National Conference of Commissioners on Uniform State Laws
676 North St. Clair Street, Suite 1700, Chicago, IL 60611 · 312/915-0195 · FAX 312/915-0187



March 3, 1995

Mr. Spiros V. Bazinas
Legal Officer
International Trade Law Branch
Office of Legal Affairs
United Nations Commission
on International Trade Law
P.O. Box 500
A-1400 Vienna, Austria

Dear Mr. Bazinas:

The National Conference of Commissioners on Uniform State Laws welcomes the invitation to comment on the 20 January 1995 draft of a proposed UNCITRAL project on receivables financing. For the following reasons, the Conference recommends that UNCITRAL proceed with a project to draft a model receivables financing law for adoption by nations.

For over a hundred years, the Conference has been the leading force in harmonizing the laws of the states of the United States. One of the most important Conference products is the Uniform Commercial Code, which has been adopted in all of the states. Article 9 of the Commercial Code deals in substantial part with receivables financing. One of the major accomplishments of that Article was to establish a legal basis for modern receivables financing. Although Article 9 is currently under consideration for reform, the basic legal framework for receivables financing will almost certainly remain in its present form.

The situation regarding receivables financing that was faced some forty years ago at the interstate level is similar to the situation regarding receivables financing arising now at the international level. The solution proposed by the

Conference in cooperation with the American Law Institute for this country was to prepare a body of law that could be enacted, and that was enacted, by each of the states. It was unnecessary to prepare or propose any overarching federal legislation. In the international setting regarding receivables financing, we recommend a similar approach.

UNCITRAL's primary objective should be the preparation of a model law for enactment by nations as part of their corpus of law. It is in their interest to have a body of law that provides a sound basis for receivables financing. To the extent that any nation has such a body of law, suppliers of goods or services on unsecured credit will have access to a secondary credit market in which they may obtain funds by offering pools of receivables as collateral to secure loans. This form of receivables financing stimulates economic activity by facilitating the primary sale of goods and services.

UNCITRAL could provide a distinct and valuable service to the international community by formulating and promulgating a sound model receivables financing law for national adoption, so that the economic value of receivables financing can be realized even in credit markets within a nation. With that legal base, international credit markets will also be well served through increased primary sales and secondary level secured credit. Conversely, the absence of a sound legal base in the laws of the several nations will hinder the development of a satisfactory body of international economic law.

Three fundamental legal risks threaten the integrity of receivables financing, whether within a nation or internationally: (1) the risk that assignments will not be deemed valid and binding on debtors, (2) the risk of bankruptcy or insolvency of the assignor and the ensuing claim that the receivables are property of the bankrupt's estate to be distributed to general creditors of the bankrupt, and (3) the risk of conflicting claims to the same pool of receivables. The most important of these risks is the bankruptcy risk, but comprehensive solution to the bankruptcy risk is likely to include substantial resolution of the validity and priority risks as well.

If an assignor becomes bankrupt, the nation in which the assignor is located will probably prescribe the law governing the marketing and distribution of the assets of the assignor's

estate. In cases in which the receivables have been absolutely assigned, it is vitally important that the assigned receivables not be captured for the benefit of unsecured creditors in the administration of the assignor's estate. As you may know, that issue arose in the United States recently, even after all these years, and to date has not been fully resolved. To achieve the desired result, the bankruptcy law governing the assignor's estate and the law governing receivables must recognize that absolute assignments are valid and the assignments divest the assignor of ownership of the receivables. In the event that more than one nation asserts bankruptcy power, rules of private international law will determine which nation has that jurisdiction.

The bankruptcy risk and the risk of competing claims to receivables raise essentially "property"-type legal issues. Many, if not most, of the contestants are persons who have had no prior contract relationship with each other. The assignor may have been a common hub in separate transactions, but the interests of these property claimants cannot be organized contractually before the fact since, in most situations, they are strangers to each other. International commercial law has wisely tended to address "contract"-type issues while avoiding a "property"-type analysis.

This is reflected clearly in the Convention on Contracts for the International Sale of Goods. Article 4(b) declares explicitly that the Convention is not concerned with the effect that a contract of sale may have on the property in the goods sold. The Factoring Convention stopped short of addressing property.

The 20 January 1995 draft refers to the Sales Convention and to the Factoring Convention, which were framed by a "contract"-type analysis. However, any law establishing a minimally satisfactory framework for receivables financing cannot be viewed in such a narrow context. Fundamental rules of property must be prescribed. Experience teaches that in that context, a model law for domestic enactment is preferable to an international convention.

Accordingly, we recommend that the UNCITRAL receivables financing project proceed with the goal of formulating and disseminating a sound model law for adoption by nations.

Thank you for allowing the Conference to comment on the receivables financing draft. We hope to have the opportunity to work with you and others in UNCITRAL on this and other projects of common interest.

Sincerely,

Richard C. Hite

Richard C. Hite
President

RCH:cms

cc: William M. Burke
K. King Burnett
Rion M. Gregory
Frank F. Jestrab
Leon M. McCorkle, Jr.
Fred H. Miller
Charles W. Mooney, Jr.
Curtis R. Reitz