

THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE

BRIEF SUMMARY

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On December 12, 2001, the United Nations General Assembly approved an international convention providing uniform rules on the assignments of receivables.¹ The Convention is now being considered by various nations for signature and ratification. The following is a brief summary some of the key provisions of the Convention:

Objectives. As the preamble to the Convention indicates, the objective of the Convention is to provide, for assignments of receivables, uniform rules that will have the effect of increasing the availability of credit and reducing the costs of credit while at the same time avoiding disruption of existing financing practices, fostering the development of new financing practices and protecting the interests of debtors.²

Receivables and Assignments Covered. The Convention addresses the assignment of receivables which are contractual rights to payment. Covered assignments include both the creation of security interests in receivables and

¹ The Convention - entitled the United Nations Convention on the Assignment of Receivables in International Trade - may be found at www.uncitral.org by clicking on "UNCITRAL Texts and Status" and on then on "International Payments". For a fuller discussion of the provisions of the Convention in comparison to UCC Article 9, see Sigman and Smith. "Toward Facilitating Cross-Border Financing and Securitization: an Analysis of the United Nations Convention on the Assignment of Receivables in International Trade", 57 *The Business Lawyer* No. 2 (Feb. 2002).

² The Convention refers to the person who assigns a receivable as the "assignor," the person to whom the receivables is assigned as the "assignee," and the person who owes the receivable as the "debtor." The contract that gives rise to the receivable is referred to as the "original contract." The Convention also refers to countries as "States" and to those countries that sign and ratify the Convention as "Contracting States."

“true sales” of receivables. However, by excluding transactions in securities, derivatives and other financial assets, assignments of deposit accounts, and assignments of claims under letters of credit and independent guaranties, and by protecting those who are holders of negotiable instruments or assignees of certain real estate lease receivables, the Convention rules relate primarily to assignments of trade, loan and similar commercial and consumer receivables arising in asset-based lending, factoring, securitization and project finance transactions.

Internationality. For the Convention to apply to an assignment of a receivable, either the assignment or the receivable must be international, i.e., the assignor and assignee must be located in different States or the assignor and the debtor must be located in different States. Also, for the Convention to apply, the assignor must be located in a Contracting State and, for the rights or obligations of the debtor to be affected by the Convention, either the debtor must be located in a Contracting State or the original contract must be governed by the law of a Contracting State. The Convention provides specific rules to determine where an assignor, assignee or debtor is located. Under these rules, an assignor or assignee that is a legal entity is located in the State in which it has its central administration, i.e., its chief executive office.

Rules Among Assignor, Assignee and Debtor. The Convention provides specific rules that set forth when and by whom the debtor may be notified of an assignment and whom the debtor must pay, following the assignment, in order to obtain a discharge on the receivable. The debtor’s setoff and recoupment rights are generally preserved. Furthermore, agreements of a debtor not assert claims and defenses against an assignee are generally validated.

Future Receivables and Bulk and Partial Assignments of Receivables. The Convention overrides domestic commercial laws that would otherwise not permit an assignment of receivables in bulk, a present assignment of future receivables, or an assignment of partial or undivided interests in receivables. The Convention provides that the contract of assignment between the assignor and the assignee need not describe the receivables specifically; rather, the receivables may be described generally so long as they may be identified to the contract of assignment. A new contract of assignment need not be executed when there is a present assignment of a future receivable and the future receivable thereafter arises or is created and can be identified to the contract of assignment.

Anti-Assignment Clauses. The Convention generally overrides contractual clauses that restrict assignments of receivables arising from the sale or lease of goods, credit card receivables or receivables arising out of the

licensing of intellectual property. It does not override domestic statutes or rules of law restricting assignments.

Choice of Law for Priority. The Convention provides that the priority of an assignee's interest in a receivable as against other claimants is determined by the law of the State in which the assignor is located.³ That law also determines, for purposes of priority, whether the assignment is a "true" sale or a secured transaction. If a challenge to the priority of an assignment is made in a court located in a State other than the State in which the assignor is located, the court may not refuse to apply the priority rules of the State of the assignor's location unless those rules are "manifestly contrary to the public policy of the forum State." However, if an insolvency proceeding is commenced by or against an assignor in an insolvency tribunal located in a State other than the State in which the assignor is located, the insolvency tribunal may charge the receivables with wage, tax or other preferential claims if otherwise required under the forum State's insolvency laws.

Proceeds. The Convention gives the assignee a right in the proceeds of an assigned receivable that are paid to the assignee directly or that are held by the assignor on instructions by and for the benefit of the assignee in a segregated lock box or in any other manner in which the proceeds are segregated from the assets of the assignor. The assignee's right in the proceeds has under the Convention the same priority as the assignee's right in the receivable to which the proceeds related. Nevertheless, the Convention does not address a priority conflict between an assignee claiming an interest in property as proceeds of an assigned receivable and a depositary bank, securities intermediary or other person, claiming an interest in the property as original collateral or otherwise not as proceeds of the receivable, through a right of setoff or a transfer of an interest in the property by agreement.

Consumer Protection. The provisions of the Convention do not alter rights and obligations of parties to consumer transactions under domestic consumer protection laws.

Optional Provisions. The Convention sets forth optional choice of law rules to be applied in cross-border receivable assignment transactions even if the Convention would not otherwise apply. The Convention also sets forth in

³ If the United States were to adopt the Convention, it is contemplated that the United States would do so by making a declaration to the effect that, if the Convention's choice of law rules for priority point to a state of the United States in a transaction within the scope of UCC Article 9, the UCC Article 9 choice of law rules apply so long as the UCC Article 9 choice of law rules point to a state within the United States.

an optional annex a menu of substantive priority rules that a State may choose to apply, including a priority rule based upon the first to file in a notice filing system. In addition, the annex contains provisions for the establishment of an international filing system and general rules for its operation.⁴

⁴ It is not contemplated that the United States would adopt the optional choice of law chapter or any of the annex rules.