The United Nations Convention on the Assignment of Receivables in International Trade: Insolvency Aspects

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Abstract

Breaking new ground, the UN Convention on the Assignment of Receivables in International Trade refers all priority conflicts with respect to receivables to the law of single and easily determinable jurisdiction, and one that is most likely going to be the insolvency jurisdiction, namely to the law of the assignor's place of business or, in the case of places of business in more than one State, the assignor's central administration. In the case of an insolvency proceeding in another jurisdiction, the mandatory rules of that juridiction displace any priority rule of the law of the assignor's location only if that priority rule is manifestly contrary to the public policy of that jurisdiction. In such a case, the balance of the priority rules of the law of the assignor's location prevails over the priority rules of the insolvency jurisdiction with the exception of rules relating to preferential rights. In any case, the Convention ensures that priority rules do not interfere with basic insolvency rights, such as those relating to stays, avoidance actions and to the performance of contracts or maintenance of the estate. Copyright © 2004 John Wiley & Sons, Ltd.

I. Introduction

The United Nations Convention on the Assignment of Receivables in International Trade ("the Convention") was adopted and opened for signature by the United

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Nations General Assembly by resolution 56/81 of 12 December 2001.[1] The Convention is the result of almost six years of work at the inter-governmental level by the United Nations Commission on International Trade Law (UNCITRAL).[2] It will enter into force upon ratification by five States.[3]

The main objective of the Convention is to "promote the availability of capital and credit at more affordable rates" across national borders, thus facilitating the cross-border movement of goods and services.[4] The Convention achieves this objective by reducing legal uncertainty with respect to a number of issues arising in the context of important receivables financing transactions, including asset-based lending, factoring, invoice discounting, forfaiting, securitization, as well as transactions in which no financing is provided.[5] The Convention establishes principles and adopts rules relating to the assignment of contractual monetary claims ("receivables").[6] The Convention removes legal obstacles, including specific statutory and contractual limitations, and enhances certainty in the context of substantive law (e.g. debtor's rights and obligations) and conflict-of-laws issues.[7]

One of the most important achievements of the Convention is to subject all priority conflicts between an assignee and third parties claiming an interest in an assigned receivable (including the administrator in the insolvency of the assignor) to the law of the location of the assignor.[8] This decision has been rightly described as "significant progress in the development of international commercial law and the harmonization of conflict-of-laws rules in the area of secured transactions."[9]

Another major achievement of the Convention is the limited priority rule with respect to proceeds, which aims to facilitate practices such as securitization and undisclosed invoice discounting.[10] Parties structuring their transactions in accordance with the Convention will be able to ensure priority with respect to proceeds even in countries whose domestic law does not recognize rights in proceeds, as long as those countries have become party to the Convention.[11]

1. G.A. Res. 56/81, U.N. GAOR, 56th Sess., Agenda Item 161, U.N. Doc. A/RES/56/17 (2002), [2001] 32 Y.B. Comm'n on Int'l Trade L., *available at* http://www.uncitral.org. For a list of the preparatory documents, see *Receivables Financing: Analytical Commentary on the Draft Convention on Assignment of Receivables in International Trade*, U.N. Comm'n on Int'l Trade Law, 34th Sess., at 2-3, U.N. Doc. A/CN.9/489 and Add. 1 (2001), *available at http://www.uncitral.org* [hereinafter *Analytical Commentary*].

2. UNCITRAL is the core legal body in the United Nations system in the field of international trade law unification and harmonization (for general information on UNCITRAL, see http://www.uncitral.org.

3. Convention, *supra* note 1, art. 45(1). So, far the Convention has been signed by Luxembourg, Madagascar and the United States of America.

4. *Id.* pmbl., para. 5.

5. *See Analytical Commentary*, *supra* note 2, at 5–7.

6. *Id.* art. 2.

7. *See* Convention, *supra* note 1, arts. 8–10, 15–21, 26–32. For a more detailed discussion of the general principles of the Convention and its effect on domestic law, see Spiros V. Bazinas, *Le Projet de Convention de la CNUDCI. Ses Objectifs et Ses Effets sur les Autres Lois*, 75 Revue de Droit Bancaire et de la Bourse 171 (Sept.–Oct. 1999); Spiros V. Bazinas, *Die Arbeit von UNCITRAL im Bereich der Forderungsabtretung zur Kreditfinanzierung*, *in* Die Forderungsabtretung, insbesondere zur Kreditsicherung 99 (Walther Hadding & Uwe H. Schneider eds., 1999). See also Spiros V. Bazinas, UN-Uebereinkommen ueber Forderungsabtretungen, ZeuP, 4/2002, 782; and Eva-Maria Kieninger/Elisabeth Schuetze, Neue Chancen fuer internationale Finanzierungsgeschaefte: Die UN-Abtretungskonvention, ZIP 48/2003, 2181.

8. Convention, *supra* note 1, art. 22.

9. *See* Michel Deschamps, *The Priority Rules of the United Nations Receivables Convention: A Comment on Bazinas*, 12 Duke J. Comp. & Int'l L. 389, 389 (2002).

10. Convention, *supra* note 1, art. 24.

11. *Id.* art. 1.

The third major achievement is the validation of the assignment of future receivables and of receivables not identified individually,[12] as well as the validation in certain cases of assignments made despite anti-assignment clauses.[13]

This article briefly discusses the first two of these achievements of the Convention[14] and, in particular, the question of how the Convention achieves its main objective, creating certainty with regard to the rights of assignees, without unduly interfering with the rights of other creditors, in particular in the case of the insolvency of the assignor. Before addressing this question in part III, part II clarifies the scope of application and some key terms of the Convention.

II. Scope of Application and Terminology

A. Substantive scope of application

1. Assignment of receivables

"Assignment" is defined in the Convention as a transfer of property in receivables by agreement.[15] The definition covers both the creation of security rights in receivables and the transfer of full property in receivables, whether or not for security purposes.[16] The Convention, however, does not specify what constitutes either an outright assignment or a security transfer, leaving this issue to law applicable outside the Convention.[17] An "assignment" may be a contractual subrogation or pledge-type transaction.[18] On the other hand, it may not be a transfer by operation of law (e.g. statutory subrogation) or other non-contractual assignment.[19]

The "assignor" is the old creditor in the contract from which the assigned receivables arise ("original contract").[20] The assignor is either the borrower (or a third party, such as a guarantor) assigning receivables as security or a seller of receivables. The "assignee" is the new creditor, the lender in the financing contract.[21] The "debtor" is the obligor in the original contract.[22]

The Convention defines a "receivable" as a "contractual right to payment of a monetary sum."[23] The definition includes parts of and undivided interests in receivables. While the exact meaning of the term "contractual right" is left to national law, it is clear that claims from contracts for the supply of goods, construction, and services are clearly covered, whether the contracts are commercial or consumer

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12. Id. art. 8.
13. Id. art. 9.
14. For a discussion of earlier drafts of the Convention, see Spiros V. Bazinas, *Lowering the Cost of Credit: The Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade*, 9 TUL. J. INT'L & COMP. L. 259 (2001) [hereinafter Bazinas, *Lowering the Cost of Credit*]; Spiros V. Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution*, 8 DUKE J. COMP. & INT'L L. 315 (1998). *See also* CARSTEN BÖHM, DIE SICHERUNGSABTRETUNG IM UNCITRAL-KONVENTIONSENTWURF (Shaker Verlag 2000).
15. Id. art. 2.
16. Id.
17. Id.
18. See Bazinas, *Lowering the Cost of Credit*, *supra* note 14, at 268.
19. Id. at 268–270.
20. Convention, *supra* note 1, art. 2.
21. Id.
22. Id. "The account debtor" in article 9 UCC terminology.
23. Id.

contracts.[24] Also included are loan receivables, intellectual property license royalties, toll road receipts, monetary damage claims for breach of contract, as well as interest and non-monetary claims convertible to money.[25] The term does not include a right to payment arising other than by contract, such as a tort claim or a tax refund claim.

2. *Exclusions and other limitations*

The scope of receivables covered is restricted by way of outright or limited exclusions of some types of receivables or assignments.[26] The Convention excludes some assignments because no market exists for them (e.g. assignments to a consumer for consumer purposes; however, assignments of consumer receivables fall within the scope of the Convention).[27] The Convention also excludes the assignment of those types of receivables that are already sufficiently regulated, or for which some of the provisions of the Convention may not be suitable, such as assignments of receivables arising from securities, letters of credit, independent guarantees, bank deposits, derivative and foreign exchange transactions, payment systems and so forth.[28]

Beyond the outright exclusion of certain types of assignments or receivables, the Convention provides two further types of limitations. One type is the "hold harmless" clause, which applies to assignments of receivables in the form of negotiable instruments, consumer receivables, and real estate receivables.[29] The Convention applies to the assignment of such receivables. However, it does not change the legal position of certain parties to such assignments. For example, the priority of a holder in due course under the law governing negotiable instruments is preserved.

The Convention places another type of limitation upon the scope of article 9, which recognizes as effective assignments notwithstanding anti-assignment and similar clauses. This provision applies only to trade receivables broadly defined to include receivables from the supply or lease of goods or the provision of services other than financial services.[30] It does not apply to the assignment of other receivables, such as loan or insurance receivables. This means that the effectiveness of an anti-assignment clause in an assignment outside the scope of this provision is subject to law outside the Convention (which, under article 29, is the law governing the receivable). As a result, if that law gives effect to anti-assignment clauses, the assignment will be ineffective and the Convention (other than article 29) will not apply.[31]

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24. *Analytical Commentary*, *supra* note 2, at 5.
25. *Id.* at 5–7.
26. Convention, *supra* note 1, art. 4. For a detailed analysis of exclusions or other limitations relating in particular to securities and to real estate receivables, see Harry C. Sigman & Edwin E. Smith, *Toward Facilitating Cross-Border Secured Financing and Securitization: An Analysis of the United Nations Convention on the Assignment of Receivables in International Trade*, *in* 57 Bus. Law. 727, 734 (Feb. 2002). *See also* Spiros V. Bazinas, *Multi-Jurisdictional Receivables Financing: UNCITRAL's Impact on Securitization and Cross-Border Perfection*, 12 Duke J. Comp. & Int'l L. 365 (2002).
27. Convention, *supra* note 1, art. 4(1)(a); *Analytical Commentary*, *supra* note 2, at 5.
28. Convention, *supra* note 1, art. 4(2).
29. *Id.* art. 4(3) to (5).
30. *Id.* art. 9(3).
31. Articles 40 and 41 permit Contracting States to exclude further practices from the scope of articles 9 and 10 or the Convention respectively by declaration to the depositary of the Convention.

3. The international character of the assignment or the receivable

As it focuses on international trade, the Convention applies in principle only to assignments of international receivables and to international assignments of receivables.[32] An assignment is international if the assignor and the assignee are located in different States.[33] A receivable is international if the assignor and the debtor are located in different States.[34] The international character of an assignment or a receivable is determined by the location of the assignor and the assignee, or the debtor, at the time of the conclusion of the assignment contract.[35]

The Convention generally does not apply to domestic assignments of domestic receivables (i.e. where the assignor, the assignee, and the debtor are located in the same State).[36] There are two exceptions, however. The first relates to subsequent assignments where, for example, A assigns to B, B to C, and so on.[37] In order to ensure consistent results, if the assignment from A to B is governed by the Convention, the assignment from B to C is also governed by the Convention even though it is a domestic assignment of domestic receivables.[38] The second exception relates to a conflict of priority between a domestic and a foreign assignee of domestic receivables (i.e. assignee A in country X and assignee B in country Y while the receivables are owed by a debtor in country Y and the assignor is also in country Y).[39] In order to ensure certainty as to the priority rights of assignees, the Convention covers the priority conflict between assignee A and assignee B,[40] even though the assignment to B is a domestic assignment of domestic receivables.[41]

B. Territorial scope of application

With the exception of the debtor-related provisions,[42] the Convention applies to international assignments and to assignments of international receivables if the assignor is located in a State that is a party to the Convention.[43] The Convention may apply to subsequent assignments that may be wholly domestic even if the assignor is not located in a Contracting State as long as a prior assignment is governed by the Convention.[44]

For the debtor-related provisions to apply the debtor too should be located in a State party to the Convention or the law governing the assigned receivables should be the law of a State party to the Convention. This approach protects the debtor from being subject to a text of which the debtor could not be aware.[45] It does not, however, exclude the application of the Convention's rules that have no impact on

32. Convention, *supra* note 1, art. 1(1)(a).
33. *Id.*
34. *Id.*
35. *Id.* art. 3. As a result, a change of location of the parties after the conclusion of the assignment contract is irrelevant for the purpose of the application of the Convention.
36. *Id.* art. 1(1)(a).
37. *Id.*
38. *Id.*; *see* Uwe H. Schneider & Alexandra Dreibus, *Die Kettenabtretung*, *in* BANKRECHT UND PERSPEKTIVEN, FESTSCHRIFT FÜR HERBERT SCHIMANSKI (Norbert Horn, Hans-Juergen Lwowski, Gerd Nobbe eds., RWS Verlag 1999).
39. Convention, *supra* note 1, art. 22.
40. *Id.*
41. *Id.* art. 5(m)(i). But there is no adverse effect on B since the Convention refers priority conflicts to the assignor's law (i.e. country Y, where the debtor is also located).
42. *Id.* Arts. 15–21.
43. *Id.* art. 1(1).
44. *Id. art. 1(1)(b).*
45. *Id.* art. 1(3).

the debtor, such as the rules dealing with the relationship between the assignor and the assignee or the rules dealing with priority among competing claimants. Accordingly, even if the debtor-related provisions do not apply to a particular assignment, the balance of the Convention may still apply to the relationship between the assignor and the assignee or the assignee and a competing claimant.

The autonomous conflict-of-laws rules of the Convention may apply even if the assignor or the assignee is not located in a Contracting State as long as a dispute is brought before a court in a Contracting State.[46]

C. Key definitions

The definition of the term "priority" covers not only the preference in payment or other satisfaction but also related matters, such as the determination of whether that right is a personal or a property right, whether or not it is a security right, and whether any required steps to render the right effective against a competing claimant have been satisfied (the steps for so called "perfection").[47] Priority does not generally cover the effectiveness of an assignment as between the assignor and the assignee or as against the debtor.[48]

In order to cover all possible priority conflicts, the term "competing claimant" is defined so as to include other assignees,[49] even if both the assignment and the receivable are domestic and thus outside the Convention's scope.[50] The definition also includes other creditors of the assignor, including creditors with rights in other property extended by law to the assigned receivable, such as creditors with a proprietary right in the receivable created by court decision or a retention of title in goods extended by law to the receivables from the sale of the goods, and the administrator in the insolvency of the assignor.[51]

The Convention defines "location" by reference to the place of business of a party, or the habitual residence, if there is no place of business.[52] Departing from the traditional "location rule," referring in the case of multiple places of business to the place with the closest relationship to the relevant transaction,[53] the Convention provides that, when an assignor or an assignee has places of business in more than one State, reference shall be made to the place of central administration (in other terms, the principal place of business or the main centre of interests).[54]

The reason for this approach is to provide certainty with respect to the application of the Convention as well as to the law governing priority (i.e. the law of the State in which the assignor is located).[55] In contrast, when a debtor has places of business in more than one State, reference is to be made to the place most closely connected to the original contract.[56] This different approach was taken with regard

46. *Id.* art. 1(4).
47. *Id.* art. 5(g).
48. *Id.* arts. 5(g), 8 and 22 ("with the exception of matters that are settled elsewhere in this Convention").
49. *Id.* art. 5(m).
50. *Id.* art. 5(m)(i).
51. *Id.* If the right in goods is extended to receivables by contract, their assignment falls within the Convention by virtue of article 2(a).
52. *Id.* art. 5(h).
53. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 10(a), U.N. Doc. A/Conf. 97/18, *reprinted in* 19 I.L.M. 671 (1980).
54. Convention, *supra* note 1, *id.* art. 5(h).
55. *Id.* art. 22.
56. *Id.*

to the location of the debtor so as to ensure that the debtor is not surprised by the application of legal rules to which the original transaction between the debtor and the assignor has no relationship.[57]

In the case of transactions made through branch offices, the central administration location rule will result in the application of the Convention rather than the law of the State in which the relevant branch is located, if the assignor has its central administration in a State party to the Convention.[58] In addition, a transaction may become international and fall under the Convention if the assignee has its central administration in a State other than the State in which the assignor is located, even though the assignee acted through a branch located in the same State as the assignor.[59] Moreover, the central administration rule will result in the application of the law of the assignor's central administration (rather than the place with the closest relationship to the assignment) to priority disputes. Certainty in the application of the Convention and in the determination of the law governing priority justify this result. This rule will not affect a financing institution as a debtor of the assigned receivable because, in such a case, the close connection test determines the institution's location.[60] Moreover, this change will only have a limited impact on transactions in which branch offices of financing institutions are assignors or assignees, because a number of banking transactions are excluded from the scope of application of the Convention or may be excluded by way of a contractual limitation.[61]

The Convention also defines the terms "insolvency administrator" and "insolvency proceeding" in a way that is consistent with the definitions of the terms "foreign representative" and "foreign proceeding" in the UNCITRAL Model Law on Cross-Border insolvency and the EC Regulation No. 1346/2000 of 29 May 2000 on Insolvency Proceedings.[62] By referring to the purpose of a proceeding or to the function of a person, rather than to technical terms that may have different meanings in different legal systems, the definitions are sufficiently broad to encompass a wide range of collective judicial or administrative proceedings, including interim proceedings.

III. Insolvency aspects

A. Effectiveness of an assignment and priority

The Convention addresses conflicts of priority between an assignee and the assignor's creditors in the case of insolvency of the assignor by way of conflict-of-laws

57. The principle of debtor protection is one of the general principles useful for the interpretation of the Convention (see art. 7(2). *See* also *Analytical Commentary*, *supra* note 2, at 5; and Bazinas, *Lowering Cost of Credit*, *supra* note 14, at 266, 278.)

58. *See* Convention, *supra* note 1, art. 5(h).

59. *Id.* arts. 3 and 5(h).

60. *Id art. 5(h).*

61. *Id.* arts. 4(2), 9. Article 4(2) specifically excludes transactions relating to receivables from deposit accounts, letters of credit, and securities. Article 9(1) and (3)(a) allows for the effectiveness of receivable assignments, notwithstanding contractual limitations, but carves out an exception for financial services. A contractual limitation on financial services is governed by the laws governing the original contract (art. 29). For further discussion, see Catherine Walsh, *Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*, 106 DICK. L. REV. 159 (2001).

62. *Id.* art. 5(e) and (f). See also art. 2(a) and (d) of the UNCITRAL Model Law on Cross-Border Insolvency, and arts. 1(1) and 2(a) and (b) of the EC Regulation on Insolvency Proceedings.

rules.[63] It does not attempt to address specifically issues arising in the case of insolvency of the debtor of the assigned receivables or of the assignee.[64]

The Convention draws a clear distinction between the effectiveness of an assignment as between the assignor and the assignee, or as against the debtor, and effectiveness as against third parties (including the so called "perfection" and priority). Effectiveness as between the assignor and the assignee, and as against the debtor, is subject to the substantive law rules of the Convention. Such effectiveness is a matter of commercial law and should, in principle, be respected by insolvency law (subject to avoidance actions, stays, etc.; see below). Priority is subject to a conflict-of-laws rule referring to the law of the assignor's location.[65]

B. Conflicts of priority with respect to receivables

1. The basic rule

The Convention pursues the objective of achieving certainty with regard to the rights of assignees by referring conflicts between competing claims to the law of the country in which the assignor has its place of central administration or, in the case of an individual, his/her habitual residence (articles 22 and 5(h)).[66] The place of central administration, which is akin to the centre of main interests,[67] is a single and easily identifiable jurisdiction, and one that is most likely to be the jurisdiction in which the main insolvency proceeding with respect to the assignor will be opened.

While a substantive law priority rule would have provided a higher degree of certainty (and the Convention provides such rules in an optional annex), the conflict-of-laws rules of the Convention are generally recognized as constituting significant progress towards greater certainty and availability of lower-cost credit. So far, financiers have had no other alternative but to guess which law might apply to priority according to the law of several possible jurisdictions. This situation, which is due to the wide divergence of legal systems as to the law applicable to third party effects of assignments,[68] has in itself a negative impact on the availability and the cost of credit.

63. Convention, *supra* note 1, *id.* arts. 22–24.

64. It is understood, however, that, if the debtor becomes insolvent, the assignee has, under the Convention, the same rights as the assignor on the basis of the contract between the assignor and the debtor from which the assigned receivables arise. Issues arising in the case of the insolvency of the assignee are beyond the scope of a uniform law dealing with assignments of receivables, unless the assignee acts as an assignor assigning the receivables further.

65. *Id.* art. 22 ("With the exception of matters that are settled elsewhere in this Convention . . .".

66. *Id.* arts. 5(h) and 22.

67. See article 16(3) of the UNCITRAL Model Law on Cross-Border Insolvency (http://www.uncitral.org under "adopted texts").

68. For example, it is not clear whether article 12 of the Rome Convention covers issues of priority. *See* Teun H.D. Struycken, *The Proprietary Aspects of International Assignment of Debts and the Rome Convention, Article 12*, 24 LLOYD'S MAR. & COM. L.Q. 345 (1998). Assuming that it does, it is not clear whether it refers them to the law agreed upon by the parties or to the law governing the original contract. *See id.* at 348–349. In any case, neither solution is workable in the increasingly common case of bulk assignments of all present and future receivables. Using the law agreed to by the parties results in the application of several laws regardless of several assignments; in any case, it is not appropriate to refer third-party contract effects to the law agreed upon by the parties to the contract. Referring to the law governing the original contract creates the same problem in the case of several receivables arising from various contracts. In addition, it does not allow parties to determine the applicable law for future receivables at the time of assignment. For a critical evaluation of the present status of the law and an analysis of the merits of a place-of-assignor-based solution, see Eva-Maria Kieninger, *Das Statut der Forderungsabtretung im Verhältnis zu Dritten*, 62 RABELS ZEITSCHRIFT 678 (Max Planck Institut 1998). *See also* Struycken, *supra*.

The thrust of article 22 is the following: if the insolvency proceeding is commenced in the country where the assignor has its place of central administration, or, in the case of an individual, his/her habitual residence, the law governing conflicts of priority and the law governing the insolvency proceeding will be the law of the same jurisdiction. As a result, any conflict that may arise between two different statutes or other bodies of law of the same jurisdiction will be settled by the rules of law of that jurisdiction.

If, on the other hand, the insolvency proceeding is commenced in a country other than the country in which the assignor has its central administration or, in the case of an individual, his/her habitual residence, priority is still governed by the law applicable under the Convention, unless the application of a rule of the applicable law is manifestly contrary to the public policy of the forum State. In such a case, the offensive priority rule is set aside but the remaining priority rules of the applicable law apply.[69]

The reason why the priority rules of the forum State do not displace the priority rules of the applicable law is that the latter too would be mandatory rules and setting them aside would inadvertently result in uncertainty as to the rights of third parties, a result that could have a negative impact on the availability and the cost of credit. There is one exception though which is discussed below.

2. *Public policy and mandatory rules*

Apart from allowing the forum State to defeat the application of the priority rules of the assignor's law that are manifestly contrary to the public policy of the forum, the Convention provides for the positive application of the forum State's public policy by recognizing in an insolvency proceeding in a State other than the State in which the assignor is located the priority afforded to any non-consensual, preferential rights under the law of the forum State.[70] Typical examples of such rights would be local employee compensation claims and local tax claims.

3. *Special insolvency rights*

Article 23 makes no reference to special rights of creditors of the assignor or of the insolvency administrator that may prevail over the rights of an assignee under law governing insolvency. The reason is that, as defined, priority does not interfere with such special rights. Such special rights include, for example, any right of creditors of the assignor or the insolvency administrator: to initiate an action to avoid or otherwise render ineffective an assignment as a fraudulent or preferential transfer or an assignment of receivables that have not arisen at the time of the commencement of the insolvency proceeding; to encumber the assigned receivables with the expenses of the insolvency administrator in performing the original

69. Convention, *supra* note 1, *Id.* art. 23(1) and (2).
70. *Id.* art. 23(1) and (2).

contract or with the expenses of the insolvency administrator in maintaining, preserving or enforcing the receivables at the request and for the benefit of the assignee. If the assigned receivables constitute security for indebtedness or other obligations, the special rights protected include any rights existing under insolvency rules or procedures governing the insolvency of the assignor that: provide for a stay of the right of individual assignees or creditors of the assignor to collect the receivables during the insolvency proceeding; permit the substitution of the assigned receivables for new receivables of at least equal value; or provide for the right of the insolvency administrator to borrow using the assigned receivables as security to the extent that their value exceeds the obligations secured.

C. Conflicts of priority with respect to proceeds

The Convention does not contain a general rule on the law applicable to priority in proceeds. The reason lies in the differences between legal systems with respect to the nature and the treatment of rights in proceeds. However, the Convention contains two limited proceeds rules. Under the first one, if the assignee has priority over other claimants with respect to receivables and proceeds are paid directly to the assignee, the assignee may retain the proceeds.[71] The second rule is intended to facilitate practices, such as securitization and undisclosed invoice discounting. In such practices, payments are channelled to a special account held by the assignor, separately from its other assets, on behalf of the assignee. The Convention provides that, if the assignee has priority over other claimants with respect to the receivables, and the proceeds are kept by the assignor on behalf of the assignee and are reasonably identifiable from the other assets of the assignor, the assignee has the same priority with respect to proceeds.[72] The Convention does not address, however, a priority conflict between an assignee claiming an interest in proceeds held in a deposit or securities account and the depositary bank or the securities broker or other intermediary with a security or set-off right in the account.[73]

Of course, even if the assignee has a right in the proceeds of the assigned receivable, that right, like the right in the receivable itself, is subject to any special rights of the insolvency administrator or the creditors of the assignor, as mentioned above.

D. Substantive law priority rules

In order to obtain the benefit of the Convention's priority rules, parties have the opportunity to structure their transactions in a way that refers priority questions to the appropriate law (e.g. by creating special entities in appropriate locations). The question remains as to what should happen if this is impossible, or is only possible at a considerable cost, and the applicable law has insufficient priority rules. In order to address this question, the Convention offers model substantive priority provisions.[74] States have a choice between three substantive priority systems if they

71. *Id.* art. 24(1).
72. *Id.* art. 24(2).
73. *Id.* art. 24(3).
74. *Id.* annex.

wish to change their existing rules. One is based on filing of a notice about the assignment, another is based on notification of the debtor and the third is based on the time of assignment. States that wish to adjust their legislation may, by declaration, select one of these priority regimes, or simply enact new priority rules or revise their existing priority rule by way of domestic legislation. The assumption is that, in an environment of free competition between legal regimes, the regime with the most economic benefits will prevail.

IV. Conclusion

A balanced treatment of the rights of secured creditors, on the one hand, and preferential and unsecured creditors on the other hand, is the litmus test for a successful priority rule in a uniform law dealing with assignments. The Convention passes this test. On the one hand, by referring conflicts of priority arising in the case of insolvency of the assignor to a single and easily determinable jurisdiction, the Convention allows the assignee to predict with a reasonable degree of certainty which law will govern such conflicts. On the other hand, the Convention avoids the risk of undermining the delicate balance established by insolvency law. This result is achieved by: ensuring that in most cases the law governing conflicts of priority under the Convention and the *lex loci concursus* are laws of the same jurisdiction; and by avoiding in all other cases undue interference with the *lex loci concursus*.