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NOTE SUR LA LOI APPLICABLE A LA CESSION DE CRÉANCES

établie par le Bureau Permanent

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NOTE ON THE LAW APPLICABLE TO RECEIVABLES FINANCING

drawn up by the Permanent Bureau

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NOTE ON THE LAW APPLICABLE TO RECEIVABLES FINANCING

INTRODUCTION

The Eighteenth Session[1] of the Hague Conference on Private International Law decided [2] to "retain or include in the Agenda of the Conference, but without priority: [...] the law applicable to assignment of receivables".[3] The purpose of this Note is to describe briefly for Member States of the Conference the activities undertaken by the Permanent Bureau following that Decision, and to inform them of the progress of UNCITRAL's work on this topic.

THE ACTIVITIES OF THE PERMANENT BUREAU

The Hague Conference has followed from the outset the work of the UNCITRAL Working Group on the preparation of a uniform draft law[4] on assignment in receivables financing[5]. A closer form of collaboration was envisaged between the Hague Conference and UNCITRAL because, at an early stage, the negotiators became aware of the need to include conflict-of-laws rules in the draft Convention. This arises mainly from the difficulty of achieving unification of the substantive law for certain aspects of the subject. Against this background, the Hague Conference organised a working meeting in co-operation with the Secretariat of UNCITRAL, the meeting being held at The Hague, at the premises of the Permanent Bureau of the Conference, from 18 to 20 May 1998. This working group, open to all Member States, consisted of experts from sixteen States,[6] an expert consultant, Mr Paul Lagarde, and a representative of the UNCITRAL Secretariat, Mr Spiros Bazinas. It discussed the private international law aspects of assignment in receivables financing, and more specifically, the provisions of the draft Convention at the stage it had reached following the twenty-eighth meeting of the UNCITRAL Working Group.

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[1] Final Act, Part B, item 4, e.

[2] *Proceedings of the Eighteenth Session (1996),* Tome I, *Miscellaneous matters,* p. 47.

[3] For the considerations leading up to this decision, see Note on the work of the United Nations Commission on International Trade Law (UNCITRAL), Prel. Doc. No 7 of June 1995, prepared for the Special Commission of June 1995 on general affairs and policy of the Conference, *Proceedings of the Eighteenth Session (1996)*, Tome I, *Miscellaneous matters*, p. 97; Conclusions of the Special Commission of June 1995 on general affairs and policy of the Conference, *Proceedings of the Eighteenth Session (1996),* Tome I, *Miscellaneous matters;* p. 115; Note on the law applicable to the assignment in receivables financing, by Michel Pelichet, Deputy Secretary General, Prel. Doc. No 13 of August 1996, *Proceedings of the Eighteenth Session (1996),* Tome I, *Miscellaneous matters,* pp. 197-201.

[4] At its last meeting, the Working Group agreed that this uniform law should take the form of a convention, provisionally entitled "Draft Convention on Assignment in Receivables Financing", rather than a model law.

[5] UNCITRAL decided to begin work on assignment in receivables financing at its twenty-eighth session, held in Vienna from 2 to 26 May 1995.

[6] H.E. Mr Antonio Boggiano (Argentina), Ms Ruth Straganz (Austria), Mr Jean-Christophe Boulet (Belgium), Ms Catherine A. Walsh (Canada), Mr Michel Deschamps (Canada), Mr Shi Zhaoyu (China), Mr Krešimir Sajko (Croatia), Ms Zoja Ladová (Czech Republic), Mr Jean Stoufflet (France), Ms Christine O'Rourke (Ireland), Mr Fausto Pocar (Italy), Mr Shinichiro Hayakawa (Japan), Ms Norma Ang (Mexico), Mr Antoon V.M. Struycken (Netherlands), Ms Dorothée Van Iterson (Netherlands), Mr José-Simeon Rodriguez Sanchez (Spain), Mr Hans Kuhn (Switzerland), Mr Louis Del Duca (United States of America), Mr Peter Winship (United States of America).

The discussions of the group of experts focussed on five major topics, and resulted in a number of conclusions and recommendations addressed to the UNCITRAL Working Group. These conclusions and recommendations, which were set out in its report A/CN.9/WG.II/WP.99 of 10 July 1998,[7] are in essence the following.

As regards the role of conflict of laws rules in delimiting the geographical scope of application of the Convention, as defined in Article 1 of the draft, the experts recommended deleting the reference to private international law in paragraph (2). They also suggested leaving unaltered the first paragraph of Article 1, which reads: "This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the assignment, the assignor is located in a Contracting State."

The experts then considered the definition of the concept of internationality in Article 3 of the draft. They pointed out that according to a well-established tradition in the Hague Conference internationality is not defined, thus avoiding the necessity of choosing between a legal concept and an economic one. However, bearing in mind that the purpose of the UNCITRAL draft is to achieve certainty and predictability in the solutions adopted, the experts took the view that the legal concept of internationality in Article 3 should be retained.

The third aspect considered by the experts was the concept of the "location" of one of the parties, which recurs at various points in the draft. From the outset, the experts took the view that the definition of the location of natural persons should be kept separate from the one used for legal persons and other group entities. For natural persons, the experts opted for the criterion of habitual residence, which is the preferred connecting factor in modern private international law. For legal persons, the experts did not arrive at any final conclusion as between the registered office or place of registration, and the actual head office. They therefore proposed following the criteria used in other international instruments. They cited the *Rome Convention on the Law Applicable to Contractual Obligations*, of 19 June 1980, which refers in Article 4, paragraph 2, to the "central administration" or "principal place of business" of the legal person. They also referred to the *European Union Convention on Insolvency Proceedings*, signed in Brussels on 23 November 1995, which provides in Article 3, paragraph 1: "In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary".[8] The experts also suggested including a separate rule for autonomous establishments, branch offices or other entities without distinct legal personality.

The fourth topic discussed by the group of experts was the value of having conflict-of-laws rules to compensate for the lack of a substantive solution for certain issues: form, assignability, the right of the assignee to the proceeds of receivables, the law of priority and competing rights in the event of insolvency of the assignor. As regards the form of the assignment and the right of the assignee to the proceeds of receivables, the experts concluded that a conflict rule was not desirable; as a matter of form, they suggested a substantive rule. No recommendation was made on the question of contractual assignability, but it was felt that a conflict rule was needed for statutory assignability. The rule laid down in article 24 c) of the UNCITRAL draft, whereby this question is subject to the law of the assignor, was regarded as satisfactory.

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[7] The English version was published under the same symbol. A copy of this document is annexed to this Note

[8] This Convention has not yet entered into force, and will probably be dealt with by way of a draft Regulation under the new powers conferred on the European Community by the Treaty of Amsterdam.

There was some criticism of the provisions originally drafted to cover competing rights in the event of insolvency of the assignor,[9] possibly because of the changes made to them, as we will see below.

Lastly, the experts dealt with the scope of general conflict-of-laws rules which are intended to be applicable even when the Convention is inapplicable. They queried the need for general conflict of laws rules to govern the assignment contract, which has no special features, and suggested that if these provisions were to be maintained they could be based on Article 12(2) of the Rome Convention. The experts also pointed to the danger for the debtor of choosing the law governing the assignor, when this rule is applied in isolation from the substantive rules of the Convention: the debtor might be obliged to pay twice, once under the provisions of the law governing the assigned receivable, and a second time under the law governing the assignor. But it was recognised that there was no really satisfactory conflict of laws rule to resolve the question of whether the assignment can be invoked against third parties.

THE WORK OF UNCITRAL

Between the meeting of the group of experts at The Hague and this Note, the UNCITRAL Working Group has met three times. At its twenty-ninth session (Vienna, 5-16 October 1998), the Working Group discussed the conclusions reached by the group meeting at The Hague. As for the substance of the topic, it adopted a number of draft articles of the Convention, including the articles dealing with private international law.[10] At its thirtieth session (New York, 1-12 March 1999) the Working Group adopted the title, the preamble, and draft articles 1 to 24, with the exception of draft articles 23 and 24.[11] The Working Group completed its work at its thirty-first session (Vienna, 11-22 October 1999) and adopted the draft Convention and its annex as a whole.[12] The Secretariat has also prepared a two-part commentary on the draft Convention.[13]

On reading the draft Convention, it is evident that the UNCITRAL Working Group has taken account of some of the recommendations of the group of experts of the Hague Conference. For instance, paragraph 1 of article 1 has been retained, whereas the explicit reference to private international law in paragraph 2 has been deleted. The definition of the concept of internationality in article 3 has remained unchanged. The question of how to define a person's "location" has given rise to considerable discussion. Finally, the Working Group has proposed retaining, as a general connecting factor, the place of business (article 6 (i) (i)) and if there is none, the habitual residence (article 6 (i) (iv)). The rule has been further defined to mean that if the assignor or the assignee has more than one place of business, the relevant place of business is the one where its central administration is exercised (article 6 i) ii)); if the debtor has more than one place of business, the relevant place of business is that which has the closest relationship to the original contract (article 6 i) iii)). A special rule for branch offices and agencies was discussed, but has not yet been included in the draft Convention. This question will be discussed again when UNCITRAL meets in June-July 2000.

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[9] *Cf.* Annex to this Note.

[10] See A/CN.9/455, paras. 17 and 67-119.

[11] See A/CN.9/456, para. 18.

[12] The text of the draft Convention may be downloaded from the UNCITRAL website at http://www.uncitral.org. The provisions shown in brackets have not been finally adopted by the Working Group.

[13] The first part of the commentary, under the symbol A/CN.9/WG.II/WP.105, is available in English and French. The second part, under the symbol A/CN.9/WG.II/WP.105, is presently available only in the original English version.

There is no provision in the draft Convention to govern the form of the assignment and the question of the legal assignability of the receivable. These questions are perhaps not amenable to regulation by means of uniform substantive provisions. It has yet to be decided whether conflict-of-laws rules should be proposed. Concerning the form, it may be that countries which become parties to the new UNCITRAL Convention will wish to retain their existing conflict rule on form; this is especially true for countries bound by the 1980 *Rome Convention on the Law Applicable to Contractual Obligations*, Article 9 of which contains a very detailed provision.

As for the question of the legal assignability of the receivable, this seems to fall within the scope of the law of the receivable, unless there are rules of public policy in the law of the assignment. This brings us back to the debates on these two rules. It is not certain that the draft Convention would gain from the inclusion of such a provision.

It is now proposed, in article 25, paragraph 2, that in the forum State the specific rules governing insolvency should be given priority over the law of the assignor, except where the forum in which an insolvency proceeding begins is the one in which the assignor is located. This is because in the latter case, it may be assumed that all the provisions applicable in that State will be mutually consistent.

The last problem discussed by the expert group in The Hague was resolved by the provision now found in article 29 of the draft Convention, whereby the law governing the receivable determines whether the debtor's obligations have been discharged. In other words, if the debtor takes care to comply with the requirements of the law of the receivable, which will be familiar to him *a priori*, he will not run the risk of being expected to pay a second time.

As for opposability to third parties, one need only recall the controversy sparked off by the 1980 Rome Convention. Some people, including the *Rapporteurs* for that Convention, say that the Convention is silent on this question and that the solution can be found only in the ordinary law of each individual State.[14]

Others take the opposite view, that the solution ought to be available in the Convention itself. The highest court in the Netherlands seems to support this view. In a judgment of 16 May 1997[15] the *Hoge Raad* decided to apply Article 12(1) of the Convention to the question whether the assigned receivable could be invoked against the liquidator of the assignor's debt.[16]

This is not the solution adopted by UNCITRAL, which proposes applying the law of the State in which the assignor is located (Article 30). This is a satisfactory solution, partly for the following reasons –

1) the assignor is known to the assignee and to third parties, whereas the law of the assignment will often be very difficult to determine, especially for third parties;
2) in the event of insolvency of the assignor, this law will be the same as the law governing the insolvency;
3) the debtor is in any case protected by Article 29, since he can simply follow the rules of the law of the assignment.

[14] They rely, *inter alia*, on the fact that an early draft of the Convention contained a provision along these lines which was subsequently deleted.

[15] *Brandsma qq* v *Hansa Chemie AG*, *Rechtspraak van de Week* 126.

[16] For a critical analysis, see T.H.D. STRUYCKEN, The proprietary aspects of international assignment of debts and the Rome Convention, Article 12, *L.M.C.Q.* 1998, pp. 345-360.

The scope of the conflict of laws rules in Chapter V of the draft Convention is not always clearly defined (Article 1, paragraph 3, and Article 28, paragraph 1). The Working Group decided to retain Chapter V in the draft Convention, while providing that each State would be free to make a declaration informing the other Contracting States that it was not bound by this chapter (the "opt-out") (Article 37). However, these provisions have been left in square brackets, as the Working Group was unable to agree on the circumstances in which they should apply. There are, as we know, two possibilities –

1) to place conflict rules in the context of substantive rules, to supplement the latter on points on which they are silent;
2) to extend them beyond the substantive rules, to govern situations not covered by those rules.

Although some issues, including the meaning of the term "location" and the scope of the private international law provisions in the draft Convention, have not yet been finally resolved, the Working Group decided to bring its work to a close. It was felt that these issues should be settled by UNCITRAL at its next plenary session.

The draft Convention adopted by the Working Group has been sent, for observations, to all the States and international organisations concerned. Observations received will be compiled by the Secretariat and distributed with the finalised version of the commentary on the Convention, with a view to future discussions on adopting the Convention.

The draft Convention will be submitted to UNCITRAL for final consideration and adoption at its thirty-third session, which will be held in New York from 12 June to 7 July 2000, after which it will be submitted for adoption to the next United Nations General Assembly, to be held in October or November 2000.

CONCLUSION

In view of the advanced stage reached in the work of UNCITRAL, the Permanent Bureau could have suggested removing the law on assignment of receivables from the agenda of the Conference. However, since two of the questions left unresolved by the Working Group concern private international law, and will be debated again by UNCITRAL at its session of June-July 2000, the Permanent Bureau considers it important that the Hague Conference should be represented in those discussions. The Permanent Bureau is therefore suggesting that the topic should be retained on the agenda of the Conference, thus facilitating its representation at the final discussions within UNCITRAL.

From the foregoing it is evident that because of the work already done in collaboration with UNCITRAL, and the existence of a draft UNCITRAL law incorporating the issues of the applicable law, there is no need for the Conference to engage in work on its own behalf.