UN Receivables Convention Goes to Senate

Wednesday, February 17, 2016

A first step is taken toward potential ratification.

On February 10, US President Barack Obama sent to the US Senate for ratification the United Nations Convention on the Assignment of Receivables in International Trade (the Convention). Approved by the General Assembly of the United Nations in 2001, the Convention provides uniform rules for the cross-border assignments of receivables. The rules are largely consistent with those in Article 9 of the Uniform Commercial Code (UCC).[1] The Convention was signed by President George W. Bush in 2003 but has up until now never been ratified by the Senate. The Senate’s ratification will likely spur other countries to seriously consider the Convention, which so far has been adopted by only one country. The Convention requires adoption by five countries before it will take effect in the adopting countries.

The Convention, if widely adopted, could affect cross-border factoring, asset-based lending, securitization, and project finance transactions.

Objectives

As the preamble to the Convention indicates, the Convention’s objective is to provide, for assignments of receivables, uniform rules that will increase the availability of credit and reduce the costs of credit while also avoiding the disruption of existing financing practices, fostering the development of new financing practices, and protecting debtors’ interests.[2]

Receivables and Assignments Covered

The Convention addresses the assignment of receivables that are contractual rights to payment. Covered assignments include both the creation of security interests in receivables to secure obligations and “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 real estate lease receivables, the Convention rules relate primarily to assignments of trade, loan, and similar commercial and consumer receivables that support 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 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 rules that set forth when and by whom a debtor may be notified of an assignment and whom the debtor must pay, following the assignment, to obtain a discharge on the receivable. The debtor’s setoff and recoupment rights are generally preserved. Furthermore, agreements of a debtor not to 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 so long as the future receivable, when it arises or is created, 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\(^{[3]}\) 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.\(^{[4]}\) That law also determines, for purposes of priority, whether the assignment is a “true” sale or a secured interest that secures an obligation. 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 lockbox 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 depository 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 Convention’s provisions 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 apply in cross-border receivable assignment transactions, even if the Convention would not otherwise apply. The Convention also sets forth in an optional annex a menu of substantive priority rules that a state may choose to apply, including a priority rule based on the first to file in a notice filing system. In addition, the annex contains provisions for establishing an international filing system and general rules for its operation.\(^{[5]}\)

The Convention, if widely adopted following the United States’ lead, would substantially reduce a number of legal uncertainties for lenders and other credit providers in cross-border transactions that involve the assignment of receivables and thereby fulfill the objectives of the Convention in creating greater availability of credit at lower costs. Although Senate ratification is uncertain at this time, a number of trade organizations and interest groups view the Convention favorably.\(^{[6]}\) Those in the finance community should generally be aware of the Convention’s
provisions and the benefits that wide adoption would provide to facilitate the financing of cross-border trade.


[2] The Convention refers to the person who assigns a receivable as the “assignor,” the person to whom the receivable 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 adopt the Convention as “Contracting States.”

[3] The Convention defines the term “priority” to include the concept of “perfection” under UCC Article 9.

[4] According to the package that President Obama sent to the Senate, if the United States were to adopt the Convention, it 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.

[5] According to the package that President Obama sent to the Senate, the United States would not adopt the optional choice of law chapter or any of the annex rules.

[6] According to the package that President Obama sent to the Senate, the Uniform Law Commission and the American Law Institute, the cosponsors of the UCC, were actively consulted during the negotiation of the Convention, and the Convention has the support of the Commercial Finance Association, the American Bar Association, the International Chamber of Commerce, the International Factors Group, and General Electric Capital Corporation.

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