THE UNCITRAL *DRAFT CONVENTION ON ASSIGNMENT IN RECEIVABLES FINANCING*: APPLICABILITY, GENERAL PROVISIONS AND THE CONFLICT OF CONVENTIONS

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[Financing is paramount for the promotion of commerce, both on a domestic and an international level. In relation to the latter, the United Nations Commission on International Trade Law is currently attempting to promote international commerce through the unification of the law on receivables financing: the Draft Convention on Assignment in Receivables Financing ('Draft Convention'). This article discusses the fundamental aspects the Draft Convention: its sphere of application; its general provisions; and the potential for conflict with other private law conventions. In doing so, it seeks to place the Draft Convention in the wider context of the creation of one uniform law, as opposed to the creation of many uniform laws that are not interconnected. The article concludes that, if international trade is to be promoted through uniform legal instruments, drafters should elaborate on common principles and methods rather than creating 'islands of uniformity'.]

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I INTRODUCTION

Several years ago, a Swiss professor[1] asserted that the unification of international contract law could basically be divided into two periods: one which related to the unification of the law of those contracts, such as transport contracts and contracts for the sale of goods, which are universally accepted and for which unification did not therefore pose too many problems;[2] and, more recently, one in which efforts were made to unify so-called 'innominate contracts'.[3] These two periods had one thing in common — they focused mainly on the unification of specific contracts. However, since 1988, when these remarks were made, this has changed. Unification efforts which go beyond the unification of specific contracts are actually under way. This article focuses upon one of these efforts: the attempt by the United Nations Commission on International Trade Law ('UNCITRAL') to unify the law relating to the assignment of receivables. Several years of preparatory work by the Working Group on International Contract Practices ('Working Group') has most recently resulted in the *Draft Convention on Assignment in Receivables Financing* ('*Draft Convention*').[4]

Given the limited space available in this article, I will only be able to focus on a few of the issues raised by the *Draft Convention*: its sphere of application, the general provisions, and the provisions on the conflict of conventions. I have chosen these issues in order to put the various unification efforts into perspective. Although it should be the starting point of any unification effort, the goal of all these attempts seems to have been forgotten: that is, creating *one* uniform law. When new international uniform law conventions are not coordinated amongst themselves and already existing instruments, it leads to a multiplication of the sources of law, contravening the very purpose of uniform law conventions. However, it is not sufficient to complain about the lack of an overall unification plan;[5] this article will therefore only discuss issues dealt with by both the *Draft Convention* and other international uniform law conventions. It will illustrate where differences exist between the uniform law conventions in order to demonstrate that there is a need, if not for an overall unification plan, then at least for a uniform strategy when approaching specific problems, such as the use of common principles and methods.[6]

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1 Professor Kurt Siehr made these comments in 1988: Kurt Siehr, 'Unificazione Internazionale del Diritto dei Contratti Innominati' (1988) *Diritto del Commercio Internazionale* 83.

2 Ibid 85.

3 Ibid.

4 This article is based on the 2 November 1999 version of the *Draft Convention*, annexed to the *Report of the Working Group on International Contract Practices on the Work of Its Thirty-First Session* UNCITRAL (33rd Sess) annex I, UN Doc A/CN.9/466 (1999) ('*Report of the Working Group 31st Session*'). Discussed on the occasion of UNCITRAL's 33rd session held in New York from 12 June to 7 July 2000.

5 For a similar affirmation, see J Kropholler, *Internationales Einheitsrecht Allgemeine Lehren* (1975) 167.

6 For a recent paper dealing specifically with the relationship between the various uniform commercial law conventions, see generally Franco Ferrari, 'The Relationship Between International Uniform Contract Law Conventions' (2000) 5 *Uniform Law Review* 69.

II THE DRAFT CONVENTION

A *Structure*

Before focusing on some specific provisions of the *Draft Convention*, it is useful to spend some words on its structure, which mirrors the structure of several uniform law conventions: the *Vienna Convention on the International Sale of Goods* ('*CISG*')[7] and the 1988 International Institute for the Unification of Private Law ('UNIDROIT') *Convention on International Factoring* ('*Factoring Convention*')[8] and *Convention on International Financial Leasing* ('*Leasing Convention*').[9] The substantive law provisions of the *Draft Convention* are preceded by a preamble and a chapter containing both provisions that define the *Draft Convention's* sphere of application, as well as general provisions. Like other international uniform commercial law conventions, the *Draft Convention's* substantive law provisions are followed by 'final provisions' which essentially deal with international public law issues, such as the entry into force of the *Draft Convention*, the concept of a Contracting State and the relationship of the *Draft Convention* with other conventions.

The *Draft Convention* is innovative in as far as it contains — at least in the version to be discussed in this article — a chapter, namely Chapter V, which deals exclusively with private international law issues. This is a rare occurrence in substantive law conventions and has led to much criticism from some members of the Working Group.[10] It is doubtful whether this chapter will be retained. One can only hope that it will be deleted, above all because, according to the current version of the *Draft Convention*, Chapter V would be applicable — unless a specific reservation were declared[11] — in a Contracting State independently of whether or not the territorial requirements were met.[12] As evidenced by the *Report of the Working Group 31st Session*, some delegations shared this view and stated that 'from a legislative policy point of view, it would not be appropriate to attempt, in essence, to prepare a mini private international law convention within a substantive law convention.'[13]

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7 Opened for signature 11 April 1980, 19 ILM 671 (entered into force 1 January 1988).

8 Opened for signature 28 May 1988, 27 ILM 943 (entered into force for France, Italy and Nigeria 1 May 1995; Hungary 1 December 1996; Latvia 1 March 1998; Germany 1 December 1998).

9 Opened for signature 28 May 1988, 27 ILM 931 (entered into force between France, Italy and Nigeria 1 May 1995; Hungary 1 December 1996; Panama 1 October 1997; Latvia 1 March 1998; the Russian Federation 1 January 1999; Belarus 1 March 1999). The *Leasing Convention* will also enter into force for the Republic of Uzbekistan on 1 February 2001.

10 *Report of the Working Group 31st Session*, above n 4, [145]–[149].

11 *Draft Convention*, above n 4, art 1(3):

> The provisions of Chapter V apply to assignments of international receivables and to international assignments of receivables as defined in this chapter independently of paragraphs (1) and (2) of this article. However, those provisions do not apply if a State makes a declaration under article 37.

12 Ibid.

13 *Report of the Working Group 31st Session*, above n 4, [146].

Overall, however, the structure of the *Draft Convention* is modelled on one which has generally proved to be acceptable. Hence, this structure should also be taken into account when drafting future conventions. The *Draft Convention* not only corresponds to the most recent uniform commercial law conventions in respect of its structure (disregarding Chapter V), but is also similar in nature. Like these conventions, it constitutes a self-executing treaty:[14] that is, a convention

> where legal rules arising from the convention are open for immediate application by the national judge and all living persons in a Contracting State are entitled to assert their rights or demand fulfilment of another person's duty by referring directly to the legal rules of the treaty[15]

without there being a need for a further legislative act by the national legislator.[16] The self-executing nature of a convention like the *Draft Convention* has the obvious advantage of highlighting — instead of concealing — its international origin.[17]

B *The Preamble*

The provisions of the *Draft Convention* are preceded by a preamble. If one compares this preamble with those of other international uniform commercial law conventions, one will notice that they are not dissimilar. Indeed, like other conventions,[18] the preamble of the *Draft Convention* not only reaffirms the 'conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among States',[19] but also espouses the goal which is behind the elaboration of any international uniform commercial law convention — the promotion of international trade through the minimisation of legal uncertainties.[20] The fact that the *Draft Convention* has the same goal as other international uniform commercial law conventions is without doubt helpful in, and paramount to, trying to create *one* uniform commercial law. It must, however, be pointed out that the mere

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14 It has often been pointed out that both the *CISG* and the *Factoring Convention* constitute self-executing treaties: in respect of the *Factoring Convention* see, eg, Franco Ferrari, *Il Factoring Internazionale* (1999) 12; Christoph Häusler, *Das UNIDROIT Übereinkommen über Internationales Factoring (Ottawa 1988) unter besonderer Berücksichtigung seiner Anwendbarkeit* (1998) 89; in respect of the *CISG* see, eg, Paul Volken, 'The Vienna Convention: Scope, Interpretation and Gap-Filling' in Petar Sarcevic and Paul Volken (eds), *International Sale of Goods — Dubrovnik Lectures* (1986) 21–2; *Filanto SpA v Chilewich International Corporation,* 789 FSupp 1229 (SDNY, 1992).

15 Paul Volken, 'Das Wiener Übereinkommen über den Internationalen Warenkauf — Anwendungsvoraussetzungen und Anwendungsbereich' in Peter Schlechtriem (ed), *Einheitliches Kaufrecht und Nationales Obligationenrecht* (1987) 81, 83 (author's own trans).

16 Kropholler, above n 5, 101.

17 Ibid 102.

18 See, eg, *CISG*, above n 7, preamble; *Leasing Convention*, above n 9, preamble.

19 *Draft Convention*, above n 4, preamble.

20 Ibid.

'adoption of uniform rules'[21] is — contrary to what the drafters seem to believe — on its own not enough to achieve this result.[22] It is common knowledge that mere 'textual uniformity of the law ... is insufficient'[23] to create uniformity. The preamble should reflect this.

III INTERNATIONAL SPHERE OF APPLICATION

Similar to other international uniform commercial law conventions, the *Draft Convention* defines its own substantive, international, territorial and temporal sphere of application: these provisions are found in Chapter I.[24] However, this does not preclude some concepts, which are relevant to the determination of the *Draft Convention's* sphere of application, from being dealt with in other chapters. In this respect, it suffices to point out that the definition of 'Contracting State',[25] which is without doubt a concept relevant to the *Draft Convention's* sphere of application, is to be found in the chapter dedicated to the 'Final Provisions',[26] not unlike other international uniform commercial law conventions.[27] The same is to be said in respect of the provision dealing with the *Draft Convention's* temporal sphere of application, which is also dealt with in that chapter.[28]

As far as the international sphere of application of the *Draft Convention* is concerned, one notices that the Convention exclusively covers international situations. For many years, the drafters of international uniform commercial law conventions have been directing their efforts merely to covering situations which can somehow be defined as 'international'.[29] Most recently, however, this trend has been criticised: some authors claim that international situations raise the same problems as purely domestic situations.[30] Although this may be true, unification at the international law level does not impact on the domestic law level, preserving the solutions which characterise a particular legal system.[31] Consequently, countries with particular legal, economic and political systems

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21 Ibid.

22 See also *Factoring Convention*, above n 8, preamble (2).

23 Lisa Ryan, 'The Convention on Contracts for the International Sale of Goods: Divergent Interpretations' (1995) 4 *Tulane Journal of International & Comparative Law* 99, 101 (referring to the *CISG*).

24 Kropholler, above n 5, 189, states that it is systematically correct to put the provisions defining a convention's sphere of application at the beginning of the convention.

25 *Draft Convention*, above n 4, art 43(2).

26 Ibid Chapter VI.

27 *CISG*, above n 7, art 99; *Factoring Convention*, above n 8, art 14.

28 *Draft Convention*, above n 4, art 43(3).

29 See generally B Lemhöfer, 'Die Beschränkung der Rechtsvereinheitlichung auf internationale Sachverhalte' (1960) 25 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 401.

30 In respect of the *Factoring Convention*, see, eg, Ferrari, *Il Factoring Internazionale*, above n 14, 56–7; in respect of the *CISG*, see, eg, Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) *Ohio State Law Journal* 265, 269.

31 Kropholler, above n 5, 168.

will not be discouraged from binding themselves to the outcomes of these unification efforts which would otherwise be unacceptable.

A *The 'Internationality' Requirement*

While the limitation of the *Draft Convention's* sphere of application to international situations is of no surprise, the same cannot be said of its definition of 'internationality'. This states that the internationality criterion is met — and the need to determine the *Draft Convention's* applicability is triggered — where either the assignment relates to international receivables or where the receivables are assigned internationally.[32]

1 *Assignment of International Receivables*

The former criterion to determine internationality corresponds to that provided in the *Factoring Convention*, which also defines 'internationality' on the basis of the internationality of the receivables.[33] The use of one and the same definition in different conventions is to be appreciated in view of the goal to create *one* uniform commercial law. It avoids the need for interpreters to keep in mind and examine as many different definitions as there are conventions, which would indeed be detrimental to the certainty of law at which all unification efforts aim.

The fact that one of the ways to define internationality under the *Draft Convention* corresponds to the definition to be found in the *Factoring Convention* is a rather recent achievement. While the *Factoring Convention's* internationality is exclusively based upon the parties to the underlying contract (the debtor and the assignor) having their place of business in different countries,[34] the definition of the *Draft Convention's* internationality has not always depended on where the debtor and the assignor had their place of business. Indeed, according to an earlier version of the *Draft Convention*, the location to be taken into account was not so much their place of business, but rather the place where the parties had their 'central administration'.[35] After a

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[32] *Draft Convention*, above n 4, art 1: '(1) This Convention applies to: (a) assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of the conclusion of the contract of assignment, the assignor is located in a Contracting State'. For recent remarks on this provision, see, eg, Carsten Böhm, *Die Sicherungsabtretung im UNCITRAL-Konventionsentwurf* (2000) 23–4.

[33] See also B A Diehl-Leistner, *Internationales Factoring* (1992) 126–7; Franco Ferrari, 'Der Internationale Anwendungsbereich des Ottawa-Übereinkommens von 1988 über Internationales Factoring' (1996) *Recht der Internationalen Wirtschaft* 182, 183–4; Riccardo Monaco, 'La Convenzione Internazionale per i Contratti di Factoring' (1989) *Bancaria* 11, 13.

[34] See also Franco Ferrari, 'La Sphère Internationale d'Application de la Convention d'Ottawa de 1988 sur l'Affacturage International' (1999) *Revue de Droit des Affaires Internationale* 895, 898–9; Häusler, above n 14, 282.

[35] Art 5(k) of the 30 March 1999 version of the *Draft Convention*: *Report of the Working Group on International Contract Practices on the Work of its Thirtieth Session* UNCITRAL (32nd Sess) UN Doc A/CN.9/456 (1999):

> For the purposes of articles 1 and 3:

lengthy discussion during the Working Group's last meeting,[36] the reference to 'central administration' was fortunately deleted, although not completely, in favour of a reference to the 'place of business'.[37] The reason that this (partial) deletion of the reference to 'central administration' is to be welcomed lies in the need to avoid, where possible, the introduction of new concepts, which thus avoids the creation of further uncertainty.[38]

It appears that the most recent definition of internationality provided for in the *Draft Convention* is identical to that found in the *Factoring Convention*. Although this is true where the parties involved have only one place of business, it is not true where one party has multiple places of business. The *Factoring Convention* solves the problem of identifying the relevant place of business by referring to 'the place of business which has the closest relationship to the relevant contract and its performance'.[39] However, the *Draft Convention* refers, where the party which has multiple places of business is either the assignor or the assignee, to the 'place where its central administration is exercised'.[40] The inclusion of this rule is to be criticised not only because it introduces a concept which is not provided for in the most recent international uniform contract law conventions, and for which a more appropriate substitute exists, but also because it deviates from rules which are widely accepted.[41]

2 *Bulk Assignments and Future Receivables*

As far as the aforementioned concept of internationality is concerned, one must point out that it can cause some problems, as in the case where a bulk assignment is made and where the assigned receivables are partly domestic and partly international.[42] Where, for instance, the creditor assigns the receivables to a party who has its place of business in the same state as the creditor, the

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(i) the assignor is located in the State in which it has that place of business which has the closest relationship to the assignment;
(ii) the assignee is located in the State in which it has that place of business which has the closest relationship to the assignment;
(iii) the debtor is located in the State in which it has that place of business which has the closest relationship to the original contract;
(iv) in the absence of proof to the contrary, *the place of central administration of a party is presumed to be the place of business* which has the closest relationship to the relevant contract. If a party does not have a place of business, reference is to be made to its habitual residence;
(v) several assignors or assignees are located at the place in which their authorized agent or trustee is located [emphasis added].

36 *Report of the Working Group 31st Session*, above n 4, [25]–[30].
37 *Draft Convention*, above n 4, art 6(i).
38 See also Ferrari, 'The Relationship between International Uniform Contract Law Conventions', above n 6, 77.
39 *Factoring Convention*, above n 8, art 2(2).
40 *Draft Convention*, above n 4, art 5.
41 See also, apart from the provision referred to in fn 39, *CISG*, above n 7, art 10.
42 For a similar criticism regarding the internationality requirement provided for by the *Factoring Convention* see, eg, Ferrari, *Il Factoring Internazionale*, above n 14, 59.

internationality *de quo* can lead to the application of both the *Draft Convention* as well as domestic law, although only one (bulk) assignment has been made to one and the same assignee. The disadvantages resulting from this are apparent.

As far as the assignment of future receivables is concerned, the problem is somewhat different. Where a creditor assigns future receivables to a party which has its place of business in the same state, at the time of the assignment it is not necessarily known whether domestic rules or those of the *Draft Convention* govern the assignment.[43] The answer to this question will indeed depend upon whether the receivables arise as international or domestic receivables: that is, whether at the time the original contract is concluded the debtor will have its place of business in a state which differs from that in which the assignor has its place of business.

3 *International Assignment of Receivables*

Whereas the concept of internationality in the *Factoring Convention* depends solely on the parties to the original contract having their place of business in different states,[44] internationality under the *Draft Convention* is not the exclusive consideration in determining its applicability.[45] As mentioned already, the *Draft Convention* may also be applicable where the assignor and the debtor have their place of business in the same state, as long as the assignment is international: that is, as long as the assignee's 'place of business'[46] is, at the time of the assignment, located in a different state.[47] Consequently, where a bulk assignment is made by an assignor located in a state different from that in which the assignee has its place of business, the assignment as such can be subject to the rules of the *Draft Convention*, independently of whether the receivables are international or domestic. In respect of the assignment of future receivables, the internationality *de quo* does not cause the problems which can arise from the internationality criterion based upon the debtor and the assignor having their place of business in different states. Indeed, in relation to the *Draft Convention's* applicability, it is

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43 This is because under the *Draft Convention* it is not necessary, unlike under some domestic laws, to identify the debtor at the time of the assignment, as long as the receivables can 'at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates': *Draft Convention*, above n 4, art 9(1)(b).

44 See also Monaco, above n 33, 13; Eberhard Rebmann, 'Das Unidroit Übereinkommen über das internationale Factoring (Ottawa 1988)' (1989) 53 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 599, 605.

45 Spiros Bazinas, 'Die Arbeit von UNCITRAL im Bereich der Forderungsabtretung zur Kreditfinanzierung' in W Hadding and U H Schneider (eds), *Die Forderungsabtretung, insebosndere zur Kreditsicherung, in ausländsichen Rechtsordnungen* (1999) 106.

46 As in other international uniform commercial law conventions, the citizenship of the parties involved is irrelevant for the purposes of determining the internationality: see, eg, *CISG*, above n 7, art 1(13).

47 *Draft Convention*, above n 4, art 3:

> A receivable is international if, at the time of the conclusion of the original contract, the assignor and the debtor are located in different States. An assignment is international if, at the time of the conclusion of the contract of assignment, the assignor and the assignee are located in different States.

irrelevant whether the future receivables will be domestic or international, since one of the alternatively listed internationality requirements is met if, at the time of the assignment, the assignor has its place of business in a state different from that in which the assignee has its place of business.

The only question which comes to mind at this point is whether such a broad definition of internationality (which results from the two internationality criteria) is appropriate. Is it appropriate, in other words, to merely exclude the domestic assignment of domestic receivables from the *Draft Convention's* international sphere of application? When considering this question one should not forget that the *Draft Convention* does not contain, unlike the *CISG*,[48] any provision which protects the parties' reliance upon the domestic setting of the transaction.[49]

B *Further Requirements*

In order for the *Draft Convention* to apply, it is not sufficient that the internationality requirement be met. Like many recent international uniform commercial law conventions, with the exception of the *Hague Uniform Sales Laws*,[50] the *Draft Convention* requires that there be a link with at least one Contracting State. The fact that a further requirement is needed to trigger the *Draft Convention's* applicability is positive not only from a substantive point of view, but also from a methodological one, since a uniform methodology is paramount to the creation of *one* uniform law.[51]

As far as that link is concerned, it can either be: (i) a 'territorial' one, such as those provided for in article 1(1)(a) of the *CISG* and article 2(1)(a) of the *Factoring Convention*, which require that the parties to the sales contract have their place of business in *different* Contracting States; or (ii) a 'legal' one, such as those provided for in articles 1(1)(b) and 2(1)(b) respectively, to name just the

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48 *CISG*, above n 7, art 1(2).

49 Note that the *Factoring Convention* does not contain a provision which protects the parties' reliance upon the domestic setting of the (factoring) transaction either: Ferrari, *Il Factoring Internazionale*, above n 14, 66.

50 *Convention Relating to a Uniform Law on the International Sale of Goods (with annex)*, opened for signature 1 July 1964, 834 UNTS 107 (entered into force 18 August 1972); *Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods*, opened for signature 1 July 1964, 834 UNTS 169 (entered into force 23 August 1972). It has often been pointed out that the *Hague Uniform Sales Laws* were applicable without any other requirement having to be met (at least where the forum State had not declared any reservation): see, eg, Franco Ferrari, *International Sale of Goods* (1999) 32.

51 See also Ferrari, 'The Relationship between International Uniform Contract Law Conventions', above n 6, 77–8.

most well-known examples,[52] by virtue of which the conventions are also applicable where the rules of private international law lead to the law of a Contracting State.

1 *Legal Requirement*

Unlike the *CISG* and especially the *Factoring Convention*[53] — which, given the subject matter, is undoubtedly even more closely related to the *Draft Convention* — the *Draft Convention* does not rely upon a 'legal' criterion to determine its application. Further, the *Draft Convention* no longer contains a provision which can lead to its application even when the 'territorial' requirement is not met.[54] Why this criterion has not been retained is not easy to understand. In my opinion, the arguments put forward by some delegations that 'the level of uncertainty resulting from the reference to the rules of private international law was unacceptable', and that 'the scope of the the Draft Convention ... was so broad that no further extension by reference to any rule of private international law was needed',[55] should not have led to the deletion of the private international law criterion of applicability. This does not mean, however, that the deletion was not justifiable. Indeed, since a chapter containing private international law rules was included (Chapter V), the retention of the private international law criterion of applicability would have resulted in problems of coordination, which had to be avoided at all costs.

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52 Many papers have been written on the issues arising from art 1(1)(b): see, eg, Christophe Bernasconi, 'The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods (Article 1)' (1999) 46 *Netherlands International Law Review* 137; Franco Ferrari, 'CISG art 1(1)(b) and Related Matters: Brief Remarks on Occasion of a Recent Dutch Court Decision' (1995) 13 *Nederlands Internationaal Privaatrecht* 317; Hermann Pünder, 'Das Einheitliche UN-Kaufrecht — Anwendung Kraft Kollisonsrechtlicher Verweisung nach art 1(1)(b) UN-Kaufrecht' (1990) *Recht der Internationalen Wirtschaft* 869; Kurt Siehr, 'Der internationale Anwendungsbereich des UN-Kaufrechts' (1988) 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 587.

53 *Factoring Convention*, above n 8, art 2(1)(b).

54 However, art 1(1) of the version of the *Draft Convention* discussed during the Working Group's 27th session, 20–31 October 1997, reprinted in *Report of the Working Group on International Contract Practices on the Work of Its Twenty-Seventh Session* UNCITRAL (32nd Sess) UN Doc A/CN.9/445 (1997) [125] ('*Report of the Working Group 27th Session*'), provides:

> (1) This Convention applies to assignments of international receivables and to international assignments of receivables as defined in this Chapter:
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> (a) if, [at the time of the assignment,] the assignor and the assignee have their places of business in a Contracting State; or
>
> (b) if the rules of private international law lead to the application of the law of a Contracting State.

55 Ibid [139].

2 *Territorial Requirement*

In order for the *Draft Convention* to apply, a territorial requirement, in addition to the internationality requirement, must be met: the assignor[56] must, at the time the assignment is concluded,[57] have its place of business, or, where the assignor has more than one place of business, the place where its central administration is exercised, in a Contracting State.[58] If one compares this territorial requirement with that stipulated in the *Factoring Convention*, which requires that all the parties involved have their place of business in a Contracting State (debtor, assignor and assignee),[59] it becomes apparent that the 'territorial' scope of the *Draft Convention* is broader than that of the *Factoring Convention*. In my opinion, this broad scope is justified on the grounds that the *Draft Convention* is applicable on the exclusive basis of the territorial criterion.[60]

As far as the definition of 'Contracting State' is concerned, the *Draft Convention* follows established practice and requires, apart from the deposit of an instrument of ratification, acceptance, approval or accession, the expiration of a specific period of time (six months) following the end of the month in which the deposit occurred.[61]

The temporal sphere of application is governed by article 43(3), according to which the *Draft Convention* applies only to those assignments made on or after the date when it enters into force in respect of the Contracting State referred to in article 1(1).

3 Ratione Materiae

In relation to the substantive sphere of application, it must be pointed out that the *Draft Convention* defines 'assignment'.[62] This is to be appreciated, since the lack of a definition could induce the interpreters to resort to a domestic definition. This, however, would run counter to article 8(1) which states, similar to most recent international uniform commercial law conventions,[63] that 'in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of

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56 Unlike previous drafts, it is *only* the assignor: see the former art 1 of the *Draft Convention* in *Report of the Working Group 27th Session*, above n 54. Note, however, that where the assignor assigns domestic receivables internationally or where they assign international receivables domestically, at least two parties involved in the transaction are located in a Contracting State. Only when international receivables are assigned internationally is it possible for the assignor to be the sole party located in a Contracting State.

57 For the purposes of the *Draft Convention's* applicability it is irrelevant whether the assignor transfers its place of business after the assignment.

58 Böhm, above n 32, 23.

59 *Factoring Convention*, above n 8, art 2(1)(a).

60 Whereas, for instance, the *Factoring Convention* is also applicable where the rules of private international law lead, regarding both the underlying contract and the factoring contract, to the law of a Contracting State.

61 *Draft Convention*, above n 4, arts 43(1)–(2).

62 Ibid art 2(a).

63 *CISG*, above n 7, art 7(1); *Factoring Convention*, above n 8, art 4(1); *Leasing Convention*, above n 9, art 6(1).

good faith in international trade.'[64] The more concepts that are defined in an international uniform commercial law convention, the less probable it is that interpreters will have recourse to domestic definitions.

Article 2(a) of the *Draft Convention* defines the assignment as the

> transfer by agreement from one person ('assignor') to another person ('assignee') of the assignor's contractual right to payment of a monetary sum ('receivable') from a third person ('the debtor'). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer.

However, article 2(a) not only defines 'assignment', it also defines 'receivables'. This definition appears to be broader than that found in the *Factoring Convention*, according to which 'receivables' (the assignment of which may be covered by the *Factoring Convention*) are merely those arising from contracts for the sale of goods and for the supply of services.[65] Although the *Draft Convention's* definition of 'receivables' includes *any contractual right* to payment of a monetary sum — even where it does arise from contracts other than those for the sale of goods or the supply of services — one must emphasise that fact in instances in which the 'receivable' is a receivable other than a 'trade receivable' (defined as 'a receivable arising under an original contract for the sale or lease of goods or the provision of services other than financial services').[66] Some of the *Draft Convention's* provisions will not be applicable to that assignment, at least according to the draft discussed here. Whether this solution will be retained is still uncertain.

Not unlike the *Factoring Convention*, the *Draft Convention* provides for some exclusions from its sphere of application.[67] One of these appears, at least at first sight, to be very similar to the one stipulated in the *Factoring Convention*,[68] which excludes from its sphere of application international factoring contracts regarding receivables which arise from contracts for the sale of goods purchased exclusively for personal, family or household use.[69] On closer examination,

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64 *Draft Convention*, above n 4, art 8(1).

65 Ferrari, *Il Factoring Internazionale*, above n 14, 46.

66 *Draft Convention*, above n 4, art 6(l).

67 Ibid art 4:

> (1) This Convention does not apply to assignments:
> (a) made to an individual for his or her personal, family or household purposes;
> (b) to the extent made by the delivery of a negotiable instrument, with any necessary endorsement;
> (c) made as part of the sale, or change in the ownership or the legal status, of the business out of which the assigned receivables arose.
>
> (2) This Convention does not apply to assignments listed in a declaration made under article 39 by the State in which the assignor is located, or with respect to the provisions of this Convention which deal with the rights and obligations of the debtor, by the State in which the debtor is located.

68 *Factoring Convention*, above n 8, art 1(2)(a).

69 For comments regarding art 1(2)(a), see Ferrari, *Il Factoring Internazionale*, above n 14, 48; Häusler, above n 14, 278.

however, it is noticeable that the exclusion contained in the *Draft Convention* does not exclude the assignment of consumer receivables from its sphere of application, but rather excludes the assignment made for consumer purposes.[70] Although it is evident from the *Report of the Working Group 31st Session* that the drafters were aware of the fact that this exclusion differed from that of the *Factoring Convention*,[71] they did not offer a valid justification for departing from the type of exclusion provided for in the *Factoring Convention*.

IV GENERAL PROVISIONS

A *Party Autonomy and Exclusion*

Like many other international uniform commercial law conventions,[72] the *Draft Convention* contains a provision dealing with its exclusion, according to which

> [t]he assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.[73]

However, unlike the provisions of other international uniform commercial law conventions — such as article 3 of the *Factoring Convention* which, on the contrary, only admits an exclusion in toto[74] — article 7 of the *Draft Convention* does not allow for the exclusion of the *Draft Convention* as a whole.

Although the *Draft Convention* does not specify the form the exclusion must take, one cannot doubt that it can be made both explicitly and implicitly, as evinced by the text of the commentary prepared by the Secretariat of UNCITRAL. By expressly stating so, the Secretariat has avoided the problems of interpretation which have arisen under the *CISG*, in respect of which some authors[75] and courts[76] rightly claim that it can be excluded implicitly, whereas other authors[77] and courts[78] claim that the exclusion can only be made expressly.

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70 Note that the consumer purpose must lie with the assignee.

71 See, eg, *Report of the Working Group 31st Session*, above n 4, [58].

72 See, eg, *CISG*, above n 7, art 6; *Factoring Convention*, above n 8, art 3.

73 *Draft Convention*, above n 4, art 7.

74 For similar statements with respect to art 3 of the *Factoring Convention*, see L J Kitsaras, *Das Unidroit-Übereinkommen über das Internationale Factoring vom 28.5.1988 (Ottawa) aus der Sicht des Deutschen und Griechischen Rechts* (1994) 50–1.

75 See, eg, B Audit, *La Vente Internationale* (1990) 38; Kevin Bell, 'The Sphere of Application of the Vienna Convention on Contracts for the International Sale of Goods' (1996) 8 *Pace International Law Review* 237, 255; B Czerwenka, *Rechtsanwendungsprobleme im Internationalen Kaufrecht* (1987) 170.

B *Interpretation*

The *Draft Convention's* chapter containing the general provisions also deals with the issue of the *Draft Convention's* interpretation.[79] In this respect, it is noticeable that the text of article 8(1) of the *Draft Convention* is identical to that of article 7(1) of the *CISG*. This fact appears to be positive considering the need to create *one* international uniform commercial law through a uniform methodology and, where possible, a body of uniform concepts. However, whether this is entirely beneficial is questionable upon closer examination. One must wonder why the drafters did not model article 8(1) along the lines of article 4(1) of the *Factoring Convention* and article 6(1) of the *Leasing Convention*. These (affirmatively) solve a problem which, under article 7(1) of the *CISG*, has led to a dispute among legal writers, namely whether the preamble is to be taken into account when interpreting the convention. Indeed, the *Factoring Convention* and *Leasing Convention* expressly state that during their interpretation 'regard is [also] to be had to [their] objects and purpose as set forth in the preamble',[80] a statement which is not found in the version of the *Draft Convention* discussed here. It must, however, be pointed out that during the 33rd session, UNCITRAL decided to insert a reference to the preamble as an element to be taken into account when interpreting the *Draft Convention*.

The fact that the drafters literally copied article 7(1) of the *CISG* can also be criticised for another reason — it fails to take into account the criticisms directed at that article. In this respect it suffices to recall that various authors have pointed out that, despite the obligation to have regard to the international character of the *CISG* and the need to promote uniformity in its application, which basically results in the 'autonomous' interpretation of the its provisions,[81] not all concepts can be interpreted autonomously.[82] The concept of 'party to a contract', for instance, is not an 'autonomous' one; indeed, who is a 'party to a contract' depends on the law applicable by virtue of the private international law of the

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76 See, eg, Tribunale di Vigevano, 12 July 2000 (unpublished, copy on file with author); LG München, 29 May 1995, 21 O 23363/94 (available on UNILEX); and OLG Celle, 24 May 1995, 20 U 76/94 (available on UNILEX).

77 See, eg, Isaak Dore and James DeFranco, 'A Comparison of the Non-Substantive Provisions of the UNCITRAL Convention on the International Sale of Goods and the Uniform Commercial Code' (1982) 23 *Harvard International Law Journal* 49, 53; Caroline Klepper, 'The Convention for the International Sale of Goods: A Practical Guide for the State of Maryland and its Trade Community' (1991) 15 *Maryland Journal of International Law and Trade* 235, 238.

78 See, eg, LG Landshut, 5 April 1995, 54 O 644/94 (available on UNILEX); *Orbisphere Corporation v United States,* 726 FSupp 1344 (CIT, 1989).

79 *Draft Convention*, above n 4, ch II.

80 *Factoring Convention*, above n 8, art 4(1); *Leasing Convention*, above n 9, art 6(1).

81 For papers discussing the *CISG*'s autonomous interpretation, see especially Frank Diedrich, 'Maintaining Uniformity in International Uniform Law via Autonomous Interpretation: Software Contracts and the CISG' (1996) 8 *Pace International Law Review* 303.

82 See especially Franco Ferrari, 'CISG Case Law: A New Challenge for Interpreters?' (1998) 17 *Journal of Law and Commerce* 245.

forum.[83] Would it not be preferable if the drafters were to insert some wording to show that the obligation to interpret the *Draft Convention* 'autonomously' is not absolute, and maybe even point out which concepts are not to be interpreted 'autonomously'?

The drafters should also seek to avoid another problem that often arises in connection with article 7(1) of the *CISG*: that of the value to attribute to foreign court decisions and arbitral awards. If the drafters were to expressly state that these decisions can only have persuasive value, as they should,[84] no legal writer could even think of asking for the creation of a 'supranational *stare decisis*'.[85]

C *Gap-Filling*

1 *General Remarks*

Not unlike any other international uniform commercial law conventions, the *Draft Convention* does not constitute an exhaustive body of rules.[86] In other words, the *Draft Convention* does not deal with all the issues that can arise in connection with assignments falling under its sphere of application. The fact that the drafters were aware of this can easily be evinced from the adoption of article 8(2), which lays down a rule on gap-filling. According to this rule, which is to be found in many recent international commercial law conventions,

> [q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. [87]

The fact that the drafters have inserted a rule on gap-filling, which is to be found in other conventions as well, is per se positive in that it promotes the creation of a uniform methodology which is necessary in order to create *one* uniform law. In the case at hand, one has, however, to consider the down-side of the drafters copying a rule which is generally embedded in a different context, that is, a context of substantive law. Unlike most other international uniform commercial law conventions, the *Draft Convention* contains a chapter which

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83 In respect of the *Factoring Convention*, see, eg, Ferrari, *Il Factoring Internazionale*, above n 14, 66.

84 For similar statements, regarding either the *CISG* or the *Factoring Convention*, see, eg, Fritz Enderlein and Dietrich Maskow, *International Sales Law* (1992) 56; Ferrari *Il Factoring Internazionale*, above n 14, 115; see also Ernst Kramer, 'Uniforme Interpretation von Einheitsrecht — mit Besonderer Berücksichtigung von art 7' (1996) *UNKR, Juristische Blätter* 137, 146. For a recent court decision concerning the *CISG* which expressly states that foreign court decisions can only have persuasive value, see generally Tribunale di Pavia, 29 December 1999, *Il Corriere Giuridico* (2000) 932.

85 Larry Dimatteo, 'The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings' (1997) *Yale Journal of International Law* 111, 113.

86 For a similar conclusion, see, eg, Kropholler, above n 5, 170.

87 This terminology is used in all three uniform law conventions: *CISG*, above n 7, art 7(2); *Factoring Convention*, above n 8, art 4(2); *Leasing Convention*, above n 9, art 6(2).

deals exclusively with private international law issues (Chapter V). The rule on gap-filling would extend to this as well, unless the drafters were to insert wording to the contrary. One has to wonder whether the drafters are aware of this: do they really want to oblige the interpreters to identify general principles of private international law upon which the *Draft Convention* is based?

2 *Identification of the General Principles*

The greatest practical problem posed by article 8(2) is the difficulty in identifying the general principles upon which the *Draft Convention* is based.

According to many legal writers the principle of 'party autonomy' is a general principle that informs many international uniform commercial law conventions.[88] One may be led to believe that the *Draft Convention* is also based on this principle. In my opinion, this view is not tenable. The fact that parties are not permitted to exclude the *Draft Convention* in toto[89] makes it impossible to consider the principle of 'party autonomy' as one of the principles upon which the *Draft Convention* is based.

One of the 'true' general principles of the *Draft Convention* (this is also correct as far as the *Factoring Convention* is concerned)[90] is that of *favor cessionis*. This can easily be derived from article 9, according to which an assignment is effective whether it relates to 'existing or future, one or more, receivables' or 'parts of, or undivided interests in, receivables.' The *favor cessionis* principle also informs article 11, which states that '[a]n assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee, limiting in any way the assignor's right to assign its receivables.'[91]

Another general principle is that the assignment cannot put the debtor in a position which is worse than that in which he would have been if the assignment had not taken place. This principle is clearly expressed in article 17(1), according to which 'an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.' It is also found in article 20, which expressly provides, in the case of a claim by the assignee, for the debtor to be able to raise against the

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88 With respect to the *CISG*, see, eg, M Karollus, *UN-Kaufrecht* (1991) 16; Peter Schlechtriem, *Internationales UN-Kaufrecht* (1996) 33. With respect to the *Leasing Convention*, see, eg, Franco Ferrari, 'General Principles and International Uniform Commercial Law Conventions: A Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT [Factoring and Leasing] Conventions' (1997) 2 *Uniform Law Review* 451, 468; Aldo Schermi, 'Il Leasing Finanziario e la Convenzione Internazionale di Ottawa del 28 Maggio 1988' (1994) *Giustizia Civile* 725, 727. With respect to the *Factoring Convention*, see, eg, Claudia Gargiulo and Enrico Giancoli, 'La Cessione del Redito Sotto la Lente UNIDROIT' (1993) *Commercio Internazionale* 1296, 1303; cf Ferrari, *Il Factoring Internazionale*, above n 14, 127 (denying that the *Factoring Convention* is based upon the principle of 'party autonomy').

89 See above n 67 and accompanying text.

90 Ferrari, *Il Factoring Internazionale*, above n 14, 128.

91 *Draft Convention*, above n 4, art 11(1).

assignee all defences or rights of set-off arising from the original contract of which the debtor could avail itself if such a claim were made by the assignor.

The space allocated to this paper does not allow me to exhaustively list the general principles underlying the *Draft Convention*, it just allows me to point out that where an internal gap cannot be filled by having recourse to one of the general principles, one must, as *ultima ratio*, resort to the domestic law made applicable by virtue of the rules of private international law. However, since the *Draft Convention* contains a chapter on private international law, one must wonder which private international law is to be taken into account in identifying that domestic law: the original domestic law, that laid down by the *Draft Convention*, or, maybe both? The deletion of Chapter V would solve this as well as many other problems.

V CONFLICT OF CONVENTIONS

Since the number of international uniform commercial law conventions is constantly growing, conflicts of conventions become inevitable.[92] Since the drafters of the most recent conventions are very well aware of this problem,[93] it is not surprising that the *Draft Convention* contains a conflict of conventions rule. It is worth pointing out that this provision has undergone several changes. Whilst the *Draft Convention* initially gave precedence to other international agreements, the rule was later modified to state that the *Draft Convention* 'prevails over any international convention or other multilateral or bilateral agreement which has been or may be entered into by a Contracting State and which contains provisions concerning matters governed by this Convention.'[94] Fortunately, on the occasion of the last meeting of the Working Group, the drafters gave up this aggressive approach and adopted the original proposal which is more in line with established practice.[95] Thus, the *Draft Convention* 'does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by' the *Draft Convention*.[96] Consequently, as noted by the drafters themselves, the *Draft Convention* will not prevail over the *Factoring Convention*, for instance, the latter being the more specific instrument.[97] The more unification efforts are undertaken, the more one must try to coordinate them. In the long run, uncoordinated unification efforts cannot be helpful to anybody.

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92 For papers on the issue of conflicts of conventions, see generally Ferenc Majoros, 'Konflikte Ziwschen Staastsverträgen auf dem Gebiete des Privatrechts' (1982) 46 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 84; Paul Volken, *Konventionskonflikt im Internationalen Privatrecht* (1977); W H Willing, *Vertragskonkurrenz im Völkerrecht* (1996).

93 *CISG*, above n 7, art 90; *Factoring Convention*, above n 8, art 15; *Leasing Convention*, above n 9, art 17.

94 *Draft Convention*, above n 4, art 9 (variant B).

95 *Report of Working Group 31st Session*, above n 4, 51.

96 *Draft Convention*, above n 4, art 36.

97 *Report of Working Group 31st Session*, above n 4, 51.

VI CONCLUSION

It cannot be doubted that there is a need for a convention that creates uniformity in the area of assignment law. For this reason, the UNCITRAL *Draft Convention* is to be welcomed. The need for uniformity should, however, be weighed against another need, that of avoiding the creation of another 'island of uniformity'. In other words, drafters must avoid creating international uniform law conventions, such as the *Draft Convention*, which do stand alone — that is, which do not take into consideration the conventions that already exist. If one really wants to promote international trade through the elaboration of uniform legal instruments, these unification efforts must be coordinated. Such coordination can best be achieved by elaborating the common principles and methods upon which the various international uniform commercial law conventions are based.