

Draft
June 11, 2007 –
Under review and
subject to change

**United Nations Convention on the Assignment
of Receivables in International Trade**

Proposed United States Declarations and Understandings

Prefatory Note

The United Nations Convention on the Assignment of Receivables in International Trade has been signed by the United States and may be considered for ratification by the United States Senate.

The Convention permits a country that adopts the Convention to make declarations with respect to specified articles of the Convention. By a “declaration” the adopting country modifies or supplements a provision of the Convention in a manner permitted by the Convention when that country's law applies. The articles of the Convention with respect to which a declaration may be made are set forth below. Following each article is either a declaration proposed for adoption by the United States Senate or a statement that no declaration is proposed. Several understandings relating to the Convention are also proposed. In an “understanding” the adopting country sets forth its interpretation of a particular provision of the Convention without modifying or supplementing it. In addition, below are various notes suggesting how the United States Department of State’s report to the United States Senate might provide further explanations of several of the proposed declarations and understandings.

These proposals are being made by a drafting committee organized by the National Conference of Commissioners on Uniform State Laws, comprised of uniform law commissioners and representatives of the American Law Institute. The drafting committee benefited from consultation with representatives of the Uniform Law Conference of Canada and the Mexican Uniform Law Center, as well as the United States Department of State and other advisors and observers. The proposals have not at this point been approved by the United States Department of State nor have they been submitted to the United States Senate.

A full copy of the Convention may be found at http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html. Questions and comments concerning the proposals should be addressed to Harold Burman at the United States Department of State at burmanhs@state.gov, Edwin E. Smith at Edwin.Smith@bingham.com, and Steven O. Weise at steve.weise@hellerehrman.com.

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Article 2. Assignment of receivables

For the purposes of this Convention:

(a) “Assignment” means the transfer by agreement from one person (“assignor”) to another person (“assignee”) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (“receivable”) from a third person (“the debtor”). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;

...

[The Report to the Senate should explain in connection with the definition of “receivable”: A “receivable” is a contractual right to payment of a monetary sum. For example, a licensor’s contractual right to payment under a license (such as a royalty or license fee) and an assignor’s or transferor’s contractual right to payment for an assignment or other transfer of an interest in intellectual property are contractual rights to payment of a monetary sum and so are “receivables.” Accordingly, the Convention applies to assignments of those rights to payment. Of course, not all contract rights are receivables. The rights of a party to a license or an assignment or other transfer of an interest in intellectual property that are not a contractual right to payment of a monetary sum are not a “receivable” as defined in the Convention. The Convention does not apply to assignments of those rights.]

Article 4. Exclusions and other limitations

...

2. This Convention does not apply to assignments of receivables arising under or from:

...

(e) The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;

[Understanding: The United States understands that paragraph (2)(e) of article 4 excludes from the scope of the Convention the assignment of (i) a receivable that is a security, regardless of whether the security is held with an intermediary, and (ii) a receivable that is not a security but is a financial asset or instrument, if the financial asset or instrument is held with an intermediary.]

[The Report to the Senate should explain that the understanding does not address whether the Convention applies to the assignment of a receivable that arises from the transfer of (i) a security, or (ii) a financial asset or instrument that is held with an intermediary. The Report to the Senate should also state that references to the term “security” and to the phrase “financial asset or instrument held with an intermediary” should be understood as that term and phrase are used in other international instruments to be identified in the Report.]

Article 5. Definitions and rules of interpretation

For the purposes of this Convention:

...

(h) A person is located in the State in which it has its place of business. If the assignor or the assignee has a place of business in more than one State, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one State, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;

...

[Understanding: The United States understands that the phrase “that place where the central administration of the assignor or the assignee is exercised” as used in paragraph (h) of article 5 has a meaning equivalent to the phrase “that place where the chief executive office of the assignor or assignee is located”.]

[The Report to the Senate should explain that, for the Convention to achieve its objective of encouraging the greater availability of credit at lower cost, those extending credit will need to know with considerable certainty whether the Convention applies and, if it does apply, the applicable conflict-of-laws rule for determining the priority of an assignee’s right in the assigned receivables as against the rights of competing claimants. Those determinations will depend upon the location of the assignor and also in many cases upon the location of the assignee. Having a definition of the location of an assignor or assignee that refers to a single, identifiable place is essential to providing that certainty. The Report to the Senate should explain that an assignor’s or assignee’s “chief executive office” is normally readily identifiable because (i) the factors used to identify that location are more objective than the factors used to identify a location based on other possible tests (not used in the Convention) of the kind referred to in the following sentence, and (ii) the term is used in Article 9 of the Uniform Commercial Code and there is substantial case law and commentary explaining its meaning. The Report to the Senate should further explain that the phrase “that place where the central administration of the assignor or the assignee is exercised” in paragraph (h) of article 5 does not mean “registered seat”, “place of organization”, “centre of main interests”, “principal place of business” or “chief place of business”. In any particular instance, the location under any of those other terms might be different from the location of the “chief executive office”.]

Article 9. Contractual limitations on assignments

1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor’s right to assign its receivables.

2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

3. This article applies only to assignments of receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other

intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

[See suggested Report to the Senate with respect to article 10.]

Article 10. Transfer of security rights

1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.

2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.

3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

4. Paragraphs 2 and 3 of this article apply only to assignments of receivables:

(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;

(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;

(c) Representing the payment obligation for a credit card transaction; or

(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

5. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.

6. Paragraph 1 of this article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.

[The Report to the Senate should explain that because intellectual property that is the subject of a license is not a "receivable" (see suggested Report to the Senate with respect to article 2), neither

this article nor article 9 of the Convention makes ineffective any agreement between a licensor and a licensee limiting the licensee's right to sublicense or assign or otherwise transfer the intellectual property that is the subject of the license or the licensee's rights under the license.]

Article 23. Public policy and mandatory rules

1. The application of a provision of the law of the State in which the assignor is located may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State.

2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located.

3. Notwithstanding paragraph 2 of this article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency proceedings under the law of that State may be given priority notwithstanding article 22. A State may deposit at any time a declaration identifying any such preferential right.

[Declaration: Pursuant to article 23, the United States declares that rights that arise by operation of law under Title 11, United States Code (the "Bankruptcy Code"), Sections 364(d) and 506(c), (as these provisions may be amended or renumbered from time to time) may be given priority over the rights of an assignee in an insolvency proceeding in which the assignor is a "debtor" under and as defined in the Bankruptcy Code. This declaration is not a complete list of all rights that arise by operation of law that might be given priority over the rights of an assignee in an insolvency proceeding.]

[The Report to the Senate should explain: (i) this article does not contemplate that a State would list avoidance powers arising in insolvency proceedings, such as the power to avoid a preference or a fraudulent transfer, and (ii) there may be other priority rights arising by operation of law that might be given priority over the rights of an assignee in proceedings under the Bankruptcy Code or under other insolvency proceedings under the law of the United States or a territorial unit of the United States.]

Article 24. Special rules on proceeds

1. If proceeds are received by the assignee, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.

2. If proceeds are received by the assignor, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:

(a) The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and

(b) The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit or securities account containing only proceeds consisting of cash or securities.

3. Nothing in paragraph 2 of this article affects the priority of a person having against the proceeds a right of set-off or a right created by agreement and not derived from a right in the receivable.

[Understanding: The United States understands that article 24 provides rights and benefits to an assignee with respect to proceeds and does not derogate from any additional rights or benefits that an assignee may have with respect to proceeds under law other than the Convention.]

[The Report to the Senate should explain that articles 9 (Contractual limitations on assignments) and 10 (Transfer of security rights) make ineffective certain restrictions on or requirements concerning assignments that would otherwise be effective and that these articles do not make effective restrictions on assignment that are made ineffective under law other than the Convention (e.g. under Uniform Commercial Code §§ 9-406 – 9-408).]

CHAPTER VI. FINAL PROVISIONS

Article 33. Depositary

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

Article 34. Signature, ratification, acceptance, approval, accession

1. This Convention is open for signature by all States at the Headquarters of the United Nations in New York until 31 December 2003.
2. This Convention is subject to ratification, acceptance or approval by the signatory States.
3. This Convention is open to accession by all States that are not signatory States as from the date it is open for signature.
4. Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

Article 35. Application to territorial units

1. If a State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may at any time declare that this Convention is to extend to all its territorial units or only one or more of them, and may at any time substitute another declaration for its earlier declaration.
2. Such declarations are to state expressly the territorial units to which this Convention extends.
3. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the assignor or the debtor is located in a territorial unit to which this Convention does not extend, this location is considered not to be in a Contracting State.
4. If, by virtue of a declaration under this article, this Convention does not extend to all territorial units of a State and the law governing the original contract is the law in force in a territorial unit to which this Convention does not extend, the law governing the original contract is considered not to be the law of a Contracting State.

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

[No declaration]

Article 36. Location in a territorial unit

If a person is located in a State which has two or more territorial units, that person is located in the territorial unit in which it has its place of business. If the assignor or the assignee has a place of business in more than one territorial unit, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one territorial unit, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person. A State with two or more territorial units may specify by declaration at any time other rules for determining the location of a person within that State.

[Declaration: see Declaration made pursuant to articles 36 and 37 (shown after article 37).]

Article 37. Applicable law in territorial units

Any reference in this Convention to the law of a State means, in the case of a State which has two or more territorial units, the law in force in the territorial unit. Such a State may specify by declaration at any time other rules for determining the applicable law, including rules that render applicable the law of another territorial unit of that State.

[Declaration: Pursuant to articles 36 and 37, the United States declares that any reference in the Convention to the law of the United States means the law in force in the territorial unit determined in accordance with article 36, subject to the following. To the extent that, under the conflict-of-laws rules in force in that territorial unit, a particular matter would be governed by the law in force in a different territorial unit of the United States, the reference with respect to that matter is to the law in force in the different territorial unit. The conflict-of-laws rules referred to in the preceding sentence include related rules that determine where a person is located.]

[The Report to the Senate should explain that, because under article 5(i) references in the Convention to “law” mean substantive law, references to “law” in the declarations and understandings likewise mean the substantive law in force in a State or a territorial unit. The Report to the Senate should also explain that the second sentence of the declaration to articles 36 and 37 will bring about a result under the application of the Convention’s conflict-of-laws rules that conforms as closely as possible to the result that would follow from application of otherwise-applicable domestic conflict-of-laws rules.]

The Report to the Senate should also explain that, for transactions not covered by the UCC, if the location of a person is relevant, the location of the assignor (under the Convention’s rule that an assignor is located at its place of central administration) would be determined by the application of the non-UCC conflict-of-laws rules in force in the territorial unit determined under article 36. The Report to the Senate should also explain that the next-to-last sentence of the declaration uses the phrase “to the extent that” rather than “if” because separate aspects of a matter (for example, separate aspects of “priority” as that term is defined in the Convention) may be governed by the laws of different territorial units in the United States. The Report to the Senate should also explain that the last two

sentences of the declaration primarily refer to the conflict-of-laws rules in UCC § 9-301(1) (referred to in the UCC as “choice-of-law rules”) and the rules in UCC § 9-307 that determine where a party is located for purposes of UCC § 9-301.]

The Report to the Senate should also explain that articles 22, 36 and 37 should be read together.]

Article 38. Conflicts with other international agreements

1. This Convention does not prevail over any international agreement that has already been or may be entered into and that specifically governs a transaction otherwise governed by this Convention.

2. Notwithstanding paragraph 1 of this article, this Convention prevails over the Unidroit Convention on International Factoring (“the Ottawa Convention”). To the extent that this Convention does not apply to the rights and obligations of a debtor, it does not preclude the application of the Ottawa Convention with respect to the rights and obligations of that debtor.

Article 39. Declaration on application of chapter V

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

[Pursuant to article 39, the United States declares that it will not be bound by chapter V.]

Article 40. Limitations relating to Governments and other public entities

A State may declare at any time that it will not be bound or the extent to which it will not be bound by articles 9 and 10 if the debtor or any person granting a personal or property right securing payment of the assigned receivable is located in that State at the time of conclusion of the original contract and is a Government, central or local, any subdivision thereof, or an entity constituted for a public purpose. If a State has made such a declaration, articles 9 and 10 do not affect the rights and obligations of that debtor or person. A State may list in a declaration the types of entity that are the subject of a declaration.

[No declaration. The Report to the Senate should explain that there is no need for a declaration to exclude application of article 9 of the Convention (the override of contractual anti-assignment terms in “trade receivables”) to contracts with governmental debtors located in the United States because restrictions on assignment with respect to those receivables are typically statutory (such as those restrictions arising under the Federal Assignment of Claims Act) and, thus, are not affected by article 9 of the Convention.]

Article 41. Other exclusions

1. A State may declare at any time that it will not apply this Convention to specific types of assignment or to the assignment of specific categories of receivables clearly described in a declaration.

2. After a declaration under paragraph 1 of this article takes effect:

(a) This Convention does not apply to such types of assignment or to the assignment of such categories of receivables if the assignor is located at the time of conclusion of the contract of assignment

in such a State; and

(b) The provisions of this Convention that affect the rights and obligations of the debtor do not apply if, at the time of conclusion of the original contract, the debtor is located in such a State or the law governing the original contract is the law of such a State.

3. This article does not apply to assignments of receivables listed in article 9, paragraph 3.

[No declaration. The Report to the Senate should explain that under some circumstances it may not be desirable for a governmental debtor located in the United States to be bound by the provisions of the Convention, such as those requiring the governmental debtor to pay an assignee who has done no more than give a notice of assignment and payment instruction to the governmental debtor, as provided in article 13 of the Convention.]

However, three independent considerations suggest that an exclusionary declaration under article 41 for governmental debtors located in the United States would not be necessary or appropriate to address this issue. First, to the extent that receivables owed by governmental debtors that are located in the United States are securities or are financial assets or instruments held with an intermediary, the assignment of the receivables is already excluded from the Convention under article 4(2)(e). Second, non-contractual (e.g., statutory) restrictions on assignments of governmental receivables (such as those statutory restrictions arising under the Federal Assignment of Claims Act) remain effective under the Convention. Third, by reason of article 41(3), a declaration under article 41 cannot in any event apply to “trade receivables” (the broad category of receivables listed in article 9(3)).]

Article 42. Application of the annex

1. A State may at any time declare that it will be bound by:

(a) The priority rules set forth in section I of the annex and will participate in the international registration system established pursuant to section II of the annex;

(b) The priority rules set forth in section I of the annex and will effectuate such rules by use of a registration system that fulfils the purposes of such rules, in which case, for the purposes of section I of the annex, registration pursuant to such a system has the same effect as registration pursuant to section II of the annex;

(c) The priority rules set forth in section III of the annex;

(d) The priority rules set forth in section IV of the annex; or (e) The priority rules set forth in articles 7 and 9 of the annex.

2. For the purposes of article 22:

(a) The law of a State that has made a declaration pursuant to paragraph 1 (a) or (b) of this article is the set of rules set forth in section I of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(b) The law of a State that has made a declaration pursuant to paragraph 1 (c) of this article is the

set of rules set forth in section III of the annex, as affected by any declaration made pursuant to paragraph 5 of this article;

(c) The law of a State that has made a declaration pursuant to paragraph 1 (d) of this article is the set of rules set forth in section IV of the annex, as affected by any declaration made pursuant to paragraph 5 of this article; and

(d) The law of a State that has made a declaration pursuant to paragraph 1 (e) of this article is the set of rules set forth in articles 7 and 9 of the annex, as affected by any declaration made pursuant to paragraph 5 of this article.

3. A State that has made a declaration pursuant to paragraph 1 of this article may establish rules pursuant to which contracts of assignment concluded before the declaration takes effect become subject to those rules within a reasonable time.

4. A State that has not made a declaration pursuant to paragraph 1 of this article may, in accordance with priority rules in force in that State, utilize the registration system established pursuant to section II of the annex.

5. At the time a State makes a declaration pursuant to paragraph 1 of this article or thereafter, it may declare that:

(a) It will not apply the priority rules chosen under paragraph 1 of this article to certain types of assignment or to the assignment of certain categories of receivables; or

(b) It will apply those priority rules with modifications specified in that declaration.

6. At the request of Contracting or Signatory States to this Convention comprising not less than one third of the Contracting and Signatory States, the depositary shall convene a conference of the Contracting and Signatory States to designate the supervising authority and the first registrar and to prepare or revise the regulations referred to in section II of the annex.

[Declaration: The United States declares that, for assignments of receivables within the scope of Article 9 of the Uniform Commercial Code in force in a territorial unit of the United States, the territorial unit through its adoption of Article 9 of the Uniform Commercial Code has substantially implemented the principles of the priority rules set forth in section I of the annex and the registration system set forth in section II of the annex. Article 9 of the Uniform Commercial Code differs in only a limited way from the priority (as defined in article 5) rules set forth in section I of the annex and the registration system set forth in section II of the annex in that, among other things, Article 9 of the Uniform Commercial Code sets forth different priority (as defined in article 5) rules for assignments of "chattel paper", "instruments", "payment intangibles" (as these terms are defined in Article 9 of the Uniform Commercial Code) and other particular types of receivables.]

[The Report to the Senate should (i) explain that the Convention is substantially consistent with Article 9 of the Uniform Commercial Code; (ii) explain that the Convention rules differ from Article 9 of the Uniform Commercial Code to a limited extent, primarily with respect to (a) certain conflict-of-laws rules and (b) priority rules for assignments of "chattel paper", "instruments", "payment intangibles", or other particular types of receivables; (iii) discuss, on a section-by-section basis, how the rules of the Convention are similar (where they are) with Article 9 of the Uniform Commercial Code; (iv) explain through the use of examples how the Convention works; and (v)

observe that any future changes in Article 9 of the Uniform Commercial Code are expected to arise as amendments to uniform state law in the United States. The Report to the Senate should also explain with respect to the last sentence of the declaration that the meanings of “priority” in the Convention and in Article 9 of the Uniform Commercial Code are not identical.]

Article 43. Effect of declaration

1. Declarations made under articles 35, paragraph 1, 36, 37 or 39 to 42 at the time of signature are subject to confirmation upon ratification, acceptance or approval.

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

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

4. A State that makes a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. In the case of a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become applicable:

(a) Except as provided in paragraph 5 (b) of this article, that rule is applicable only to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor applies only in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

6. In the case of a declaration under articles 35, paragraph 1, 36, 37 or 39 to 42 that takes effect after the entry into force of this Convention in respect of the State concerned or in the case of a withdrawal of any such declaration, the effect of which in either case is to cause a rule in this Convention, including any annex, to become inapplicable:

(a) Except as provided in paragraph 6 (b) of this article, that rule is inapplicable to assignments for which the contract of assignment is concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 1 (a);

(b) A rule that deals with the rights and obligations of the debtor is inapplicable in respect of original contracts concluded on or after the date when the declaration or withdrawal takes effect in respect of the Contracting State referred to in article 1, paragraph 3.

7. If a rule rendered applicable or inapplicable as a result of a declaration or withdrawal referred to in paragraph 5 or 6 of this article is relevant to the determination of priority with respect to a receivable for which the contract of assignment is concluded before such declaration or withdrawal takes effect or with respect to its proceeds, the right of the assignee has priority over the right of a competing claimant to the extent that, under the law that would determine priority before such declaration or withdrawal takes effect, the right of the assignee would have priority.

Article 44. Reservations

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

