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PRE-IMPLEMENTATION REPORT

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United Nations Convention on the Assignment of Receivables in International Trade

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I. INTRODUCTION

A. Objective of the Convention

The United Nations Commission on International Trade Law (UNCITRAL)[2] was established by the General Assembly of the United Nations to further the harmonization, unification and modernization of the private commercial law of UN member countries in the interests of facilitating international trade. The subject of this report is a recent UNCITRAL product: the *United Nations Convention on the Assignment of Receivables in International Trade (2001).*[3] Adopted by the United Nations General Assembly and opened for signature in December 2001,[4] the Convention seeks to eliminate the prevailing uncertainties in the legal effectiveness of international receivables financing transactions through the establishment of a set of uniform rules.

B. Terms of Reference of Pre-implementation Report

For the Convention to form part of Canadian law there must, of course, be implementing legislation that accords with Canada's constitutional division of powers – at the federal level for matters within federal legislative jurisdiction, and at the provincial level for matters within provincial jurisdiction. In this pre-implementation report, the authors were asked to:

1. Review the laws of Canadian jurisdictions, including civil, common and federal law, in light of the Convention and identify where modifications would be necessary or desirable for the Convention to be implemented;
2. Set out, in light of the laws of Canadian jurisdictions, the advantages and disadvantages of the options available under the Convention and make recommendations with respect to those options;

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[2] In addition to representatives from each of the 60 member states of the Commission, UNCITRAL and its various Working Groups comprise delegates from other member states of the United Nations who have observer status as do representatives of institutions and associations with an interest in the subject matter. Canada is now a member of the Commission though at the time the Receivables Convention was in train, it shared a seat with Australia and New Zealand on a rotating basis and participated in the Working Group as an observer. The distinction between member and observer status is minimized by UNCTIRAL's consensus-based decision making process.

[3] Hereafter: "the Convention" or "the Receivables Convention." The text of the Convention is reproduced in French and in English in Appendices A and B respectively of this Report. It is posted at the UNCITRAL website: www.uncitral.org. (under General Assembly Resolutions, 56th Session, 2001).

[4] GA resolution 56/81 of 12 December 2001 (reproduced in Appendices A and B). To date, the Convention has garnered three signatures: Luxembourg (12 June 2002), Madagascar (24 September 2003), United States of America (30 December 2003). For authoritative current status information, go to http://untreaty.un.org.

and

3. Assess to the extent possible the impact on Canadian law and practice of the implementation of the Convention in Canada and draws conclusions and make recommendations in that respect.

C. Terminology

The term *assignment* is defined broadly in the Convention to cover both the outright sale of receivables and the transfer or creation of rights in receivables as security.[5] The term *assignor*[6] refers to the creditor under the *original contract*[7] that gives rise to the assigned receivable. The term *assignee*[8] refers to the new creditor under the assignment contract who may be either a secured creditor or a purchaser depending on whether the transaction is by way of security or sale. *Debtor* is the obligor under the original contract.[9] *Receivable* means any contract-generated right to payment of a monetary sum.[10]

The authors will use the terminology of the Convention throughout this Report. That is to say, unless otherwise indicated, the term *assignment* denotes an assignment by way of security or sale, and therefore incorporates both an assignment and a hypothec in Quebec parlance and an assignment and a security interest in the parlance of the other provinces and the territories. Similarly, the term *assignor* includes both a seller of receivables and a person who grants security in receivables; the term *assignee* includes both a buyer of receivables and a person holding a security right over receivables; and the term *debtor* means the person obligated to the assignor on an assigned receivable (the "account debtor" in PPSA parlance). Finally, the term *receivable* means what would be referred to as a monetary "claim" in Code parlance and an "account" in the parlance of the other provinces and the territories.

D. Canadian Legal Framework Governing the Assignment of Receivables

In Canada, the legal framework governing the financing of receivables is an aspect of "Property and Civil Rights" and therefore falls within the exclusive legislative jurisdiction of the Provinces under section 16 of *The Constitution Act, 1867*. However, the federal Parliament has a limited power to legislate in the area ancillary to matters falling within federal legislative jurisdiction. Thus, the *Financial Administration Act* restricts the assignability of receivables owing by the federal Crown[11] while the *Bankruptcy and Insolvency Act*[12] nullifies

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[5] Art. 2(a).
[6] Id.
[7] Art. 5(a).
[8] Art. 2(a).
[9] Id.
[10] Id. As between the assignor and the assignee, non-monetary claims convertible to money, including claims to returned goods, are also within the Convention, provided that they take the place of the assigned receivables: see art. 14 (1) (a) - (b).
[11] *Financial Administration Act*, R.S.C. 1985, c. F-11 s. 67.
[12] *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3

an assignment of wages or professional fees in respect of the post-bankruptcy income of the assignor[13] as well as a general assignment of receivables not collected at the point of bankruptcy unless, in the case of the latter, the assignment is registered pursuant to provincial law.[14] The operation of these provisions is not affected by the Convention.[15] Nonetheless, federal implementing legislation is necessary in view of the existence of federal legislative power in relation to the subject matter of the Convention.

In the common law provinces and the three territories, the *Personal Property Security Act* (PPSA)[16] governs the creation, conflict of laws, perfection, and priority aspects of an assignment of receivables by way of both security and sale.[17] The PPSA also codifies, and to some extent, modifies the common law rules governing the relationship between the assignee of a receivable and the debtor on the receivable.[18] These provisions are informed and supplemented by the common law (including equitable principles) and by long-standing legislation recognizing the effectiveness of an "equitable assignment" at law.[19]

In Quebec, the primary source of the relevant law is the Civil Code.[20] Assignments by way of security (hypothecs on claims) are dealt with in Book 6, Title II;[21] sale assignments (assignments in the strict Code sense) are dealt with in Book 5, Title I, Chapter VII, Section I.[22] These provisions are informed and supplemented by the general provisions of the Code on property, contractual obligations, and compensation (set-off).

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[13] Id. s. 68.1.
[14] Id. s. 94.
[15] Art. 8(3) of the Convention preserves the operation of statutory restrictions on assignments.
[16] In order of implementation, see: Ontario, 1976 (SO 1967, c. 73, in force 1 Apr 1976, replaced by SO 1989, c. 16, in force 10 Oct 1989); Manitoba, 1978 (SM 1973, c. 5, in force 1 Sept 1978, see now R.S.M. 1987, c. P35); Saskatchewan, 1981 (SS 1979-80, c. P-6.1, in force 1 May 1981, replaced by SS 1993, c. P-6.2, in force 1 Apr 1995); Yukon Territory (OYT 1980, c. 20, 2d Sess, in force 1 June 1982, see now RSY 1986, c. 130); Alberta (SA 1988, c. P-4.05, in force 1 Oct 1990); British Columbia (SBC 1989, c. 36, in force 1 Oct 1990); New Brunswick, 1995 (SNB 1993, c. P-7.1, in force 18 Apr 1995); Nova Scotia, 1997 (SNS 1995-96, c. 13, in force 3 Nov 1997); Prince Edward Island, 1998 (SPEI 1997, c. 33, in force 27 Apr 1998); Newfoundland, 1999 (SN 1998, c. P-7.1, in force 13 Dec 1999); Northwest Territories (S.N.W.T. 1994, c. 8, in force 7 May 2001); Nunavut (Nunavut Consolidated Acts, in force 7 May 2001). In citing the various provincial and territorial versions of the PPSA in this Report, the authors will use A for Alberta, BC for British Columbia, M for Manitoba, NB for New Brunswick, NL for Newfoundland and Labrador, NWT for Northwest Territories, Nu for Nunavut, NS for Nova Scotia, O for Ontario, PEI for Prince Edward Island, S for Saskatchewan, and Y for the Yukon Territory.
[17] The PPSA deems a sale of accounts or chattel paper to be a security interest subject to the same creation, perfection, priority and conflict of laws rules that apply to true security interests in these types of collateral: see PPSA (A, M, NB, PEI, S) s. 3 (2); (NL, NS) s. 4 (2); (NWT, N) s. 2 (2); BC s. 3. See also the definition of "security interest": PPSA (A, BC, NWT, N, O, Y) s. 1 (1); (M, NB, PEI) s. 1; (NL, NS) s. 2; S s. 2 (1).
[18] PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41; (NL, NS) s.42; O s.40; Y s.39.
[19] See e.g. *Judicature Act*, R.S.A. 2000, c. J-2, s. 20; *Law and Equity Act*, R.S.B.C. s. 32; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53.
[20] S.Q. 1991, c. 64, in force 1 Jan. 1994.
[21] See, in particular, CcQ arts. 2710-2713; 2743-2747.
[22] See, in particular, CcQ arts. 1637-1646.

E. Structure of the Report

Part II of this Report provides an overview of the scope of application of the Convention.

With the exception of the issues addressed in Part IV, Part III compares the provisions of the Convention with the laws of the Canadian provinces and territories. Although minor differences exist, the authors have concluded that there is no real risk of substantial conflict and therefore do not recommend any modifications to Canadian law on the issues covered in this Part.

Part IV focuses on what the authors consider to be the two most significant issues addressed by the Convention. The first is the efficacy of an anti-assignment clause, that is, a clause in the original contract between the assignor and debtor that purports to prohibit or restrict the assignability of any receivables generated by the contract (and any accessory security rights). The second is the choice of law rule for priority. The authors conclude their discussion of these two issues with recommendations for modification of the Civil Code and the PPSA to bring them into harmony with the Convention (and, just as importantly, with each other).

Part V examines the optional parts of the Convention: the "mini-convention" on conflict of laws and the annex on substantive priority rules. The authors conclude their discussions with a recommendation that Canada *not opt out* of the mini-Convention and *not opt in* to the Annex.

Part VI concludes with a general recommendation in favour of the enactment of implementing legislation at the federal, provincial and territorial levels together with the enactment of the complementary modifications to the Civil Code and the PPSA recommended in Part IV of the Report.

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II. SCOPE OF APPLICATION OF THE CONVENTION

A. The *Internationality* Requirement

In order for the Convention to apply, the assignment must be international or it must involve the assignment of international receivables.[23] An *international assignment of receivables* is defined as one entered into between an assignor and an assignee who are located in different States at the time the contract of assignment is concluded.[24] An *assignment of an international receivable* is defined as the assignment of a receivable which, at the time it arises, involves an assignor and a debtor who are located in different States.[25]

The threshold requirement for internationality does not mean that the Convention would not affect assignees under a purely Canadian assignment. First, the Convention applies to subsequent sub-assignments that do not independently satisfy the internationality criteria so long as any prior assignment in the chain does

[23] Art 1(1).
[24] Art 3.
[25] Art.3.

so,[26] as well as to prior assignments that do not independently satisfy the internationality criteria so long as a subsequent sub-assignment does so.[27] Second, the choice of law rule for priority established by the Convention[28] applies to any dispute between an assignee under an assignment governed by the Convention and a *competing claimant*, a category that is defined to include another assignee of the same receivable from the same assignor even if the assignment under which the competing assignee claims does not independently satisfy the criteria for internationality.[29]

C. Territorial Scope

If an assignment qualifies under the criteria just outlined, the application of the Convention is triggered if the assignor is located in a Contracting State.[30] However, in the interests of protecting the rights of the debtor under the original contract, the provisions of the Convention that affect the debtor's rights and obligations are inapplicable unless the debtor is also located in a Contracting State or the law governing the original contract between the assignor and debtor is the law of a Contracting State.[31]

D. Exclusions and Limitations

Although the Convention covers most types of contract-generated receivables, assignments made to an individual as assignee for that individual's consumer purposes are excluded,[32] as are assignments made as part of the sale or change in the ownership or legal status of the business out of which the receivables arose.[33] The Convention also excludes what may loosely be termed "financial receivables," more specifically, receivables arising from bank deposits, letters of credit or independent guarantees, foreign exchange and swap transactions, and sales of indirectly-held securities.[34] In some legal systems, including the United States, these transactions are subject to special rules that differ from those that apply to ordinary trade receivables, particularly on the critical issues of the effectiveness of "anti-assignment" clauses and choice of law for priority.

In several cases, the Convention defers to otherwise applicable law to the extent it gives different or superior rights. Thus, the Convention applies to the assignment of consumer receivables (for example, credit card receivables) but does not override otherwise applicable consumer protection law so far as this protects

[26] Art. 1 (1)(b).
[27] Art. 1 (2).
[28] Art. 22.
[29] Art 5(m)(i).
[30] Art 1(1)(a).
[31] Art. 1(3). This qualification is consistent with the choice of law rule in art. 29 of the Convention under which the rights and obligations of the assignee and the debtor *inter se* are governed by the law that governs the relationship between the assignor and the debtor.
[32] Art. 4(1) (a).
[33] Art. 4(1) (b).
[34] Art. 4(2).

the rights and obligations of the assignor and debtor (for example, limitations on the effectiveness of the debtor's waver of her defences and rights of set-off under the original contract[35]).[36] Similarly, while the Convention applies to the assignment of receivables arising from negotiable instruments, it does not prejudice or otherwise affect the rights and obligations of any person under any otherwise applicable law governing negotiable instruments (for example, the protection afforded to a holder in due course).[37] A similar rule applies to an assignment of land-related receivables.[38] Finally, the Convention does not interfere with statutory (as opposed to contractual) restrictions on the assignability of receivables (for example, restrictions on the assignability of wages[39] and Crown debts[40]).[41]

III. COMPARATIVE OVERVIEW

A. Assignment of Multiple and Future Receivables and Parts of Receivables

The Civil Code[42] and the PPSA[43] recognize the effectiveness of an assignment of multiple and future receivables, and parts of receivables, through a single act of assignment. This policy is replicated in the Convention.[44] The relevant provision is worded in the negative: an assignment is not ineffective between the parties and may not be denied priority against the debtor or competing claimants solely on the ground that it involves multiple or future receivables or parts of receivables. This drafting style is designed to preserve any requirements imposed on an assignor by otherwise applicable law to perform some additional step in order for the assignment to take effect against competing claimants. As a general rule, publication is a pre-condition to the third party effectiveness of an assignment under the Civil Code.[45] The PPSA similarly

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[35] See e.g. *Law of Property Act*, R.S.A. 2000, c.L-7, s. 52(2).
[36] Art. 4(4).
[37] Art. 4(3).
[38] Art. 4(5).
[39] See e.g. *Assignment of Wages Act* S.S. 1998, c.C-45.2, s. 3.
[40] See e.g. *Financial Administration Act*, R.S.C. 1985, c. F-11, s. 67*; Financial Administration Act*, S.A. c. F-12, s. 94.
[41] Art. 8(3).
[42] CcQ arts. 1637 (para 1), 1642, 2666, 2670.
[43] PPSA (A, BC, M, NB, Nu, NWT, PEI, S) s. 13(1); (NL, N) s. 14(1); O s. 12(1); Y s. 11(3). The PPSA does not specifically address the assignability of parts of receivables but their assignability is established as a matter of case law: see e.g. *Re Paddle River Construction Ltd.* (1961), 35 W.W.R. 605 (Alta. T.D.).
[44] Arts. 8(1)-(2).
[45] CcQ arts. 1642, 2663, 1642, 2663. The Civil Code creates an exception to the requirement for publication in the case of an outright assignment (as opposed to a hypothec) of specific receivables. In this instance, the assignment takes effect, not just against the debtor, but also against third parties, upon acquiescence in the assignment by the debtor or notification of the assignment to the debtor: CcQ art. 1641. . Note, however, that the Supreme Court of Canada has ruled that a hypothec on a receivable can be published by delivery (as opposed to having to be published by registration) provided that the debtor transfers effective control of the receivable to the hypothecary assignee by giving the assignee the right to collect directly in the event of default, and provided that the necessary steps are taken so that the hypothec may be set up against the debtor: *Re Blouin* (*sub nom. Caisse Populaire Desjardins de Val-Brillant v. Blouin*), [2003] 1 S.C.R. 666. As the Court observed, for a hypothec on a receivable to be set up against the debtor, all that is required is that the debtor either acquiesce in the hypothec or receive a copy or pertinent extract

requires that an assignment be perfected in order for it to take effect against most categories of third parties.[46] These rules are preserved to the extent the Civil Code and the PPSA constitute the law applicable to the assignee's priority under the choice of law rule of the Convention.[47]

B. Mutual Rights and Obligations of the Assignor and Assignee

Under the Civil Code and the PPSA, the general principle of freedom of contract applies to the parties to a contract of assignment. [48] While the Convention adopts the same principle,[49] it goes on to provide that certain usages and representations form part of the agreement between the assignor and assignee in the absence of contrary agreement. In particular:

- The parties are considered to have implicitly "made applicable to the assignment a usage that in international trade is widely known, and regularly observed by, parties to the particular type of assignment or to the assignment of a particular category of receivables."[50]
- The assignor is considered to represent that it has the legal right to assign the receivable, that the receivable has not previously been assigned to another assignee, and that the debtor does not and will not have any defences or rights of set-off.[51]
- The assignor does *not* represent that the debtor has, or will have, the financial ability to pay.[52]

The laws of Quebec and the other provinces and territories do not formally establish an equivalent list of implied terms.[53] However, the authors are of the view that they reflect reasonable commercial expectations; in any event, the parties remain free to establish contrary terms where desired in a particular case.

The Convention also recognizes that the assignee has the right, *as against the assignor*, to retain any

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or other evidence of the hypothec: see arts. 2710 (para. 2), 1641. The effect of this ruling is therefore to minimize any real difference between the requirements for effectiveness against third parties applicable to outright and security assignments of specific receivables.

[46] PPSA (A, BC M, NB, NWT, N, O, PEI, S) s. 19; (NL, NS) s. 20; Y s. 18. In addition, a perfected assignment has priority over an unperfected assignment: PPSA (A, BC, M, NB, NWT, Nu, PEI, S), s.35(1); (NS, NL) s.36(1), O s. 30(1); Y, s. 34(1).

[47] Art. 22.

[48] PPSA (A, BC, M, NB, Ont, PEI, Nu, NWT, S) s. 9; (NL, NS,) s. 10. The Yukon PPSA does not have any equivalent provision but the same principle follows from the general law of contract. This is also the case for the Civil Code: see arts. 1385-1386.

[49] Arts. 11(1) – (2).

[50] Art. 11(3).

[51] Art. 12(1).

[52] Art. 12(2).

[53] Note, however, that under art. 1640 of the Civil Code, where the assignor "guarantees the solvency of the debtor by a "simple clause of warranty, he is liable for the solvency only at the time of the assignment and to the extent of the price he received." Note further that under art. 1639 of the Code, the assignor is presumed to guarantee that the assigned receivable "exists, and is owed to him, even if the assignment is made without warranty, unless the assignee has acquired it at his own risk or knew of the uncertain nature of the claim at the time of the assignment.".

proceeds[54] of payment of the assigned receivable collected from the debtor[55] and the right to claim and retain any proceeds paid to the assignor[56] or to any another person (e.g. a competing assignee) over whom the assignee has priority under the applicable law.[57] The assignee's right is limited to the value of its right in the assigned receivable (a relevant qualification in the context of a security assignment)[58] and is subject to any contrary agreement of the parties. These rules are compatible with the general legal framework governing assignment in Quebec[59] and in the common law provinces and the territories.

The issue of whether the assignee can claim or retain the proceeds of receivables as against a competing claimant is governed, not by the Convention itself, but by the law applicable to priority as determined by the choice of law rule of the Convention.[60] So too is the issue of whether the assignee's right to the proceeds of receivables vests *in rem* or in *personam* to the extent that this characterization may be relevant at the level of priorities (for example, in the assignor's insolvency). [61]

C. Preservation of Debtor's Defences and Rights of Set-Off

The Convention confirms the widely accepted principle that an assignment - in the absence of the debtor's consent - does not affect the debtor's rights and obligations, including the payment terms, under the original contract, except as expressly stipulated by law.[62] This principle is replicated in the Civil Code[63] and is well-established in the legislation and case law of the other provinces and territories.[64]

The operation of this general principle requires elaboration in the context of the debtor's defences and rights of set-off as against the assignee. The Convention provides that the debtor may raise against an assignee "all defences or rights of set-off arising from the original contract, or any other contract that was

[54] Art. 5(j) of the Convention defines proceeds as follows: "Proceeds means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods."
[55] Art. 14(1)(a).
[56] Art. 14(1)(b).
[57] Art. 14(1)(c). On choice of law for priority, see art. 22.
[58] Art. 14(2).
[59] For security assignments, see in particular arts. 2743-2747 of the CcQ.
[60] Unless the proceeds themselves take the form of a receivable so as to come within article 22, the Convention does not supply any choice of law guidance on the relevant applicable law. This will depend on the choice of law rules of the forum applicable to the particular category of proceeds.
[61] Art. 5(g) of the Convention defines "priority" to mean "the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied."
[62] Art. 15(1).
[63] CcQ. art. 1637 (para. 2).
[64] The principle that the assignee steps into the shoes of the assignor and thus takes subject to the "equities" between the assignor and the debtor is codified in legislation in the case of legal assignments: see e.g. *Judicature Act*, R.S.A. 2000, c. J-2, s. 20; *Law and Equity Act*, R.S.B.C. s. 32; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53. However, the case law confirms that the same principle applies to equitable assignments: see e.g. *Best v. Beatty* (1920), 61 S.C.R. 576 (S.C.C.); *Royal Bank v. Schaffner* (1909), 44 N.S.R. 89 (C.A.).

part of the same transaction, of which the debtor could avail itself if the assignment had not been made and such claim were made by the assignor."[65] The position with respect to rights of set-off that are unrelated to the original transaction is different: the debtor is entitled to raise rights of set-off unrelated to the original contract or transaction only if they were available to the debtor at the time notification of the assignment was received.[66]

Although the rules are formulated somewhat differently, the result under the Civil Code is generally the same as under the Convention.[67] This is also the case for the PPSA with one possible qualification applicable to the non-Ontario versions of the Act.[68] Whereas the Convention, the Civil Code and the Ontario PPSA contemplate that the debtor's right to set off unrelated claims terminates only upon receipt of formal notification of the assignment, acquisition of knowledge by the debtor is sufficient under the non-Ontario versions of the PPSA.[69]

D. Effectiveness of Waiver of Defences and Rights of Set-off by the Debtor

The Convention sanctions the effectiveness of an agreement between the debtor and assignor not to raise against an assignee defences and rights of set-off that it would be entitled to raise against the assignor, provided that the agreement is in a writing signed by the debtor.[70] Two defences are expressly declared to be non-waiveable: fraud on the part of the assignee and defences based on the debtor's incapacity.[71]

The policy of the Convention on this issue is compatible with the Canadian position. The Civil Code prevents a debtor who has "acquiesced unconditionally" in an assignment from raising rights of set-off against the assignee that he could have raised against the assignor before the debtor acquiesced.[72] The PPSA provides that the account debtor's rights may be modified by an "enforceable agreement" not to assert defences or claims arising out of the contract.[73] Although the Act does not define what constitutes an enforceable agreement for this purpose, waiver of defence agreements have been rendered ineffective by statute only in the consumer context.[74] Such restrictions would not be affected by implementation of the Convention since it preserves the continued application of consumer protection legislation.[76] So far as the

[65] Art. 18(1).
[66] Art. 18(2).
[67] CcQ arts. 1637, 1641 (para 1), 1680 (para 2).
[68] PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41(2); (NL, NS) s.42(2); O s.40(1); Y s.39(1).
[69] Whereas the non-Ontario versions of the PPSA preserve unrelated defences and claims that accrue before the debtor "acquires knowledge" of the assignment, the Ontario Act refers to the receipt of notice of the assignment: PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41(2); (NL, NS) s.42(2); O s. 40(1); Y s.39(1).
[70] Art. 19(1).
[71] Art. 19(2).
[72] CcQ art. 1680.
[73] PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41(2); (NL, NS) s.42(2); O s.40(1); Y s.39(1).
[74] See e.g. *Law of Property Act*, R.S.A. 2000, c.L-7, s. 52(2).
[75] Art. 4(4) states that nothing in the Convention "affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household

common law is concerned, the cases establish that a waiver agreement is not binding on the debtor if vitiated by fraud[77] or if the assignor lacks status to sue the debtor on the assigned receivable.[78] As noted in the preceding paragraph, both these defences are expressly preserved by the Convention.

E. Post-Notification Modification of the Original Contract

The Convention provides guidance on the effectiveness, as against the assignee, of an agreement between the assignor and the debtor that modifies their original contract in a manner that affects the assignee's rights. A modification concluded before the debtor receives notice of the assignment is effective as against the assignee, and the assignee acquires corresponding rights.[79] After notification, a modification that affects the assignee's rights is ineffective unless: (a) the assignee consents to it; or (b) the receivable is not fully earned by performance and modification is provided for in the original contract or a reasonable assignee would consent to the modification.[80]

The Convention rule on this issue is consistent with the approach taken by the PPSA. At common law it seems that a post-notification modification of the original contract is not binding on the assignee. In the interests of maintaining flexibility where the original contract remains executory, the strictness of this rule was modified by the PPSA to make "a modification of or substitution" of the original contract effective against the assignee, notwithstanding notification, *provided* it is made "in good faith and in accordance with reasonable commercial standards and without material adverse effect on the assignee's rights under the contract or the assignor's ability to perform the contract."[81] If these conditions are satisfied, the authors are of the view that a "reasonable assignee would consent to the modification" so as to also render the modification effective against the assignee under the formulation used in the Convention.

The Convention preserves the rights of the assignee against the assignor for breach of any agreement between them that the assignor will not modify its original contract with the debtor, even where such a modification is rendered effective between the assignee and the debtor under the provisions outlined above.[82] The PPSA similarly preserves the assignee's right to claim damages against the assignor for breach of the assignor's undertaking not to modify the contract with the debtor.[83]

The Civil Code does not address this issue explicitly but he Convention rule is compatible with the

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purposes.".

[76] Art. 4(4) states that nothing in the Convention "affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household purposes.".

[77] *Hamilton v. Railton*, [1925] 3 D.L.R. 1090 (Sask. C.A.).

[78] *Arbutus Garden Homes Ltd. v. Arbutus Garden Apartments Corp.*, [1996] 7 W.W.R. 338 (B.C.S.C.); supplemented (1996), 4 C.P.C. (4th) 238 (B.C.S.C.)

[79] Art. 20(1).

[80] Art. 20(2).

[81] PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(3)-(4); A, s.41(3); (NL, NS) s.42(3)-(4); O s.40(3); Y s.39(2).

[82] Art. 20(3).

general legal framework governing assignments.[84]

F. Right to Notify and Give Payment Instructions to the Debtor

An assignee may sometimes wish to give notification for the purposes of freezing the debtor's right to set off unrelated claims and to modify the original contract without wishing to change the debtor's obligation to continue paying the assignor. This practice is reflected in the distinction drawn by the Convention between notification of the assignment and a payment instruction.

Under the Convention, both the assignor and the assignee have the right to send the debtor notification of the assignment and to issue payment instructions.[85] However, once the debtor has been notified of the assignment, only the assignee can issue payment instructions.[86]

The assignor and assignee are free to agree to a different arrangement, and the Convention preserves the personal liability of the party in breach of such an agreement for damages caused to the other party.[87] However, the notification remains effective as against the debtor.[88]

The Convention rules on this point are compatible with the general legal framework of assignment law in Quebec and in the other provinces and the territories.

G. Form of Notification of Assignment or Payment Instruction

Under the Convention, a notification of an assignment or payment instruction to the debtor must be contained in a writing that "reasonably identifies the assigned receivables and the assignee."[89] It is effective only on receipt by the debtor and only if it is in a language that can reasonably be expected to inform the debtor about the contents of the communication.[90] To alleviate uncertainty on what constitutes compliance, a communication sent in the language of the original contract is presumptively sufficient.

Compatibly with the Convention, the PPSA requires the sending of a formal notice of assignment that identifies the assigned receivables.[91] The Civil Code similarly contemplates that notification of the assignment to the debtor will be accompanied by "a copy of the deed of assignment" or other "evidence of

[83] PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(6); A s.41(4); (NL, NS) s.42(6); Y s.39(2); O no equivalent provision.
[84] In the case of a security assignment, art 2733 of the CcQ would lead to the same result as under the Convention.
[85] Art. 13(1).
[86] Art. 13(1).
[87] Art. 13(2).
[88] Art. 17.
[89] Art. 5(d). As noted earlier, however, it is not clear under the non-Ontario Acts whether formal notification is needed in order to cut-off the debtor's right to raise defences and claims unrelated to the original contract. Whereas the Ontario Act preserves unrelated defences and claims that accrue before the debtor receives notice of the assignment, the non-Ontario versions of the Act refers simply to the acquisition by the debtor of "knowledge" of the assignment: PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41(2); (NL, NS) s.42(2); O s. 40(1); Y s.39(1).
[90] Art. 16.
[91] PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(7); A s.41(5); (NL, NS) s.42(7); O s.40(2); Y s.39(4).

the assignment."[92]

H. Impact of Notification on Debtor's Right to Discharge by Payment

The Convention embodies the widely-accepted principle that before notification of an assignment, the debtor is entitled to discharge its obligation by paying in accordance with the original contract, but that after notification, the debtor obtains discharge only by paying the assignee unless "otherwise instructed."[93] The PPSA codifies essentially the same rule.[94] While the formulation is different in the Civil Code, the result is generally the same[95] with one qualification. The Code gives the debtor the right to set up against the assignee "any payment made in good faith by himself or his surety to any apparent creditor" even after notification of the assignment.[96] Although the Convention does not provide an equivalent right, it does give the debtor the right to require a putative assignee to supply adequate proof of the assignment within a reasonable period of receipt of notice, failing which the debtor is discharged by paying the assignor.[97]

If the debtor receives notification of the assignment of only a part of a receivable, the Convention relieves the debtor from the burden of having to work out the appropriate allocation of payments as between the assignor and assignee, or between multiple assignees of different parts of the receivable. The debtor may discharge its debt either by paying in accordance with the notification or by paying in accordance with the Convention as if no notification had been received (i.e. by paying in accordance with the original contract).[98] Neither the Civil Code nor the laws of the other provinces and the territories recognize an equivalent exception. However, the authors do not believe that this difference will create significant problems in practice: assignees can protect themselves by requiring the assignor to obtain the agreement of the debtor to pay the assignee directly on notification or by monitoring the receipt of payments made by the debtor to the assignor.

I. Multiple Notifications or Payment Instructions

If the debtor receives notification of more than one assignment of the same receivable by the same assignor, the Convention provides that payment in accordance with the first notification received discharges

[92] CcQ arts. 1641 (para 1), 2710 (para 1).
[93] Art 17(1)-(2).
[94] PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(7)-(8); A s.41(5)-(6); (NL, NS) s.42(7)-(8); O s.40(2); Y s.39(4).
[95] CcQ arts. 1643, 2745.
[96] CcQ art. 1643(para 2).
[97] Art. 17(7). The PPSA similarly entitles the debtor to demand adequate proof of an assignment, failing which the debtor may continue to pay in accordance with the original contract: PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(7); A s.41(5); (NL, NS) s.42(7); O s.40(2); Y s.39(4). Some of the Acts require proof within a reasonable period of time compatibly with the Convention approach. Most set a fifteen day period for response.
[98] Art. 17(6).

the debtor.[99] This rule is designed to relieve the debtor from the burden of having to investigate the relative priority rights of competing claimants. The Convention also deals with the related issue of successive payment instructions relating to a single assignment: the debtor obtains a valid discharge if payment is made in accordance with the most recent payment instruction received from the assignee.[100]

The Convention also deals with multiple notifications in the case of subsequent assignments (i.e. sub-assignments in single chain). Here, the debtor is discharged only by payment in accordance with the notification of the *last* assignment.[101] In cases of doubt, the debtor can invoke her general right under the Convention to demand adequate proof of the assignment, and any chain of assignments, within a reasonable period of notification, failing which she is discharged by paying the assignor.[102]

Neither the Civil Code nor the PPSA expressly address the question of discharge in the event that a debtor receives multiple notifications or payment instructions.[103]

J. Assignee's Affirmative Liabilities to the Debtor under the Original Contract?

The Convention provides that the failure of the assignor to perform the original contract does not entitle the debtor to recover any contract payments already made to the assignee.[104] The purpose of this provision is to protect an assignee from a positive claim for reimbursement by the debtor in the event that the assignor fails to perform the original contract. In practice, the rule is intended to cover cases where the assignment involves a series of installment payments, and the debtor seeks to recover from the *assignee* an installment already paid (to either the assignee or the assignor) because of the assignor's failure to perform on the next installment. The operation of this provision is subject to any applicable consumer protection laws.[105]

It is unclear whether this provision of the Convention is compatible with Canadian laws; arguably it is not. The Civil Code provides that an assignment cannot render the debtor's obligations "more onerous";[106] this could be construed in a way that permits a claim for restitution against the assignee. In the common law provinces and the three territories, the position is also unclear. The Convention rule is arguably consistent with the common law position that an assignee acquires the assignor's rights, subject to the debtor's defences and rights of set-off as against the assignor, but is not affirmatively liable for the assignor's breaches.

[99] Art. 17(4).
[100] Art. 17(3).
[101] Art. 17(5).
[102] Art. 17(7). The PPSA similarly entitles the debtor to demand adequate proof of an assignment, failing which the debtor may continue to pay in accordance with the original contract: PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(7); A s.41(5); (NL, NS) s.42(7); O s.40(2); Y s.39(4). Some of the Acts require proof within a reasonable period of time compatibly with the Convention approach. Most set a fifteen day period for response.
[103] Note, however, that a debtor who receives notice of a competing claim is entitled (but not required) to compel the parties to interplead with respect to their rights: see e.g. *Judicature Act*, R.S.A. 2000, c. J-2, s. 20; *Law and Equity Act*, R.S.B.C. s. 32; *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C.34, s. 53.
[104] Art. 21.
[105] Art 4(4).
[106] Art. 1637 CcQ.

However, it is arguably inconsistent with the position under the PPSA.[107]

K. Automatic Transfer of Accessory Guarantees and Other Security Rights

The Convention provides that an assignment of a receivable transfers to the assignee any personal or property rights securing payment of the assigned receivable without the need for a new act of transfer.[108] Thus, if payment of the assigned receivable is guaranteed by a third person or is secured by a security interest in other property, the assignee automatically acquires the benefit of these accessory security rights.

The Convention policy on this issue is replicated in the Civil Code rule that the "assignment of a claim includes its accessories."[109] With respect to the other provinces and the territories, it is clear from the cases that the benefit of a guarantee or other security right may be assigned along with the guaranteed receivable.[110] In the absence of an express assignment, it may still be possible for the assignee to establish as a matter of contractual construction that the assignment of the receivable incorporated an assignment of any accessory security rights.[111] Thus, the Convention rule departs from the common law approach only to the extent that it transforms a rule of construction into a rule of law.

IV. ANTI-ASSIGNMENT CLAUSES AND CHOICE OF LAW FOR PRIORITY

A. Contractual Restrictions on Assignment of Receivables and Accessory Security Rights

Under the Convention, an assignment of a receivable is effective even if a term in the original contract purports to prohibit or restrict its assignment (an anti-assignment clause).[112] The debtor retains a right of action against the assignor for breach of the term, but the assignment itself is valid, both as between the parties, and as against the debtor. This scope of application of this provision of the Convention is limited to what might loosely be called ordinary trade receivables.[113] For other categories of receivables, law outside

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[107] The PPSA provides that the assignee is subject to all the *terms* of the original contract and all defences or *claims* arising therefrom (emphasis added): see.PSA (A, BC, M, NB, NWT, Nu, PEI, S) s.41(2); (NL, NS) s.42(2); O s.40(1); Y s.39(1). The Ontario branch of the Canadian Bar Association has recommended that the Ontario PPSA be amended to confirm that the Act is not intended to alter the common law position relieving the assignee from affirmative liabilities to the debtor: *Submission to the Minister of Consumer and Commercial Relations Concerning the Personal Property Security Act* (Toronto: Canadian Bar Association – Ontario, 21 Oct 1998) at 18-19.

[108] Art. 10(1).

[109] CcQ art. 1638.

[110] See e.g. *West v. Soon* (1915), 9 W.W.R. 644 (Sask. C.A.).

[111] *Re Hallett & Co.*, [1894] 2 Q.B. 256 (C.A.).

[112] Art. 9. Art. 18(3) further confirms that breach by the assignor of an anti-assignment clause does not constitute a defence or give rise to a right of set-off if the assignee claims payment of the receivable from the debtor. Note that the debtor's personal rights of action against the assignor do not include the right to avoid the original contract on the sole ground of the breach of the anti-assignment agreement and the assignee is not liable towards the debtor on the sole ground that it had knowledge of the anti-assignment agreement between the assignor and the debtor: art. 9(2).

[113] The application of art. 9(3) is expressly limited to assignment of receivables arising from the following types of

the Convention will continue to determine the effects of an anti-assignment clause.

The Convention policy reflects the general position under most versions of the PPSA except for assignments of parts of receivables where the common law position continues to apply.[114] In Ontario, and with respect to assignments excluded from the PPSA in the other PPSA jurisdictions, the common law rule applies. At common law, an assignment in breach of an anti-assignment clause is still valid as between the parties, but cannot be enforced by the assignee directly against the debtor.[115] However, the Ontario Branch of the Canadian Bar Association has recommended amendments designed to bring the Ontario PPSA into conformity with the more liberal policy found in the other Acts on this point.[116]

The Convention rule arguably reflects the position in Quebec. The validity and effects of anti-assignment clauses are not addressed explicitly in the Code. However, there is strong support in the doctrine for the position that an assignment in breach of an anti-assignment clause is nonetheless effective against the debtor by virtue of the long-standing Code policy against restraints on the alienation of property.[117]

As noted earlier, the Convention provides that an assignment of a receivable automatically transfers to the assignee any personal or property rights securing payment of the assigned receivable.[118] The Convention further provides that the automatic transfer remains operative, where the assignment involves ordinary trade receivables, notwithstanding an anti-assignment clause in any agreement between the assignor and the debtor or the person granting the accessory security right.[119] The debtor retains a right of action against the assignor for breach of the anti-assignment clause, but the transfer of the accessory security right is effective, both as between the assignor and assignee, and as between the assignee and the debtor.[120]

The Convention rule on this point departs from the existing law in the common law provinces and the territories, and arguably also in Quebec. However, the authors are of the view that it represents a natural and useful extension of the policy against contractual restrictions on the alienation of trade receivables.

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transactions: the supply or lease of goods or services other than financial services; construction contracts; contracts for the sale or lease of real property; credit card transactions; the sale, lease or licensing of intellectual property or information; and close-out payments under multi-party netting arrangements.

[114] PPSA (BC, M, NB, NWT, Nu, PEI, S) s.41(9) A s.41(7); (NL, NS) s.42(9).

[115] See *Rodaro v. Royal Bank of Canada* [2000] [QL] O.J. 272, approving *Yablonski v. Cawood* (1997), 143 D.L.R. (4th) 65 at 76 (Sask. C.A.) (which held that even if a contract contains a prohibition on assignment, the assignment is still effective as between assignor and assignee; such a prohibition merely prevents the assignee from having direct recourse against the non consenting party to the assigned contract). These cases reflects the position under the English common law: see Roy Goode, *Commercial Law*, 2d ed. (Penquin: 1995) at 815-16 and footnote 42.

[116] See *Submission to the Minister of Consumer and Commercial Relations Concerning the Personal Property Security Act* (Toronto: Canadian Bar Association – Ontario, 21 Oct 1998) at 19-20.

[117] CcQ arts. 1212-1217. See Louis Payette, "Les Sûrétes Réeles dans le Code Civil du Québec" Cowansville (QC): Editions Yvon Blais, 2nd ed. at , 25ff, 45ff and 451ff). This is the theory in France and Italy : see Hein Kötz, "Rights of Third Parties: Third Party Beneficiaries and Assignment" Chap 13, Vol VII, *International Encyclopedia of Comparative Law* (J.C.B. Mohr (Paul Siebeck), Tübingen, and Martinus Nijhoff, Dorderecht, Boston, Lancaster: 1990) at 64-65.

[118] Art. 10(1).

[119] Art. 10(2), 10(4).

[120] Arts. 10(3), 18(3).

Recommendation

At its 2003 meeting, the Uniform Law Conference of Canada adopted the following recommendations (the language of which has been adapted to conform to the terminology used in this Report):

- *That the Ontario PPSA be amended to recognize the effectiveness of an assignment of receivables as against the debtor notwithstanding the presence of an anti-assignment clause in the original contract giving rise to the receivable;*
- *That the other versions of the PPSA be amended to expressly confirm the effectiveness of an assignment of parts of a receivable notwithstanding the presence of an anti-assignment clause in the original contract giving rise to the receivable;*
- *That the Civil Code be amended to expressly confirm the effectiveness of an assignment of receivables, notwithstanding the presence of an anti-assignment clause in the original contract giving rise to the receivable.*

Adoption of these recommendations would bring the PPSA and the Civil Code into line with the Convention rule on anti-assignment clauses while also achieving their initial objective of promoting harmonization within Canada. The authors therefore recommend implementation of these recommendations as a prelude to the implementation of the Convention.

The authors further recommend that the PPSA be amended to provide that the assignment of a receivable automatically carries with it the transfer of any accessory security rights, and that both the PPSA and the Civil Code be amended to provide that such a transfer is effective notwithstanding the presence of an anti-assignment clause in any agreement between the assignor and the debtor or third party guarantor or secured creditor.

B. Law Applicable to Priority

The priority of an assignee's interest in receivables against competing claimants is the single issue on which there is the greatest disharmony in assignment law among legal systems. Virtually all regimes adopt a first-in-time rule, at least as a starting point, but differ on the relevant event.[121] Some require notice of an assignment to be registered in a public registry to take effect against third parties, with ranking against competing claimants generally dependant on the time of registration (this of course is the general rule in the Canadian provincial and territorial regimes). In others, priority turns simply on when the assignee reached agreement with the assignor. In still others, an assignment is not effective against third parties until the debtor is either notified of or accepts the assignment, and the first assignee to give notice prevails. Even among jurisdictions that adopt the same general theory, there is considerable variation on the qualifications and exceptions.

The Working Group charged with preparing the Convention initially explored the possibility of a registration-based substantive priority rule backed by an international assignments registry. However, it became apparent that this solution was unworkable in the absence of a multilateral consensus on a

[121] Hein Kötz, "Rights of Third Parties: Third Party Beneficiaries and Assignment" Chap 13, Vol VII, *International Encyclopedia of Comparative Law* (J.C.B. Mohr (Paul Siebeck), Tübingen, and Martinus Nijhoff, Dorderecht, Boston, Lancaster: 1990) at 93-99.

registration based priority theory at the purely domestic level, and on the exceptions and qualifications that should be made to that theory.

Faute de mieux, the Convention instead seeks international uniformity at the choice of law level. The priority of an assignee's right in the assigned receivable against competing claimants is governed by the law of the State in which the assignor is located[122] subject to the preservation of statutory non-consensual preferences applicable under the law of the forum in which insolvency proceedings are commenced.[123] The practical demands of modern receivables financing informed this solution. Application of the assignor's law is the only approach capable of supplying a single predictable governing law for the global assignment of multiple receivables owing by debtors in different states and for the assignment of future receivables.

The Convention defines the range of issues captured by the concept of "priority" in broad terms to include publication and perfection and all issues relating to the determination of the proprietary status of the assignee's rights.[124] "Competing claimant" is likewise broadly defined to include competing assignees, a creditor of the assignor, and the assignor's insolvency administrator. [125] For the purpose of identifying the law of the assignor's location, the Convention deems an assignor to be located at its place of business or at her habitual residence in the rare case of an assignor without a place of business.[126] An assignor with places of business in more than one state is deemed to be located in the state where its central administration is exercised.[127]

The Convention rule is generally compatible with the PPSA[128] with three exceptions.

First the PPSA refers the priority status of the interest of an assignee of "chattel paper" who has taken possession of the paper to the law of the jurisdiction where the paper is located.[129] "Chattel paper" in the parlance of the PPSA refers to a document that evidences both a security interest in or a lease of goods

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[122] Art. 22.

[123] Art 23(3) provides that if an insolvency proceeding is 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 that the law governing issues of priority is generally the law of the location of the assignor.

[124] Art. 5(g) defines "priority" to mean "the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied."

[125] Art. 5 (m) defines "competing claimant" as follows: "Competing claimant means: (i) Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, even if that receivable is not an international receivable and the assignment to that assignee is not an international assignment; (ii) A creditor of the assignor; or (iii) The insolvency administrator.".

[126] Art. 5(h).

[127] Id.

[128] PPSA (A, BC, M, NB, NWT, Nu, O, PEI, S) s. 7(2); (NL, NS) 8(2); Y s. 6(1). Although the PPSA uses the term "chief executive office" in determining the location of an assignor with a place of business in more than jurisdiction, this concept is synonymous with the "centre of administration" test used by the Convention.

[129] PPSA (A, BC, M, NB, NWT, Nu, O, PEI, S) s. 5(1); (NL, NS) 6(1); Y s. 4(1).1).

and the monetary receivable associated with that security interest or lease.[130] The most common situation in which chattel paper arises is where goods are sold on credit under a retention of title contract or leased under a long term lease. The contracts used in these transactions are chattel paper under the PPSA and are subject to special perfection and priority rules that are inapplicable to ordinary receivables, including the *lex rei sitae* choice of law rule for priority where the assignee is in possession of the chattel paper.

The concept of "chattel paper" as a separate category of property – and the special priority status given to an assignee in possession - is unique to the PPSA and Article 9 of the Uniform Commercial Code in the United States from which it is derived. Neither the common law nor the law of any other jurisdiction including Quebec accords any special preferential status to an assignee of a receivable derived from the sale or lease of goods who happens to take possession of the underlying contracts with the original debtor. Consequently, incorporation of the PPSA (and Article 9) rule in the choice of law regime of the Convention was not a workable proposition.

The authors do not believe that this conflict between the Convention and the PPSA approaches to receivables that arise from chattel paper should negatively influence the decision on implementation. Because the special PPSA choice of law rule for chattel paper departs from widely-accepted rules of private international law, it has limited application as a practical matter: assignees cannot place any reliance on it in the cross-border context unless the litigation takes place in a PPSA or Article 9 jurisdiction and the *lex rei sitate* is also a PPSA or Article 9 jurisdiction.

The second exception is found only in the non-Ontario versions of the PPSA. Where the jurisdiction in which the assignor is located does not have a public registry system for disclosing assignments, the assignee must comply with the perfection requirements imposed by the PPSA of the enacting jurisdiction.[131] Failure to comply does not affect perfected status. However, the assignee's interest is subordinated to any third party interest acquired in the receivable if the assigned receivable was payable in the enacting province at the time the third party acquired its interest.

The third exception is also found only in the non-Ontario versions of the PPSA. Whereas the Convention,[132] (in company with the Ontario PPSA, the Civil Code[133] and Article 9[134]) rejects the doctrine of *renvoi*, the non-Ontario versions of the PPSA treat a reference to the law of the jurisdiction in which the assignor is located as including a reference to the choice of law rules of that jurisdiction.[135]

Turning to the Civil Code, it conforms to the Convention approach in referring issues of priority to

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[130] PPSA (A, BC, NWT, N, O, Y) s. 1 (1); (M, NB, PEI) s. 1; (NL, NS) s. 2; S s. 2(1).
[131] PPSA (A, BC, M, NB, NWT, Nu, PEI, S) s. 7(4); (NL, NS) 8(4); O no equivalent provision; Y s. 6(4).
[132] Art. 5(i) of the Convention defines "law" to mean "Law" to mean "the law in force in a State other than its rules of private international law."
[133] CcQ art. 3080.
[134] All of the choice of law rules of Article 9 refer to "the local law" of the designated jurisdiction: §9-301–§9-306.
[135] PPSA (A, BC, M, NB, NWT, Nu, O, PEI, S) s. 7(2); (NL, NS) 8(2); Y s. 6(1).

the law of the assignor's location but only for hypothecary assignments.[136] Outright assignments are governed by the traditional *lex rei sitae* rule.[137] Assuming the *lex rei sitae* of the receivable is conceived in traditional terms as denoting the law of the location of the debtor on the assigned receivable, this leads to the possibility of different and potentially conflicting laws being applied to the priority status of an assignee by way of security and an assignee who purchases receivables outright.

The Civil Code differs from the PPSA and the Convention in another respect. In defining the location of the grantor, the Code uses the concept of domicile. In the case of an individual, domicile equates with habitual residence.[138] In most situations, application of the law of habitual residence will not produce different results than under the PPSA or the Convention. However, for legal persons, the Code defines domicile by reference to the place in which the legal person maintains its head office.[139] In practice, this is often referred to as the registered office test, in view of the fact that corporations are generally required to designate a head office in their publicly filed constitutive documents. The registered office test is not the same as the centre of administration test used by the Convention and the PPSA. The former is an objective test; the latter depends on factual evidence on where the day to day administration of the business of the assignor is carried out.

Recommendation

At its 2003 meeting, the Uniform Law Conference of Canada adopted recommendations that the choice of law provisions of the PPSA and the Civil Code be amended to provide as follows (the wording has been adapted to conform to the terminology used in this Report):

- *That an assignor enterprise constituted under the law of a foreign country be considered to be located in the jurisdiction where its "chief executive office" (centre of administration) is located;*
- *That the location of an assignor enterprises constituted under federal or provincial or territorial law be determined according to a test akin to the registered office test in the Civil Code;*
- *That the Civil Code be amended to extend the choice of law rule applicable to hypothecs of receivables to outright assignments of receivables;*
- *That the non-Ontario versions of the PPSA be amended to provide that a reference to the law of the jurisdiction in which the debtor is located is limited to the internal rules of that jurisdiction and does not include its conflict of law rules.*

Adoption of these recommendations would bring the choice of law regimes of the PPSA and the Civil Code into general alignment with the Convention regime while also achieving their initial objective of promoting harmonization within Canada.

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[136] CcQ Art. 3105 (para 1)..
[137] In the absence of a more specific rule for outright assignments, the general *lex rei sitae* rule in art. 3097 of the Code applies by default.
[138] Art. 75 CcQ.

The authors therefore recommend implementation of these recommendations as a prelude to the implementation of the Convention.

It should be noted here that the Convention accommodates the possibility of having a different internal choice of law rule for states organized on federal lines of the kind contemplated by the second bulleted recommendation above. States are permitted to specify different intra-state location rules by declaration under the Convention.[140] *The authors recommend that such a declaration be made by Canada.*

V. OPTIONAL PROVISIONS OF THE CONVENTION

A. Chapter V on the Conflict of Laws

Chapter V of the Convention incorporates a "mini-convention" on the choice of law rules applicable in the receivables financing context. In addition to replicating the choice of law rule for priority[141] addressed above, Chapter V provides guidance on the law applicable to three additional sets of issues.

For issues relating to the contractual rights and obligations of the assignor and assignee *inter se*, the Convention adopts the principle of party autonomy. The assignor and assignee are free to select the governing law.[142] In the absence of a choice, the applicable law is that of the State with which the contract of assignment is most closely connected.[143]

For issues relating to the form of the contract of assignment, the Convention adopts a facilitative choice of law rule.[144] If the contract is concluded between parties located in the same State, it is formally valid if it meets the form requirements of its proper law or of the law of the state in which it is concluded. If the parties are resident in different states, the contract is formally valid as long as it conforms either to its proper law or to the law of either of the States in which the parties are located. The application of this rule is explicitly confined to issues of formal validity as they relate to the assignment contract between the parties. Failure to comply with the formality rules of the law of the assignor's location may still lead to invalidation of the assignee's interest as a property right to the extent these rules are interpreted as relating to priority under the Convention's expansive concept of "priority".[145]

For issues related to the relationship between the assignee and debtor, the applicable law is the law

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[139] Art. 307 CcQ.
[140] Art. 36.
[141] Art. 30
[142] Art. 28(1).
[143] Art. 28(2).
[144] Art. 27.
[145] Art. 5(g). For example, the Civil Code requires a hypothec to be in writing on pain of absolute nullity and the PPSA requires that a security agreement (deemed to include an outright assignment of receivables) be reduced to writing in order for the security agreement to be effective against third parties: CcQ art. 2696; PPSA (A, BC, M, NB, PEI, Nu, NWT, S) ss. 12(1)(c), 10(1); (NL, NS) s. 13(1)(c), 11(1); O s. 11(2)(c), 11(1); Y s. 13(1)(c), 8(1). Since these types of formality requirements go the proprietary effectiveness of the assignee's interest, they would fall within the choice of law rule applicable to issues of priority as opposed to the choice of law rule governing the formalities of the assignment contract.

governing the original contract between the assignor and the debtor.[146] The Convention identifies the following issues as falling within the scope of that rule: the effectiveness of contractual limitations on assignment as between the assignee and debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor, and any question relating to whether the debtor's obligations have been discharged.

For assignments within the direct scope of the Convention, Chapter V plays only a supplementary or 'gap filling' role.[147] It operates to designate the law applicable to those matters for which the main body of the Convention does not supply a direct solution, either expressly or by appealing to the general principles on which it is based.[148] As this Report has shown, the main body of the Convention provides a substantive rule for most important issues that might arise between the assignor and the assignee, and between the assignee and the debtor; it also provides a choice of law rule for priority against competing claimants. Consequently, Chapter V is intended to play only a very limited role in the case of assignments within the direct scope of the Convention.

For assignments falling outside the Convention, for example, because the assignor is not located in a contracting state or the issue relates to the debtor's rights and the debtor is not located in a Contracting State,[149] Chapter V adds a second layer of international harmony by providing a uniform conflicts regime to determine the applicable substantive rules.[150]

Recommendation:

The "mini-convention" on conflict of laws contained in Chapter V of the Convention is subject to an opt-out by Contracting States. The authors recommend against opting out. Part IV of the Report already has shown that the approach taken by the mini-convention to choice of law for priority is generally compatible with the Code and PPSA approaches and with reform recommendations previously adopted by the ULCC. The additional choice of law rules for the assignment contract and for assignee-debtor relations set out in the mini-Convention are compatible with the Civil Code provisions on the same issues[151] *and are not incompatible with the position in the other provinces and the territories albeit that the rules are underdeveloped*.[152] *Thus, adoption of Chapter V of the Convention would serve to modernize and clarify the common law rules, while also bringing about greater certainty with respect to the applicable law in the case of international assignments that fall outside the scope of the Convention*.

[146] Art. 29.
[147] Art. 29.
[148] Arts. 26(b) and 7(2).
[149] See the discussion on the scope of application of the Convention in Part II of this Report above.
[150] Arts. 26(a), 1(4).
[151] Arts. 3109, 3111, 3120 CcQ.
[152] See e.g. Rafferty ed., *Private International Law in Common Law Canada*, 2d ed. (Toronto: Emond Montgomery, 2003) at 783-787.

B. Convention Annex on Substantive Priority Rules

The Annex to the Convention enables states to declare that their substantive priority regimes, to the extent applicable under the choice of law rule of the Convention, will operate according to one of three theories:

- Section III of the Annex provides for priority based on the time of the contract of the assignment.
- Section IV provides for priority based on the time of notification of the assignment to the debtor.
- Section I provides for priority based on the time of registration; Section II provides for the possible future establishment of an international registry for the filing of data about assignments governed by the Convention. However, even if the registration-based priority option is selected, States are free to declare non-uniform exceptions pursuant to article 42, and may develop or designate a domestic registry for filing notices of assignments as a substitute for the international registry.

Recommendation

The Annex essentially codifies the current diversity in substantive priority regimes among different legal systems. Since it does nothing to achieve international substantive uniformity, and may create confusion in its interaction with Canadian provincial and territorial secured transactions laws, the authors recommend against opting into the registration based priority rule set out in the Annex.

VI. CONCLUSION

As matters presently stand, the development of an international receivables financing market is hindered by a lack of uniformity among the assignment laws of different states.[153] The Receivables Convention seeks to achieve global harmony through the establishment of uniform rules. This goal is reflected in the Convention's opening preamble:

> *The Contracting States*,
>
> *Reaffirming* their conviction that international trade on the basis of quality and mutual benefit is an important element in the promotion of friendly relations among States,
>
> *Considering* that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,
>
> *Desiring* to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new

[153] See generally Hein Kötz, "Rights of Third Parties: Third Party Beneficiaries and Assignment" Chap 13, Vol VII, *International Encyclopedia of Comparative Law* (J.C.B. Mohr (Paul Siebeck), Tübingen, and Martinus Nijhoff, Dorderecht, Boston, Lancaster: 1990) at 93-99.

practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

Have agreed as follows: . . .

The success of the Convention in achieving these objectives depends on its widespread implementation. As this Report has shown, Canada and the Canadian provinces and territories are in a particularly enviable position to effect implementation promptly and easily. Since the rules of the Convention are generally compatible with the assignment laws of Canada's legal systems, legal issues arising in the assignment context would generally be resolved in the same fashion regardless of whether the issue is governed by the Convention or by the Civil Code or the PPSA. The differences are minor with the exception of the Convention rules on the critical issues of the effectiveness of anti-assignment clauses and the choice of law for priority. However, the Uniform Law Conference of Canada has already endorsed reform recommendations that would bring the Civil Code and the PPSA into general alignment with the Convention on both these points. Consequently, implementation of these recommendations together with implementation of the Convention would simultaneously promote the harmonization of law at both the international and interprovincial levels.