁷⁴ An assignment made despite an anti-assignment clause contained in the contract from which the assigned receivables arise is effective.⁷⁵ However, any liability that the assignor might have under other applicable law outside the draft Convention is preserved but not extended to the assignee.⁷⁶

This approach reflects the lack of consensus in the Working Group on this matter and is an effort to bridge the existing differences. As a result of this approach, however, assignors whose assignments are subject to a law that validates anti-assignment clauses⁷⁷ will be at a disadvantage to assignors whose assignments are

71. See U.N. Doc. A/CN.9/434, para. 119 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

72. See generally Kötz, *supra* note 69, at 64-70.

73. See *id.* at 64.

74. See draft Convention, *supra* note 4, art. 12.

75. See *id.* art. 12(1).

76. See *id.* art. 12(2). The issue of possible tortious liability of the assignee who receives an assignment knowing that the receivables have already been assigned has not yet been discussed in detail. See U.N. Doc. A/CN.9/432, para. 121 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); U.N. Doc. A/CN.9/434, para. 132 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

77. The vast majority of jurisdictions follow this approach. See Kötz, *supra* note 69, at 64-70.

subject to a law invalidating such clauses.⁷⁸ Another possible disadvantage is that the assignee may inadvertently be subject to an unacceptably high risk that the debtor may declare the contract void and refuse to pay merely on the grounds that the assignor has assigned its receivables in violation of an anti-assignment clause. A better approach might be to invalidate anti-assignment clauses subject to debtor protection legislation or other public policy considerations of the country in which the debtor is located.

The Working Group is expected to consider a number of additional questions, including the following: whether anti-assignment clauses contained in an assignment or a subsequent assignment should be treated in the same way as anti-assignment clauses contained in contracts from which the assigned receivables arise; whether an anti-assignment clause contained in a syndicated bank loan should invalidate an assignment which is in reality part of a competitor's scheme to take over the debtor's business; whether, where the debtor is a State, the anti-assignment clause may result in the State being able to discharge its obligation by paying the assignor despite the validity of the assignment (as a result of which, the assignee would still prevail over the creditors of the assignor); and whether a rule should be devised for protecting the assignee from the risk that the debtor, as a result of the assignor's breach of contract, may cancel the contract from which the receivables arise.⁷⁹

Another question the Working Group is expected to address is whether, in the context of an anti-assignment clause, the consumer-debtor should be allowed to discharge its obligation by paying the assignor, even after notification.⁸⁰ An argument in favor of just such an exception to the rule on discharge of the debtor's obligation⁸¹ is that it would be unfair to require a consumer-debtor against its will to pay a new, possibly foreign, creditor. In addition, such an exception would be in line with normal practice, in which consumer-debtors are not notified of any assignment and are expected to continue making payments to the same bank account or post office box, the control over which is a matter to be settled between the assignor and the assignee.⁸²

78. See, e.g., U.C.C. §§ 2-210, 9-318(4) (1994).

79. See draft Convention, *supra* note 4, art. 12 remarks 1-2.

80. See *id.* art. 12 remarks 3-4.

81. This rule provides that, after notification, the debtor has to discharge by paying the assignee. See *id.* art. 18(2).

82. See, e.g., U.C.C. § 9-318(3) (1994).

On the other hand, an argument against recognizing the consumer-debtor's right to discharge its obligation by paying the assignor is that consumer-debtors do not need such protection. Consumer-debtors normally do not have the power to negotiate and include in their contracts an anti-assignment clause.⁸³ Those consumers who have such power are sophisticated enough to take care of their interests on their own.⁸⁴ In addition, current practice is sufficiently accommodated by the draft Convention without the need for any additional debtor-protection provision.⁸⁵ Under the draft Convention, before notification the debtor may discharge its obligation by paying the assignor, and in any case the notifying assignee notifying may instruct the debtor to keep making payments to the assignor.⁸⁶

D. Transfer of Security Rights

Receivables assigned are often backed by security rights, which may be personal rights (e.g., accessory bank guarantees) or property rights (e.g., pledges, mortgages).⁸⁷ The value of the security right becomes evident in the case of default of the debtor and insolvency of the assignor, in which case the assignee may not be able to obtain payment from the debtor or the assignor. In addition, often the value for the assignee may not be in the assigned receivable itself but in the security right.⁸⁸ Thus, the importance of the effect of the assignment on rights securing payment of the assigned receivables is obvious.

The draft Convention attempts to codify current law in that it adopts the principle that accessory rights are automatically transferred with the receivables that they secure.⁸⁹ In order to avoid interpretation problems as to the accessory character of the rights, the draft Convention refers the matter to domestic law or to the agreement of the parties.⁹⁰ Thus, security rights are transferred automatically unless otherwise provided by law or by agreement

83. See draft Convention, *supra* note 4, art. 12 remark 4.

84. See *id.*

85. See generally *id.*

86. See *id.* arts. 16, 18(1).

87. See, e.g., *id.* art. 13(1).

88. For example, the value of a receivable owing from an obligor of dubious financial health would be greatly enhanced if payment is either secured by a security interest in a valuable asset or guaranteed by a creditworthy party.

89. See draft Convention, *supra* note 4, art. 13(1).

90. See generally *id.* art. 13.

between the assignor and the assignee.⁹¹

With regard to agreements between the assignor and the debtor restricting the transfer of security rights, the draft Convention takes the approach that security rights should be treated as receivables.⁹² Thus, the rule mentioned above with regard to anti-assignment clauses—that the assignment is effective despite the anti-assignment clause—should apply.⁹³ As a result, agreements restricting the transfer of security rights that may be effective under otherwise applicable law do not invalidate the transfer.⁹⁴ This means that the owner of the asset in which a security right has been given retains any cause of action it might have under otherwise applicable law against the creditor who transferred it in violation of their agreement.⁹⁵ However, the right is transferred to the assignee, with the result that, in case of conflict, the assignee will prevail over the assignor and its creditors.⁹⁶ The Working Group recognized that such an approach should not prejudice the rights of parties granting a possessory security right, the guarantor in an independent guarantee, or the issuer of a stand-by letter of credit.⁹⁷

As to independent guarantees and stand-by letters of credit, it should be noted that the draft Convention is not intended to cover them, since they are not “security rights” that are transferred automatically with the secured obligation.⁹⁸ However, the Working Group may consider the possibility of their automatic transfer under the condition that such transfer should not prejudice the rights of the guarantor/issuer.⁹⁹ If such a consideration is accepted, the guarantor/issuer would be able to pay the beneficiary-assignor and not the assignee, but the assignee would prevail over the assignor and its creditors if they attempted to attach the receivables in the hands

91. See *id.* art. 13(1).

92. See *id.* art. 13(2).

93. See discussion *supra* Part III.C.

94. See draft Convention, *supra* note 4, art. 13(2).

95. See *id.* art. 13(3).

96. See *generally id.* art. 13.

97. See draft Convention, *supra* note 4, art. 13(3); see also *id.* art. 13 remark 2; U.N. Doc. A/CN.9/434, paras. 143-146 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

98. See draft Convention, *supra* note 4, art. 13 remark 2. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit uses the term “independent undertaking” for both types of instruments. See United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, *supra* note 1, art. 2. For a brief analysis of this Convention, see Jean Stoufflet, *La Convention des Nations Unies sur les garanties indépendantes et les lettres de crédit stand-by*, 50 REVUE DE DROIT BANCAIRE ET DE LA BOURSE 132 (1995).

99. See draft Convention, *supra* note 4, art. 13 remark 2.

of the assignor, or over the administrator in the case of the insolvency of the assignor.

IV. RELATIONSHIP BETWEEN THE ASSIGNOR AND THE ASSIGNEE

The general approach the Working Group has taken so far is based on the assumption that party autonomy is of the essence in the relationship between the assignor and the assignee.¹⁰⁰ Thus, the draft Convention focuses on the assignment rather than on the financing contract, thereby avoiding restrictions on the ability of the parties to structure the financing contract (in which assignment may be an integral part or not, based on the needs and desires of the parties).¹⁰¹ In addition, the draft Convention regulates the assignment-based relationship between the assignor and the assignee in a non-mandatory way.¹⁰² This approach is reflected in the fact that, apart from the provision on form,¹⁰³ there is no provision in the draft Convention that deals in a mandatory way with the rights and obligations of the assignor and the assignee.

It should also be noted that the only provision in the draft Convention which directly addresses the rights and obligations of the assignor is the provision on representations of the assignor, which codifies existing law and is intended to apply only in case the assignor and the assignee have not dealt with this matter in their agreement.¹⁰⁴ Under draft Article 15, unless there is an agreement to the contrary between the assignor and the assignee, the assignor guarantees that the assignor has the right to transfer the receivable,¹⁰⁵ that the assignor has not already assigned those receivables to someone else,¹⁰⁶

100. See U.N. Doc. A/CN.9/434, para. 149 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

101. See draft Convention, *supra* note 4, art. 1(1); 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 19-25.

102. See draft Convention, *supra* note 4, art. 14.

103. See *id.* art. 9. While its exact content remains to be determined, the provision on form is mainly aimed at protecting third parties. See discussion *supra* Part III.A.

104. See draft Convention, *supra* note 4, art. 15. For the discussion in the Working Group, see U.N. Doc. A/CN.9/434, paras. 152-161 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); U.N. Doc. A/CN.9/432, paras. 145-158 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 80-88.

105. See draft Convention, *supra* note 4, art. 15(1)(a). This right exists even if an anti-assignment clause has been agreed to between the assignor and the debtor. See *id.*

106. See *id.* art. 15(1)(b).

and that there are no hidden defenses of the debtor,¹⁰⁷ but not that the debtor will have the financial ability to pay.¹⁰⁸

The draft Convention does not presently deal with the rights of the assignee in case the assignor breaches its above-mentioned obligations, leaving the matter to the parties and to the law applicable outside the draft Convention.

V. RIGHT OF THE ASSIGNEE TO PAYMENT

The Working Group agreed that the assignee should have a right to whatever is received by the assignor, the assignee, or a third party (when the assignee has priority in whatever the third party receives) in payment of the assigned receivable.¹⁰⁹ However, no agreement has been reached so far on the question of whether the right of the assignee should be a personal or a property right.¹¹⁰ The idea that the assignee has the same right to whatever is received in payment of the receivable (e.g., a funds transfer, a check, cash or goods) as it has in the receivable, which is so familiar in some jurisdictions, has not been accepted in other jurisdictions.¹¹¹ In the latter jurisdictions, proceeds of receivables are treated as a separate asset subject to a different legal regime; the idea of identifying or tracing proceeds is not even considered.¹¹²

In some jurisdictions, the assignee has a right to separate the receivables from the insolvency estate,¹¹³ or at least to be treated as a secured creditor and receive payment in preference to unsecured creditors.¹¹⁴ In other jurisdictions, the assignee has a personal claim to receive payment.¹¹⁵

107. See *id.* art. 15(1)(c).

108. See *id.* art. 15(2). See, e.g., CODE CIVIL arts. 1693-1694 (Fr.); see generally Ghestin, *supra* note 69.

109. See draft Convention, *supra* note 4, art. 17. While this matter is known in the United States and elsewhere as a "proceeds" issue, use of the term in the draft Convention is avoided, since it is unknown in many jurisdictions or given a different meaning or treatment in other jurisdictions. See *id.* art. 17 remark 2.

110. See *id.* art. 17 remark 1.

111. See generally U.N. Doc. A/CN.9/445, paras. 215-220 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

112. See U.N. Doc. A/CN.9/445, para. 218 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

113. This right would arise when, to list two examples, an outright assignment is involved or an additional act has taken place before commencement of the insolvency proceeding.

114. See U.N. Doc. A/CN.9/445, paras. 215-220 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

115. See *id.* For example, such a claim could be based on principles of unjust enrichment. For a discussion of German law in this area, see Helmut Heinrichs, *in* PALANDT,

Thus the current draft recognizes the assignee's right to payment but does not specify whether this is a right *ad personam* or a right *in rem*.¹¹⁶ If payment is made to the assignee, the assignee has a right to retain whatever is received.¹¹⁷ However, if payment is made to the assignor or to a third party, the legal nature of the assignee's right will depend on applicable law under the draft Convention.¹¹⁸ The nature of the right of the assignee becomes crucial in case the assignor or other person who received payment becomes insolvent.¹¹⁹ This approach, if finally adopted, will probably result in financiers having to ensure that borrowers are located (i.e., have their registered office or habitual residence, in the case of individuals or persons without a registered office)¹²⁰ in the "right" jurisdiction.

At the same time the current draft offers, at least for discussion purposes, an alternative approach based on the principle that the assignee has in the proceeds the same right it has in the receivables.¹²¹ Under this approach, "proceeds" includes "any monetary sum or other property received upon any disposition, collection or distribution on account of an assigned receivable"¹²²—namely both cash and non-cash proceeds obtained through the sale or other disposition of the receivable, cash or other dividends collected or distributed on account of securities, and proceeds of proceeds.¹²³ In addition, under this approach, priority as to receivables would constitute "priority as to any proceeds, provided that they may be identified or traced as proceeds of the receivables."¹²⁴

It is clear that the latter approach is a more pro-receivables financing approach to the extent that it ensures that the assignee has a secured-creditor status in case of insolvency of the assignor. However, it appears, at least at the present stage, that the adoption of

BÜRGERLICHES GESEZBUCH para. 407, ann. 1(c) (47th ed. 1988); Harm Peter Westermann, *in* 1 HANDKOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH paras 402 ann. 7, 407 ann. 11 (9th ed. 1993).

116. See draft Convention, *supra* note 4, art. 17 remark 1.

117. See *id.* art. 17(1).

118. See *id.* art. 17 remark 1; see also *id.* art. 29. For a brief analysis of the conflict-of-laws provisions of the draft Convention, see discussion *infra* Part VIII.

119. See draft Convention, *supra* note 4, art. 31.

120. See *id.* art. 5(j).

121. See *id.* art. 17 remark 2.

122. *Id.*

123. See *id.*

124. *Id.* art. 17 remark 3. Should the Working Group decide to follow this approach, more detailed rules will be required.

such an approach is not likely to occur, since in a number of jurisdictions it would require a fundamental policy change in favor of the financier of receivables.

VI. PROTECTION OF THE DEBTOR

A. In General

While the assignment does not create a contractual relationship between the assignee and the debtor, it results in a number of changes in the legal status of the debtor including the way the debtor may discharge its payment obligation.¹²⁵ The assignment may affect the defenses and rights of the debtor's set-off,¹²⁶ the right of the debtor to modify the contract from which the assigned receivables arise,¹²⁷ and its right to recover payments made to the assignee not earned through performance by the assignor.¹²⁸ The Working Group has attempted, with some success, to address these issues by balancing the need to facilitate receivables financing—which is in the interest of the assignor, the assignee, and the debtor—versus the need to protect the debtor. Receivables financing is facilitated by a rule validating assignment of receivables, including future receivables assigned in bulk.¹²⁹ At the same time, the debtor's interests are protected by a series of provisions dealing with specific issues,¹³⁰ and by a general principle that the assignment cannot change the debtor's rights and obligations, except as provided by the draft Convention.¹³¹

B. Discharge of the Debtor's Payment Obligation

The draft Convention does not deal with the payment obligation of the debtor as such, but rather with the way in which the debtor may discharge its obligation.¹³² Whether the debtor has to pay at all

125. See generally draft Convention, *supra* note 4, art. 18.

126. See *id.* art. 19.

127. See *id.* art. 21.

128. See *id.* art. 22.

129. See *id.* arts. 9-10.

130. See generally *id.* arts. 18-22.

131. See *id.* art. 7(1). Such an exception is introduced, for example, by Article 12, under which the debtor does not have against the assignee a right to claim damages, if any, on the ground that the assignor assigned the receivables in violation of an anti-assignment clause. See *id.* art. 12. On the other hand, while the assignee may change some of the payment terms of the contract—such as to whom payment should be made—by way of the notification, it cannot change the currency and the country in which payment has to be made in accordance with the contract or other relationship between the assignor and the debtor. See *id.* art. 7(2).

132. See generally *id.* art. 18.

remains a matter for the contractual or other relationship between the assignor and the debtor and the law applicable to that relationship.¹³³

The thrust of the current provision on discharge by the debtor is that before notification the debtor should pay the assignor in order to be certain that its obligation will be discharged, while after notification the debtor can only discharge its obligation by paying the assignee.¹³⁴ Since the assignment is valid, even before notification, towards the debtor, the debtor may discharge its obligation by paying the assignee; but, in that case, the debtor assumes the risk of having to pay twice if it is later proven that there was no effective assignment.¹³⁵ The draft Convention goes on to deal with a number of special cases, including multiple notifications relating to several assignments, notification by the assignee, and notification under other applicable law outside the draft Convention.¹³⁶

In order to provide certainty to the debtor as to how to discharge its payment obligation in case of multiple notifications relating to several assignments of the same receivables by the same assignor, the draft Convention provides that the debtor is discharged by paying in accordance with the first notification received.¹³⁷ Whether the

133. See *id.* art. 18 remark 1; U.N. Doc. A/CN.9/432, paras. 173-181 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

134. See draft Convention, *supra* note 4, art. 18(1)-(2). The Working Group debated at some length the question whether knowledge of a previous assignment should affect the way in which the debtor should discharge its payment obligation. The view was expressed that it would run contrary to good faith standards to allow a debtor having knowledge of a previous assignment to discharge its obligation by paying the assignee who notified the debtor. However, the Working Group decided in favor of an objective approach to this question on the basis of notification of the debtor. The main reason for this approach was that introducing a subjective element in a debtor-protection rule could give rise to uncertainty and thus undermine the protection of the debtor. At the same time, it was thought that situations involving fraud could be left to other applicable law, since uniform law could not be expected to regulate all kinds of pathological situations. See *generally* 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 99-110.

135. See draft Convention, *supra* note 4, art. 18 remark 1.

136. See *id.* art. 18(3)-(5).

137. See *id.* art. 18(3). The formulation "in accordance with the payment instructions set forth in the first notification" is intended to accommodate situations in which payment has to be made not to the assignee but to the assignor or to another party. See *id.* In securitization transactions, for example, the assignee has an interest in payments being made to the assignor, since the assignee does not have the business organization necessary for it to receive payments and to conduct the necessary book-keeping. See STEVEN L. SCHWARCZ, STRUCTURED FINANCE: A GUIDE TO THE PRINCIPLES OF ASSET SECURITIZATION 34 (2d ed. 1993) ("In practice, the originator often is appointed as the collection agent initially. . . . Sometimes collections of the purchased receivables are paid to the originator and comingled, or mixed,

assignee receiving payment is the person entitled to payment is a matter to be resolved among the several assignees or other persons laying a claim in the receivables and should not affect the way in which the debtor may discharge its obligation.

In line with the goal of protecting the debtor, the draft Convention provides that the debtor who is notified by the assignee without the assignor's authorization¹³⁸ and who is in doubt as to whether an assignment took place or as to the details of the assignment may request "adequate proof" from the assignee.¹³⁹ If the assignee fails to provide such proof within a "reasonable" period of time, the debtor may discharge its obligation by paying the assignor.¹⁴⁰

While setting forth specific rules for the discharge of the obligation of the debtor by way of payment under the draft Convention, the draft Convention is not intended to interfere with domestic rules dealing with the same.¹⁴¹ Accordingly, the debtor is discharged by payment to the person who appears to be "entitled to payment" or "to a competent judicial or other authority" under rules of the law applicable outside the draft Convention.¹⁴² As in the case of multiple notifications, the draft Convention also distinguishes on this matter between debtor-discharge and third-party-protection so that the debtor is protected through a clear discharge rule while third parties can argue about the distribution of the proceeds of payment among themselves.¹⁴³

C. Notification of the Debtor

Under the draft Convention, notification of the debtor has to be in writing,¹⁴⁴ "reasonably" identify the receivables,¹⁴⁵ and identify "the person to whom or for whose account or the address to which" payment should be made.¹⁴⁶ Notification may be given by the

with the originator's general funds. That frequently occurs when the originator collects the receivables each day, but only remits the collections periodically . . .").

138. Under the draft Convention, the assignor's authorization of notification is not necessary. *See* draft Convention, *supra* note 4, art. 16.

139. *See id.* art. 18(4). Adequate proof could consist of, for example, a writing bearing the signature of the assignor or a copy of the assignment contract. *See id.*

140. *See id.*

141. *See id.* art. 18(5).

142. *See id.*

143. *Compare id.* art. 18(3) *with id.* arts. 23-24.

144. A writing includes modern means of communications. *See supra* note 55.

145. There is no need for exact specification of the receivables. *See* draft Convention, *supra* note 4, art. 16(3).

146. *See id.*

assignor or by the assignee.¹⁴⁷ Because the assignee has the right to notify the debtor without authorization or against the will of the assignor, the debtor has the right to request additional information regarding the assignment.¹⁴⁸

As already mentioned, the notification may contain a request that payment be made to the assignor, to the assignee, to a third person, to a bank account, or to a post office box.¹⁴⁹ Payment to a bank account or a post office box (or other similar methods of payment) is intended to facilitate receivables financing in that the debtor knows where to pay and is not concerned with the question of who controls the account or the post office box.¹⁵⁰ Confidentiality is also preserved. Moreover, such methods of payment may alleviate some of the difficulties with conflicting claims, since the person in control of the bank account or the post office box could be given priority. The question that still needs to be addressed is what constitutes "control."¹⁵¹

The draft Convention also deals with a number of notification-related issues. It provides that notification in violation of a non-notification agreement between the assignor and the assignee is valid, even if it creates liability for the party committing breach of contract; it also provides that notification may relate to receivables that have not arisen at the time of notification.¹⁵²

147. *See id.* art. 16(1).

148. *See id.* art. 18(4).

149. *See generally id.* art. 16(3). Draft article 16(3) refers to "the address to which the debtor is required to make payment" which covers not only street addresses but also bank accounts and post office boxes. *See id.*

150. An explicit reference to bank accounts and post office boxes can be found in Article 16(6) of an earlier draft. *See generally* U.N. Doc. A/CN.9/WG.II/WP.89 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)). The Working Group ultimately decided to delete paragraph 16(6) and replace it with a reference to the person or the address to which the payment is to be made. *See id.* paras. 184-185.

151. Guidance is provided by the work currently being undertaken in relation to Article 9 of the Uniform Commercial Code, in the context of which it is envisaged that perfection of security interests in deposit accounts may take place only by "control". *See generally* U.C.C. art. 9 (Proposed Draft, March 1998) <<http://www.law.upenn.edu/library/ulc/ucc9/m14draft.htm>>. "Control" occurs automatically when the depository institution (in the draft Convention's terminology, the debtor) is the secured party (in the draft Convention's terminology, the assignee). *See id.* § 9-109(a). For other parties, "control" exists, and thus perfection occurs, either when the depository institution has agreed with the secured party that it will follow directions from the secured party without further consent of the debtor (in the draft Convention's terminology, the assignor), or when the secured party becomes the "customer," for example, by putting the account in its own name. *See id.*

152. *See* draft Convention, *supra* note 4, arts. 16(2), 16(4).

As to the latter issue, language has been included in the draft Convention for consideration by the Working Group to limit the effect of notification to five years.¹⁵³ The reason for this limitation is to protect the assignor from assigning all the receivables that may be generated in a lifetime by limiting the types of future receivables with respect to which notification may be given.¹⁵⁴ Such a time limitation does not appear to be appropriate, since it places on the assignee and the debtor the burden of having to keep track of the time of effectiveness of notifications, and might increase uncertainty and the cost of credit.¹⁵⁵

D. Defenses of the Debtor

With regard to the debtor's defenses and the rights of set-off,¹⁵⁶ the draft Convention codifies current law by recognizing the principle that the debtor should have against the assignee the same defenses and rights of set-off that the debtor would have if the claim for payment were made by the assignor.¹⁵⁷ With regard to defenses or rights of set-off arising from the contract from which the assigned receivables arise there is no limitation; they may be raised even if they become available after assignment or after notification thereof.¹⁵⁸ Other rights of set-off,¹⁵⁹ however, may be raised only if they arise up to the time of notification¹⁶⁰ because otherwise, although the assignee would have done everything in its power to ensure that the assignment is enforceable against the debtor, the assignee would remain subject to rights of set-off that would be beyond its control.

One exception to the principle that the debtor has the same rights against the assignee as against the assignor is that the debtor may not raise any rights connected with a violation of an anti-assignment clause against the assignee.¹⁶¹ The purpose of this

153. See *id.* art. 16(4)(b).

154. See *id.* art. 16 remark 3.

155. See draft Convention, *supra* note 4, art. 16 remark 3; U.N. Doc. A/CN.9/434, paras. 172-175 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

156. The draft Convention does not attempt to specify the exact meaning of the term "available defences and rights of set-off." This matter is left to the applicable procedural law.

157. See draft Convention, *supra* note 4, art. 19(1). This follows the general principle "no one can transfer more right to another than he has himself" (*nemo plus juris transferre potest quam ipse habet*). See Kötz, *supra* note 69, at 88-92.

158. See draft Convention, *supra* note 4, art. 19(1).

159. For example, rights of set-off arising from separate dealings between the assignor and the debtor. See *id.* art. 19(2).

160. See *id.*

161. See *id.* art. 19(3).

provision is to avoid canceling the beneficial effects of the effectiveness of an assignment made in violation of an anti-assignment clause, which would be the case if the debtor could raise the liability of the assignor against the assignee for breach of an anti-assignment clause.

E. Waiver of Defenses by the Debtor

The draft Convention recognizes the right of the debtor to agree with the assignor that the debtor will not raise against a future assignee the defenses and rights of set-off that the debtor could raise against the assignor.¹⁶² Such an agreement has some value for the assignor, since more credit may be obtained on the basis of a receivable against the payment of which no defenses may be raised. At the same time, the debtor has an interest in being able to negotiate such an agreement in order to obtain more credit or better payment terms, such as a longer period of repayment or a lower interest rate. However, in an effort to protect consumer debtors from a waiver of defenses “agreed to” by way of general contract conditions, the draft Convention provides that such agreements should not prejudice consumer protection law of the country in which the debtor is located.¹⁶³

In order to protect any debtor (not just consumer debtors), the draft Convention introduces the requirement for a writing and a list of defenses that may not be waived.¹⁶⁴ The requirement that the agreement between the assignor and the assignee be in writing is intended to ensure that the debtor knows beyond a doubt which defenses it waives, as well as the consequences of such a waiver.¹⁶⁵

As to defenses that may not be waived, the principle underlying

162. See draft Convention, *supra* note 4, art. 20. The draft Convention requires an agreement in writing in order to protect the debtor. See *id.* art. 20(1). A mere unilateral act is not enough. Thus, the term waiver is not used in the draft Convention. Agreements between debtors and assignees are left to the law applicable outside the draft Convention. The main reason for this approach has been the wish to avoid limiting the debtor's ability to negotiate a waiver of defenses with the assignee. See U.N. Doc. A/CN.9/432, para. 220 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

163. See draft Convention, *supra* note 4, art. 20(1).

164. See *id.* art. 20(1)-(2).

165. This approach, in conjunction with the requirement that the assignment be in writing, has been criticized as an unnecessary formality, particularly in view of the fact that often the contract between the assignor and the debtor would not be subject to any form requirement. See U.N. Doc. A/CN.9/434, para. 212 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

the approach of the Working Group is that the receivable should be treated in the same way as a negotiable instrument and defenses that could be raised against a protected holder of a negotiable instrument¹⁶⁶ should not be subject to a waiver.¹⁶⁷

F. Modification of the Contract

The provisions of the draft Convention relating to the modification of the contract from which the assigned receivables arise have a threefold purpose: to ensure that the debtor, in agreement with the assignor, has the right to modify the contract in order to address a change in the circumstances under which the contract was concluded, and at the same time to protect the assignee from modifications that are not justified, as well as ensure that the assignee acquires the right to payment under the modified contract.¹⁶⁸

The draft Convention adopts the basic rule that, before notification of the debtor, the assignor and the debtor may freely modify their contract and that the assignee acquires corresponding rights as against the debtor, while after notification some additional requirement must be met.¹⁶⁹

Before notification of the debtor, the right of the debtor to modify the contract with the assignor should be unlimited, since as far as the debtor is concerned the assignor remains the creditor to whom the debtor can pay and discharge its obligation.¹⁷⁰ If such modification constitutes a violation of an agreement between the assignor and the assignee, the assignor may be liable, but such liability should not be extended to the debtor.¹⁷¹

166. For example, defenses arising from fraudulent acts or based on the debtor's right to contest the effectiveness of the contract with the assignor could be raised. *See* draft Convention, *supra* note 4, art. 20(2).

167. *See id.*; *see also* United Nations Convention on International Bills of Exchange and International Promissory Notes, *opened for signature* Dec. 9, 1988, G.A. Res. 43/165, U.N. GAOR, 43d Sess., Supp. No. 41, at 280, U.N. Doc. A/43/41 (1989), art. 30(1). For an analysis of the key characteristics of that Convention, *see* Gerold Herrmann, *International Bills of Exchange and Promissory Notes: Legal Problems and Disparities Overcome by the New United Nations Convention*, in *THE LAW OF INTERNATIONAL TRADE FINANCE* 259 (Norbert Horn ed., 1989).

168. *See* draft Convention, *supra* note 4, art. 21 remark 1.

169. *See id.* art. 21.

170. *See id.* art. 21(1).

171. *See* draft Convention, *supra* note 4, art. 21(3). This approach is consistent with the approach taken with regard to anti-assignment clauses, according to which the assignor may be liable as against the debtor for violation of the anti-assignment clause but this liability is not extended to the assignee. *See id.* art. 12(2). It is also consistent with the approach taken with regard to notification in violation of agreements between the assignor and the assignee,

After notification, the assignee has a legitimate expectation to receive payment of the assigned receivable. Thus, a modification should not be allowed unless it is justified. The Working Group has considered two alternative justifications: first, the modification has to be made "in good faith and in accordance with reasonable commercial standards;"¹⁷² and second, the modification has to be consented to by the assignee.¹⁷³ The first alternative has the advantage that it introduces general objective criteria, but also the disadvantage that it introduces terms the exact meaning of which are not clear and which may be interpreted differently in different jurisdictions. The second alternative appears to protect the interests of the assignee, but also inadvertently results in an excessive limitation on the rights of the debtor. In addition, it presents the disadvantage that, in long-term contracts, it may be a burden for the assignee to have to consent to every little modification that may become necessary from time to time.¹⁷⁴ As such, a better approach might be to subject any modification taking place after notification to the assignee's consent, which could not be unreasonably withheld.

As to contracts in which payment has been fully earned by performance, there is no doubt that, after notification, modification of the contract should be subject to the consent of the assignee, since such modification can only relate to the payment obligation, which the debtor knows, after notification, has to be discharged by paying the assignee.¹⁷⁵

G. Recovery of Payments

The draft Convention takes the position that, while the debtor retains the right to recover from the assignor payments made to the assignor or the assignee, the debtor should not have the right to claim the return of such payments from the assignee.¹⁷⁶ In case of breach of contract, the debtor will normally have a cause of action against the assignor for breach of contract and will be able to recover payments from the assignor. In case the assignor is not able to pay or has become insolvent, the debtor should not be in a better situation than

according to which the assignor may be liable but the notification is effective. *See id.* art. 16(2).

172. *Id.* art. 21(2); *see, e.g.*, U.C.C. § 9-318(2) (1994).

173. *See* draft Convention, *supra* note 4, art. 21(2).

174. *See id.* art. 21 remark 3; *see also* A/CN.9/434, paras. 200-203 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

175. *See* draft Convention, *supra* note 4, art. 21(2).

176. *See id.*

it would have been had the assignment not taken place.¹⁷⁷ Thus, under the draft Convention, the debtor bears the risk of the financial inability of its contractual partner to pay. However, the draft Convention recognizes that different results may be reached by application of consumer protection law and provides that the rights of consumer debtors should not be prejudiced.¹⁷⁸

VII. EFFECTS OF THE ASSIGNMENT AS AGAINST THIRD PARTIES—PRIORITY CONFLICTS

A. Background

The Working Group has debated the issue of the effects of the assignment as against third parties, such as a subsequent assignee obtaining the same receivables from the same assignor, creditors of the assignor, and the administrator in the insolvency of the assignor.¹⁷⁹ The debate confirmed that legal systems differ widely in the way in which they treat the proprietary effects of the assignment;¹⁸⁰ this is the main reason why international efforts in this field have not been successful so far.¹⁸¹

In some jurisdictions, such as Germany, the assignment is effective *erga omnes* as of the time it is made.¹⁸² Under such an approach, the first-in-time assignee obtains property in the receivables and the assignor has nothing to transfer to subsequent assignees following the Latin maxim “he who hath not cannot give” (*nemo dat quod non habet*).¹⁸³ Furthermore, the assignee prevails

177. In other words, the debtor should not be allowed to make a claim against someone other than its contractual partner in such cases. See *generally id.* art. 22 remarks.

178. See *id.* art. 22.

179. See *generally* U.N. Doc. A/CN.9/434, paras. 216-258; U.N. Doc. A/CN.9/432, paras. 245-263 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420 paras. 149-164.

180. See *generally* Kötz, *supra* note 67, paras. 100-105.

181. The Ottawa Convention does not address conflicts of priority among adverse claimants. See UNIDROIT, 1987, Study LVIII, Doc. 33, para. 50.

182. See Bürgerliches Gesetzbuch [BGB] § 398 (F.R.G.).

183. Double financing, such as the transfer of the same receivables by the same assignor to several financiers, may be a fraudulent transaction on the part of the assignor. However, there is a need to address it as an existing practice which transacting parties often may not be able to avoid if they wish to stay in business. For example, a business buying raw materials from suppliers retaining title in the materials until full payment of the price, a right which extends to the proceeds from the sale of the end-product, may have no other way of obtaining working capital than to assign the receivables from the sale of its products to a financial institution; this means the assignment of the very proceeds given as security to the supplier. In addition, there

over creditors of the assignor or the insolvency administrator if the assignment took place before execution or attachment or before the commencement of the insolvency proceeding.¹⁸⁴

The Working Group recognized that the main advantage of this approach lies in its simplicity and its main disadvantage in the fact that third parties have no reliable way of knowing whether there is an earlier assignee. However, it should be noted that, in practice, third parties are often able to rely on representations of the assignor and on information with regard to the financial status of business people available to financing circles.¹⁸⁵

In other jurisdictions, such as Japan and Spain, assignment becomes effective against third parties upon notification of the debtor.¹⁸⁶ In other words, priority is determined according to the order of notification.¹⁸⁷ Thus, the first assignee to notify the debtor prevails over subsequent assignees and the assignee beats the creditors of the assignor and the insolvency administrator if notification takes place before execution or the commencement of the insolvency proceeding. This approach may function well in cases of the assignment of single receivables, or even of several receivables, provided that the receivables exist at the time of the assignment and that a third party may rely on statements made by the debtor. However, such an approach does not appear to be suitable in receivables financing transactions that involve a high volume of smaller-amount receivables assigned in bulk without specification of the exact amount or of the identity of the debtor, such as occurs in securitization.¹⁸⁸

appears to be a need to protect the good faith of subsequent potential financiers who may have no way of knowing whether the receivables offered as security by the potential borrower have already been assigned; except if the existence of previous assignments has to be taken for granted, in which case the value of the receivables as a tool for obtaining financing would be seriously compromised.

184. However, if the assignment takes place within a certain period of time before the opening of the insolvency proceedings, a suspect period, it may be invalidated as a fraudulent or preferential conveyance. See AnfG §§ 3, 4 (F.R.G.).

185. This is the well known "know thy borrower" maxim of the banking world. See generally U.N. Doc. A/CN.9/434, paras. 246-248 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)) and 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420 para. 154.

186. See PHILIP R. WOOD, *COMPARATIVE LAW OF SECURITY AND GUARANTEES* 39 (1995) (discussing Japanese and Spanish law).

187. See *id.*

188. See U.N. Doc. A/CN.9/434, para. 249 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

In yet other jurisdictions, as in the United States, the effectiveness of the assignment as against third parties is subject to the registration of certain data with regard to the assignment in a public registry.¹⁸⁹ The first assignee to register the data prescribed by law prevails over assignees who registered later or did not register at all. Not only the assignment but also registration has to take place before the execution or the commencement of an insolvency proceeding in order for the assignee to prevail over judgment creditors and the insolvency administrator.¹⁹⁰

The main advantage of this approach is that it provides a warning to potential financiers searching the index of the registry under the name of the assignor as to the existence of rights of other parties in the receivables offered by the assignor to the potential financier in return for financing or as a security for credit to be extended.¹⁹¹ In addition, a registration system provides a basis for resolving most, if not all, conflicts between the assignee and third parties. On the other hand, some States in the Working Group have found such a registration system to be objectionable, principally on the ground that it will harm non-notification financing practices.¹⁹²

In recognition of the complexity of the problem, the Working Group decided to consider an approach based on a combination of substantive law and conflict-of-laws rules.¹⁹³

B. Substantive Law Priority Provisions

Registration-based and time-of-assignment priority rules are set forth in the draft Convention for States to choose from, thus allowing for the free competition of systems.¹⁹⁴ Under the registration rules,

189. See U.C.C. § 9-302(1) (1994).

190. See *generally* U.N. Doc. A/CN.9/434, paras. 250-253 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); U.N. Doc. A/CN.9/432, paras. 249-255 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)); 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1996), U.N. Doc. A/CN.9/420, paras. 155-160.

191. The cost and the availability of credit on the basis of receivables depends to a large extent on the certainty and predictability that exists with regard to the rights of third parties. If the risk that a potential financier may be deprived of the benefit of the assigned receivables in the event of the assignor's insolvency cannot be evaluated, no credit can be extended on the basis of receivables. If that risk is high because of lack of certainty and predictability as to the rights of the assignee, the cost of credit will increase.

192. See U.N. Doc. A/CN.9/434, para. 248 (to be published in 27 U.N. Comm'n on Int'l Trade L.-Y.B. (1997)).

193. See U.N. Doc. A/CN.9/445, paras. 22, 26 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

194. To my knowledge there is no comprehensive study discussing the impact of the lack of registration systems throughout the world on the cost and availability of credit, with the

priority is determined according to the order of registration of certain data about the assignment.¹⁹⁵ The assignee prevails over the insolvency administrator or judgment creditors of the assignor if the assignment and registration take place before the commencement of insolvency proceedings or execution.¹⁹⁶

The registration system envisaged in the draft Convention involves the non-mandatory entering into a database of certain information about the assignment.¹⁹⁷ In the absence of registration, a party does not lose its rights established by contract. It may find, however, that its rights are subordinated to the rights of another party.¹⁹⁸

One goal of registration under the draft Convention is to protect third parties by putting them on notice about assignments and to provide a basis for the resolution of conflicts among parties asserting a claim in the assigned receivables.¹⁹⁹ The notice gives only enough information for a searcher to be forewarned and thereby able to make such further inquiry and to take such further action as it considers appropriate under the circumstances.²⁰⁰

Because of its limited function, registration under the draft Convention requires, in marked contrast to classic registration, the placement on public record of a very limited amount of data: the names of the assignor and the assignee, and a brief non-specific

exception of a few country-specific studies sponsored by the World Bank.

195. See draft Convention, *supra* note 4, art. 34.

196. See *id.* arts. 34-35.

197. See generally Personal Property Security Act, STATUTES OF NEW BRUNSWICK [S.N.B.] 1993, c. P-7.1 (Can.); U.C.C. art. 9 (1994); John L. Simpson & Jan Hendrik, *Model Law on Secured Transactions Completed*, in LAW IN TRANSITION 1 (1994); Proposed UNIDROIT Convention on International Interests in Mobile Equipment, UNIDROIT 1996, Study LXXII, Doc. 30; International Register, UNIDROIT 1996, Study LXXII-C, Doc. 1; TODD C. NELSON & RONALD C.C. CUMING, NATIONAL LAW CTR. FOR INTER-AMERICAN FREE TRADE, HARMONIZATION OF THE SECURED FINANCING LAWS OF THE NAFTA PARTNERS: FOCUS ON MEXICO (1995); WORLD BANK, REPORT NO. 13873-BO, HOW LEGAL RESTRICTIONS ON COLLATERAL LIMIT ACCESS TO CREDIT IN BOLIVIA (1994).

198. Subordination, in case of a prior assignment by way of security, means that the assignee with priority may satisfy its claim first and then has to turn over to the assignor or to the next-in-line assignee any remaining surplus. In case of a prior outright assignment, however, subordination means that the prior assignee may obtain payment and retain any remaining surplus. See generally U.C.C. §§ 9-312, 9-504(2) (1994).

199. See U.N. Doc. A/CN.9/445, para. 88 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

200. It is argued that a registration-based system is likely to increase the availability of lower cost credit. See generally Lane H. Blumenfeld, *A Hole in the Bucket: The Unavailability of Financial Credit Due to the Lack of a Registry in Russian Collateral Law*, in LAW IN TRANSITION 14 (1994).

description of the receivables.²⁰¹ Thus, a single notice can cover a large number of present and future receivables arising from one or several contracts as well as a changing body of receivables and a changing amount of secured debt (i.e., revolving credit).²⁰² In addition, such registration is inexpensive and simple. It requires no formalities, such as notarial involvement, or supervision by the registrar who receives, archives, and, for the appropriate fee, discloses data submitted for registration.

Another key feature of registration under the draft Convention is that the system has to be, for reasons of efficiency, at least partly electronic. The submission could be in paper form but searching has to be electronic.²⁰³ A fully electronic system, comprising electronic data entry and searching, would maximize efficiency: it would be fast, available at all hours, and free from the risk of data entry error on the part of the registrar, thereby reducing its potential liability. Furthermore, the cost of registration would be reduced. It appears to be technically possible to structure the system in such a way that users could access it through a simple desktop or even a laptop computer via secure, private communication networks called Value Added Networks.

The application of the registration provisions is subject to two conditions: first, that a suitable registration system will be established; and second, that a Contracting State will declare that it wishes to be bound by those provisions.²⁰⁴ The draft Convention refers to the supervising authority and the operator of the system without specifying a mechanism for the appointment of the supervising authority (the appointment of the operator may be left to the supervising authority).²⁰⁵

This approach is based on the assumption that a Contracting State that wishes to be bound by the registration provisions of the draft Convention will have taken the necessary measures to establish

201. See draft Convention, *supra* note 4, art. 37(1).

202. See *id.* art. 37(2).

203. See *id.* art. 38; U.N. Doc. A/CN.9/445, para. 91 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)).

204. See draft Convention, *supra* note 4, arts. 23(2), 24(2).

205. While the supervising authority may well have to be an intergovernmental entity, the operator may be a private entity. The exact functions of the operator will depend on whether the system is to link national registries or function as an independent international registry. In the former case, registration may be national, as long as the data are transferred promptly to a data bank accessible to searchers from all over the world. In the latter case, registration will have to be made at the international registry only, possibly through multiple entry points located all over the world.

a workable registration system. This approach may have to be reviewed, at least with a view to setting forth in the draft Convention a mechanism for the appointment of a supervising authority. The draft Convention may provide, for example, that the appointment of a supervising authority may be requested by one-third of the Contracting States and that it has to be decided by a conference of the Contracting States to be convened by the depositary of the Convention, the Secretary-General of the United Nations.²⁰⁶

Under the time-of-assignment priority rules, the first assignee in time prevails over subsequent assignees. Assignees prevail over the insolvency administrator and judgment creditors if the assignment takes place before commencement of insolvency proceedings or execution.²⁰⁷ However, under such an approach future receivables (receivables coming into existence after execution or the commencement of insolvency proceedings) as well as unearned receivables (receivables earned by performance after execution or the opening of insolvency proceeding) are being given to the assignee. Such an approach would run counter to legal systems in which the assignment of future or unearned receivables is ineffective as against creditors of the assignor and the insolvency administrator as a disposition after execution or the commencement of insolvency proceedings. In the case of unearned receivables, the assignor or the insolvency administrator has to earn them by performance, thus taking value out of its estate, an act that may result in an undue benefit being given to the assignee to the detriment of the creditors of the assignor.

C. Conflict-of-Laws Priority Provisions

An approach to the problem of priority among conflicting claimants that focuses exclusively on conflict-of-laws provisions may not provide the desired degree of certainty since third parties must first determine which is the applicable law and then in each case look at the provisions of the law applicable to determine their rights and obligations. Certainty would not be served, in particular, if the law applicable were to be the law governing the receivable. Under such a

206. The conference may prepare and adopt the regulations which would govern the procedural or technical details of registration and decide that the amendment of these regulations, which needs to be more flexible than the procedure for the amendment of the Convention, may be left to the supervising authority and the registrar. See draft Convention, *supra* note 4, art. 36.

207. See generally *id.* arts. 39-40.

rule, parties would have to determine which law governs the underlying relationship between the assignor and the debtor. In the case of a contract, it could be the law chosen by the parties, or even some other law. For example, it could be the law with the closest relationship to the contract from which the assigned receivables arise. In addition, under such a rule, different rules would apply with regard to receivables arising from different contracts and assigned in bulk by the same assignor to the same assignee. Moreover, in case of future receivables, the assignee would not be able to determine the applicable law at the time of assignment.

However, a conflict-of-laws rule based on a clear connecting factor, such as the location of the assignor, would constitute an improvement to the current state of the law in that parties would be able to determine the law governing such conflicting rights at the time of assignment.²⁰⁸ Thus, the draft Convention provides that priority conflicts are to be governed by the law of the country in which the assignor is located (i.e., where the assignor has its registered office or habitual residence in the case of an individual or a person without a registered office).²⁰⁹

The location of the assignor as a connecting factor provides a single point of reference and one that can be ascertained easily at the time of even a bulk assignment of future receivables. In addition, it avoids conflicts between the draft Convention and the applicable insolvency law since the law governing priority and the law governing the insolvency proceeding would be the law of the same country, at least in the case of a main insolvency proceeding which normally will be opened in the country in which the assignor has its registered office. Moreover, the assignor's location would be a connecting factor suitable to legal systems in which registration is practiced since in such legal systems third parties would normally look to the location of the assignor to ascertain the status of the receivables.²¹⁰ Finally, under such an approach the problem of conflicts between claimants ascertaining a claim based on the draft Convention and claimants ascertaining a claim based on law outside the draft

208. Currently, in view of the uncertainty prevailing as to the law applicable to priority questions, assignees have to meet the requirements of a number of jurisdictions in order to ensure that they will obtain priority, a process which has an adverse impact on the availability and the cost of credit. See U.N. Doc. A/CN.9/445, para. 22 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). It should also be noted that the Rome Convention does not deal with such conflicts, although some uncertainty prevails as to this matter. See *id.* para. 23.

209. See draft Convention, *supra* note 4, art. 31(1).

210. See 26 U.N. Comm'n on Int'l Trade L.-Y.B. (1995), U.N. Doc. A/CN.9/412, para. 78.

Convention, such as conflicts between foreign and domestic assignees of domestic receivables or conflicts between a foreign assignee and a domestic inventory financier, is overcome since all priority conflicts would be subjected to the law of the same country.

D. The Relationship Between Substantive and Conflict-of-Laws Priority Provisions

The substantive law priority provisions chosen by each Contracting State may apply either instead of, or in combination with, the conflict-of-laws priority provisions. A combined application of those priority provisions may be more appropriate since the draft Convention would increase certainty by offering two layers of unification. Such a combined application would not create any conflict situations since the substantive law priority provisions of the draft Convention and the law governing priority would be the law of the same country (e.g., the country in which the assignor is located).²¹¹ On the other hand, if no agreement is reached on a substantive law priority rule, a conflict-of-laws priority rule is an acceptable fall back position.

E. Relationship Between the Draft Convention and Applicable Insolvency Law

The true litmus test for a legal regime aimed at facilitating receivables financing is the protection of the rights of the assignee as against the administrator in the insolvency of the assignor and the assignor's judgment creditors.

In receivables financing transactions in which a pool of hundreds or even thousands of receivables is often assigned, the real risk is not that some debtors will not pay—that risk is minimized by being spread to a large number of debtors, most of whom will normally pay. Rather, the real risk appears to be a challenge to the rights of the assignee with regard to the whole pool of receivables, mainly by the administrator in the insolvency of the assignor.

The thrust of the approach taken in the draft Convention is that, if a certain event (i.e., registration or assignment) takes place before commencement of the insolvency proceeding, the assignee prevails.²¹² However, the draft Convention does not attempt to regulate the

211. The substantive law priority provisions of the draft Convention would apply if the assignor is located in a Contracting State. See draft Convention, *supra* note 4, art. 1(1).

212. See *id.* arts. 35, 40.

grounds on which the insolvency administrator may challenge the assignment. This matter is left to law applicable outside the draft Convention. This approach is to ensure the rights of the assignee in most cases since the honest and prudent assignee who has given value and obtained the receivables before the beginning of the suspect period should be safe from possible challenges to its rights.

In addition, by subjecting priority questions to the law of the country in which the assignor is located, the possibility for conflicts between the draft Convention and the applicable insolvency law has been minimized since the law applicable to priority questions and the law applicable to insolvency would in most cases be the law of the same country. For example, it would probably be the law of the country in which the assignor has its registered office or, if the assignor does not have a registered office or is an individual, its habitual residence.

In order to address possible conflicts between the draft Convention and the applicable insolvency law that may arise if the insolvency proceeding is commenced in a country other than the country in which the assignor is located, the draft Convention provides that it is not intended to interfere with mandatory provisions or provisions that reflect public policy decisions of the State in which the insolvency proceeding is commenced.²¹³

VIII. CONFLICT OF LAWS

A. In General

The conflict-of-laws priority rules discussed above²¹⁴ form part of an effort of the Working Group to address the critical and difficult questions of priority. In that regard, the approach of the Working Group so far has been that if consensus on a substantive law priority provision cannot be reached, efforts should be made towards reaching a solution at the conflict-of-laws level.²¹⁵ In addition to those priority rules, the draft Convention contains a number of conflict-of-laws provisions dealing with the relationship between the assignor and the assignee and the rights and obligations of the debtor as against the assignee.²¹⁶

While some reservations have been expressed during the

213. *See id.* art. 44.

214. *See* discussion *supra* Part VII.C.

215. *See id.*

216. *See generally* draft Convention, *supra* note 4, arts. 29, 30.

discussion of the question whether any conflict-of-laws provisions should be included in a substantive law convention on assignment, the Working Group has decided to retain those provisions in the text for future consideration.²¹⁷

B. Scope

The Working Group has not yet reached a decision as to the scope or the purpose of the conflict-of-laws provisions contained in the draft Convention.²¹⁸ Such rules could function as a basis for the application of the draft Convention although the application of the draft Convention by virtue of conflict-of-laws rules has been eliminated as a possibility in Article 1 of the draft Convention.²¹⁹ They could also function as gap-filling rules since draft Convention Article 8(2) provides that matters covered by, but not expressly settled in, the draft Convention are to be settled by reference to the general principles on which it is based and, in the absence of such principles, by reference to conflict-of-laws rules. Matters not covered by the draft Convention are left to other applicable law.²²⁰ Arguably, the former purpose would be more meaningful than the latter since the draft Convention is intended to regulate assignment issues in a rather comprehensive way.²²¹ However, it would not be an exaggeration to say that even a gap-filling purpose would make sense

217. See U.N. Doc. A/CN.9/445, para. 55 (to be published in 28 U.N. Comm'n on Int'l Trade L.-Y.B. (1998)). The main reservation relates to the possible conflicts between the draft Convention and the Rome Convention on the Law Applicable to Contractual Obligations or the Inter-American Convention on the Law Applicable to International Contracts. However, it is doubtful whether such conflicts can arise for a number of reasons, namely: those other conventions are general texts dealing with the law applicable to contracts in general, whereas the draft Convention deals with the specific issue of assignment as a transfer of property rights in receivables; and the two conventions mentioned do not appear to deal with a matter that is at the heart of the draft Convention, such as the question of priority. Another reservation relates to the general usefulness of conflict-of-laws provisions, which are often complicated and may not be the best basis on which business people can assess risks and make decisions. However, it is indisputable that a clear conflict-of-laws priority rule would constitute a great improvement compared with the situation in which financiers find themselves today, that is, faced with the need to meet the requirements of several possibly applicable laws in order to ensure priority.

218. See generally draft Convention, *supra* note 4, arts. 29-33.

219. See *id.* art. 1; see also discussion *supra* Part VII.D.

220. See draft Convention, *supra* note 4, art. 8(2). For a discussion of gap-filling in international conventions, see Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions*, 3 UNIFORM L. REV. 451, 454 (1997).

221. See draft Convention, *supra* note 4, art. 2.

since a number of issues will unavoidably remain outside the scope of the draft Convention.²²²

C. Law Applicable to the Contract of Assignment

The draft Convention recognizes the contract of assignment as an independent contract, even in the case in which it is just a clause in the financing contract, and subjects it to the law chosen by the parties.²²³ In addition to the contract, the draft Convention subjects the proprietary effects as between the contractual parties to the law chosen by the parties.²²⁴

In the absence of a choice of law by the parties, the law applicable to the contract of assignment and its proprietary effects as between the parties to the contract is the law of the State with which “the contract is most closely connected.”²²⁵ In order to avoid any uncertainty, the draft Convention creates a rebuttable presumption that the State in which the assignor is located is “most closely connected” with the contract of assignment.²²⁶

A provision specifying the law applicable to the contract of assignment would be very useful, irrespective of whether the purpose of the conflict-of-laws rules is to provide a second layer of harmonization of law or to fill the gaps left in the draft Convention. The main reason justifying this position is that the draft Convention leaves a number of matters to the law applicable outside the draft Convention, including: the meaning of an outright assignment and an assignment by way of security; possibly the question of the form of the contract of assignment;²²⁷ the accessory or independent character of a security right which determines whether it is transferred automatically with the receivables the payment of which it secures, or whether a new act of transfer is needed; and the consequences of a breach of representations by the assignor.

D. Law Applicable to the Rights and Obligations of the Debtor

To determine which law should govern the rights and obligations of the debtor, the draft Convention adopts an approach based on the

222. See discussion *infra* Parts VIII.C-D.

223. See draft Convention, *supra* note 4, art. 29(1).

224. See *id.* art. 29(2).

225. See *id.* art. 29(3).

226. See *id.*

227. Two of the three variants of draft Article 9 refer the matter to the law applicable. See *id.* art. 9.

position that the rights and obligations of the debtor should be subject to the law under which the debtor initially undertook its obligations towards the assignor—the law governing the receivable. In order to avoid raising any uncertainty, the draft Convention lists the matters left to the law governing the receivable: the assignability of the 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 defenses.²²⁸

In an effort to avoid the uncertainty that might be introduced by reference to the law governing the receivable, the draft Convention specifies that such law is the law governing the contract from which the assigned receivable arises, meaning the law with which that contract is connected and is presumed to be the law of the State in which the assignor is located.²²⁹

Again, such a provision would usefully clarify the law applicable to a number of matters left outside the scope of the draft Convention, including: the assignability of a receivable;²³⁰ whether the assignor is liable towards the debtor for assigning its receivables in violation of an anti-assignment clause; whether the right of the assignee to request payment is a right *ad personam* or *in rem*; the debtor's obligation to pay; the discharge of the debtor on grounds other than those specified in the draft Convention, such as by paying to a competent judicial or other authority;²³¹ the defenses and rights of set-off that the debtor may raise against the assignee;²³² and agreements between the debtor and the assignee by which the debtor waives its defenses and rights of set-off towards the assignee.²³³

E. Law Applicable to Conflicts of Priority

Questions of priority are left to the law of the State in which the assignor is located.²³⁴ Pending final determination of the issue of the

228. *See id.* art. 30(1).

229. *See id.* art. 30(2).

230. The draft Convention covers this to some extent in that it specifies that future receivables and receivables not identified individually are assignable. It also deals with contractual limitations to assignment but leaves unaddressed other statutory limitations to assignment.

231. *See id.* art. 18(5).

232. The draft Convention provides that the debtor has the same defenses and rights of set-off against the assignee that it would have against the assignor, without specifying them. *See id.* art. 19(2).

233. *See id.* art. 19(3).

234. For arguments in favor of such an approach, see discussion *supra* Part VIII.C. *See*

purpose of the conflict-of-laws rules and of the relationship between those rules and any substantial law priority rules, a separate conflict-of-laws priority provision is retained in the text of the draft Convention.²³⁵ This provision would become redundant if the Working Group decides that the purpose of the conflict-of-laws provisions should be to fill the gaps left in the draft Convention since the draft Convention would contain a conflict-of-laws priority provision in any case. However, if the Working Group decides in favor of a combined substantial law and conflict-of-laws approach, the two conflict-of-laws priority provisions would need to be consolidated into one.

IX. CONCLUSION

From the above analysis, I hope it is clear that the UNCITRAL Working Group preparing a draft Convention on Assignment in Receivables Financing has made considerable progress in the four meetings it has had thus far.²³⁶

The feasibility of a uniform legal regime covering a wide variety of receivables financing transactions, including factoring and securitization, has been established. The effectiveness of the assignment of future receivables and of bulk assignments has been recognized and the time of transfer of the receivables has been specified, along with the time at which the receivables are deemed to arise.²³⁷ In addition, a balanced provision on anti-assignment clauses has been agreed upon,²³⁸ along with a satisfactory provision on the transfer of security rights.²³⁹ Moreover, agreement has been reached with regard to the relationship between the assignor and the assignee and with regard to the protection of the debtor.²⁴⁰

It is equally clear that a number of issues remain to be addressed: the scope of application of the draft Convention; the type

generally Mark Moshinsky, *The Assignment of Debts in the Conflict of Laws*, 108 L.Q. REV. 591, 611 (1992).

235. See draft Convention, *supra* note 4, art. 31.

236. According to current planning, the draft Convention should be finalized by the Working Group within 1998 and sent to the Commission for adoption in 1999. Whether the draft Convention is opened for signature by States within 1999 or 2000 depends on whether it will be sent to the General Assembly at the end of 1999 or to a special diplomatic conference, which would probably take place in the fall of 1999. This matter will have to be decided by the Commission at a later stage.

237. See draft Convention, *supra* note 4, art. 15.

238. See *id.* art. 12.

239. See *id.* art. 13.

240. See *id.* arts. 14, 18.

of the substantive law priority rules to be finally adopted and their interplay with the conflict-of-laws rules; and the relationship between the draft Convention and the law applicable to the insolvency of the assignor.

However, I would argue that the progress made thus far has already justified UNCITRAL's decision to undertake work in this field of the law.²⁴¹ I would go a step further by saying that there are clear indications that consensus is within reach on the outstanding issues. To the relevant indications referred to in this Article, I would add the good old UNCITRAL tradition of working on the basis of consensus and not on the basis of majority rule which invariably leaves one side too bruised to accept the end result. I would also mention the awareness of the UNCITRAL Working Group that this work may considerably facilitate the flow of lower-cost credit to a number of countries where such credit is currently not available. UNCITRAL's solid thirty-year record attests that it can live up to such high expectations.

241. The threshold of success set by Philip R. Wood of Allen & Overy, London, in his most interesting editorial article for UNCITRAL, is "to assign the 'mandatory notice' [priority] rule to oblivion." Philip R. Wood, *Global Marketability of Receivables: What Needs To Be Done Now*, 12 BUTTERWORTHS J. INT'L BANKING & FIN. L. 512 (1997).