The UNCITRAL Convention on the Assignment of Receivables in International Trade, assignment of future receivables and Turkish law

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The Assignment of receivables is an important financing technique the regulation of which varies from legal system to legal system. In December 2001, the Convention on the Assignment of Receivables in International Trade made by the United Nations Commission on International Trade ("the UNCITRAL Convention")[1] was adopted by the General Assembly[2] . The UNCITRAL Convention was prepared for the purposes of establishing a model for the modernisation of domestic assignment law and as a first substantive step towards the overall harmonisation of the law of assignment of receivables in international trade[3]. The key objective of the Convention is to facilitate the cross-border flow of credit and to lower the cost of credit through harmonisation of rules that govern assignments which will lead to greater predictability and certainty in the assignment of receivables contracts. In general, Turkish law contains some essential elements of modern secured transactions regimes such as priorities in collateral, registration and therefore, public notice of security interests on certain property[4] and non-possessory security interests. However, Turkish secured transactions law is fragmented and the elements that shape the system can be found[5] in the Civil Code, the Code of Obligations, the Commercial Code, the Code of Execution and Bankruptcy and some other special statutes6 . As far as the law on assignment of receivables is concerned, in Turkey it is governed by the Code of Obligations (CO)[7] , which was adopted in 1926 and is based on the Swiss Code of Obligations (OR)[8] .

Since the Turkish secured transactions law is fragmented and the rules relating to different security interests can be found in different Codes, discussion of each of them here may unnecessarily enlarge the scope of this article. Therefore, this article will deal only with the assignment of future receivables as they are crucial for securitisation transactions. In this connection, formal validity of assignments and the assignment of future receivables under Turkish law and the UNCITRAL Convention will be discussed. Furthermore, certain observations and suggestions will be made as to the feasibility and usefulness of ratification of the UNCITRAL Convention in light of a comparison of the Convention with Turkish law relating to assignment of future receivables.

I. BRIEF REMARKS ON THE TURKISH CODE OF OBLIGATIONS AND SECURITISATION TRANSACTIONS

It is beyond the scope of this article to discuss at length the background philosophy of adoption and the creation of modern Turkish civil and commercial laws[9] . Suffice it here to say that the Turkish Republic has been a modern, secular, and Western democracy since 1923. Its legal culture is a combination of Swiss, German, Italian and French legal cultures. Certain laws[10] of these countries "*were translated, adapted and adjusted [in the late 1920s] to solve the social*

and legal problems of Turkey "[11] and have been, since then, periodically up-dated as their models were up-dated. One of the main reasons why Turkey adopted the Swiss OR along with the Swiss Civil Code, rather than, for instance, the German Civil Code (BGB), was that the then Justice Minister Mahmut Esat Bey (Bozkurt)[12] had studied law in Switzerland[13] and that the success and the method of the Swiss Code of Obligations and of the Swiss Civil Code were admired at that time even by the German lawyers[14] .

The Turkish CO is the complementary part of the Turkish Civil Code[15] , they are interrelated and the CO regulates obligations between persons[16] . The black letter of the Code is not the only text adopted but also the academic opinions and precedents have been adopted[17] in order to better adapt the black letter text into business practices. The CO regulates, in its first division, the general contractual framework and in its second division, special contracts[18] .

The subject matter of securitisation transactions in Turkey includes consumer loans granted by banks for consumer contracts, receivables from financial leasing contracts, receivables arising out of export contracts, receivables of companies. In the last decade securitisation transactions in Turkey have involved credit card receivables, export receivables, trade finance cash flows, equipment leasing and diversified payment rights[19] .

II. ASSIGNMENT OF RECEIVABLES UNDER TURKISH LAW

As a general definition, under Turkish law, assignment of receivables is the transfer of receivables that arise out of a debtor-creditor relationship, to an assignee. In order to be valid, the assignment should be in writing[20] but the debtor's consent is not required[21] . Although his consent is not necessary, a notification should be made to the debtor in order to prevent any mistaken payments made in good faith by the debtor to the assignor. Also, if the receivable is represented by a negotiable instrument, the negotiable instrument should be endorsed and delivered to the assignee.

Articles 162 through 172 govern the law of assignment in the CO. Article 162 reads as follows:

"*1. The obligee [creditor/assignor] may assign a claim to which he is entitled to another without the consent of the obligor [debtor], unless the law, an agreement, or the nature of the legal relationship is to the contrary.*

2. The obligor [debtor] cannot raise, against a third person who has acquired the claim in reliance upon a written acknowledgment of indebtedness which does not contain a prohibition of assignment, the defence that the assignment has been precluded by agreement "[22] .

Under Turkish law, there are certain components of an assignment of receivables. An assignment is subject to a valid contract between assignor and the assignee; an assigned receivable must exist and there must be no anti-assignment clause.

Apart from the requirements under the CO, there is a special regulation under the Capital Markets legislation in Turkey when receivables are assigned to a bank or a general financial

company. In that context, an assignment contract for the purposes of securitisation transactions or assignment of receivables to banks and general finance companies where asset backed securities are issued directly or indirectly by these companies and where the backing assets are receivables should fulfil certain conditions. These conditions are set out in the "Communiqué on Principles Regarding Registration of Asset Backed Securities with the Board and Principles Regarding the Establishment and Activities of General Financial Companies"[23] . According to the Communiqué, an assignment contract must contain the names, commercial titles and business addresses of the parties to the assignment agreement and the types and inventory of the receivables that are subject of the agreement, there must be a provision which stipulates that receivables shall be assigned to a general finance company or a bank together with their interests and personal and proprietary securities attached to them and the assignor must guarantee the existence of receivables and the default of the debtor in payments[24] . There should also be provisions on dispute resolution procedure, the procedure that will be followed in the cases of warnings and denouncements to the party in default in accordance with the agreement and principles on payments that shall be made by general finance companies or banks to the association that assigns its receivables[25].

A. Valid Contract between the Assignor and the Assignee

1. Validity of a Contract in General

According to the CO there must be a valid contract between the assignor and the assignee which is concluded by virtue of evidence confirming mutual consents[26] . The subject of the contract of assignment should not be against the public policy, *bono mores*, basic personal rights, and mandatory provisions of law[27] .

As an example to this general rule two illustrations can be provided. For instance, according to Article 162(1) of the CO, a receivable that is not assignable by law cannot be assigned. In this context, contracts of loan of an object for use where a borrower may not allow another party to use the object[28] or in the case of life annuities and contracts of support for life, the rights of the grantee cannot be transferred[29] . Another example with regard to basic personal rights is provided for by the Turkish Civil Code Article 23. According to this article a person cannot assign his present or future rights or receivables, without limiting them as to time and subject, to a third party. The rationale of this article is that an assignment of rights without a limitation may violate the basic personal rights of a person and this should not be permitted. Mutual consents of the parties should not be rendered defective due to duress, wilful deception or mistake[30] and there should not be any overreaching as well[31] .

2. Formal Validity Requirement

Apart from these traditional general requirements of contract law, assignments are also subject

to formal validity rules provided for by Article 163 of the CO. Article 163(1) reads as follows:

"*Form of Contract*

1. In order to be valid, an assignment must be in writing ".

The CO subjects the formal validity of an assignment to a writing requirement and this is a statutory formal validity requirement. Put another way, oral contracts to assign a receivable are not valid and parties cannot decide among themselves, contractually, that the contract can be oral. Accordingly, there is no party autonomy which allows the parties to agree on a lesser formal way of assigning the receivables.

On the other hand, promises as to assign a receivable may be entered into without a requirement as to form by virtue of Article 163(2) which reads as follows:

"*2. The obligation to conclude a contract of assignment may be entered into without requirement as to form* ".

The general writing requirements for contracts are enshrined in Articles 12 through 15 of the CO. According to Article 12, where the law requires a contract to be in writing such writing is also applicable to any modification thereof except for ancillary points of a complementary nature which are not contradictory to such a contract. Article 13 of the CO states that a contract, which by law must be in written form, must bear the signatures of all persons who are to be bound by it[32] . Article 14(1) of the CO, by virtue of Article 22 of the Electronic Signature Law[33] , was amended and now Article 14 of the CO permits secure electronic signatures and grants them same legal value as handwritten ones[34] . The recently prepared draft CO law, which is in consultation period, clarifies this point and provides for handwritten signature as well as an electronic one provided that it is a secure one[35] . The importance of this matter within the framework of contracts of assignment is that according to Turkish law the assignor must sign the contract but the assignee does not need to sign that contract. This is because the Article 13 of the CO requires the signature of the party who assumes obligation under a contract[36].

Article 169(3)[37] of the CO regulates assignment without consideration. The form of contract in an assignment without consideration is subject to the provisions of donation[38] which require a written form. However, even if the assignee does not sign the contract of assignment in the assignment without consideration, confirming evidence of consent is needed in order to conclude a legally valid contract. However, if the assignment is with consideration where the cause of the assignment is indicated, then the assignee should also sign the contract of assignment. In a partial assignment of receivables the amount that is assigned should be clearly indicated on the contract of assignment. But when the whole amount of any given receivable is to be assigned then this receivable should be specific but there is no necessity to indicate the amount in the contract of assignment. Furthermore, in a contract of assignment the identity, the subject matter of the assignment and the mutual assents of the parties of the contract of assignment should clearly be understood from the text of the contract[39] . However, one should

also clearly point out that there is no necessity to indicate the reason for the assignment in the assignment contract[40].

B. Existence of Assigned Receivable and the Assignment of Future Receivables under Turkish Law

Assignment of future receivables under Turkish law is one of the most controversial points of law. Although the subject is reasonably straightforward in different jurisdictions[41] , under Turkish law the assignment of future receivables must be distinguished as to whether the receivable arises out of an original contract that exists or does not exist at the time of the assignment contract.

As a traditional view under Turkish law, receivables that do not exist (or receivables arising out of speculative contracts that have not been concluded) at the time of the assignment contract cannot be assigned. Turkish law recognises assignments of future receivables that arise out of original contracts that exist at or before the conclusion of the assignment contract. For instance, an assignor may assign a specific element of the right to payment arising under a contract of sale to an assignee as the sales contract exists at or before the conclusion of the assignment contract. Another example is provided by lease contracts where the lessor assigns future rental payments arising out of an existing lease contract.

However, there are also views that accept the former type of assignments *i.e.* the possibility of assignability of receivables, once they legally arise, which are based on the original contract that does not exist at the time of the assignment contract[42]. One can concur with this view and argue that it should be possible to assign even non-existent receivables arising out of the original contract where the original contract has not been concluded at the time of the assignment contract, once they legally arise and as long as they should be identifiable as to the assignment contract they relate to[43] .

In fact, by virtue of the "conversion principle"[44] under Turkish law, it is possible to assign future receivables that arise out of contracts that do not exist at the time of the conclusion of the assignment contract. By virtue of this principle, the assignment of future receivables that arise out of a contract that does not exist at the time of the conclusion of the assignment contract may be upheld as an agreement of promise to assign[45] . However, one should also mention that even according to the conversion principle the receivables should be identifiable as to the assignment they relate to in order to prevent assignment of speculative receivables which will never arise legally. As a consequence of this type of assignment, in order to prevent unfair results, if the debtor has paid the assignee and an objection to the rights of the assignee might create unfair results, then by virtue of Article 2 of the Civil Code, an objection as to the legality of the rights of the assignee should be overruled[46] .

The bulk assignment of future receivables without being limited to subject matter and time is contrary to the Civil Code Article 23(2) and Code of Obligations Article 20(1) and these types

of assignment where there is no limitation as to subject matter and time are null and void.

Sometimes a receivable may not exist due to the fact that the original contract is legally invalid. The assignment of this type of receivable arising out of a legally invalid contract cannot be legalised by virtue of its assignment[47] . A right to payment cannot be assigned if it has already been paid or set-off. Also a right to payment cannot be assigned twice as in the first assignment the right to payment will leave the assets of the assignor and thus, there will no longer belong to the assignor and so cannot be assigned twice. Any good faith assignee's rights will not be preserved[48] .

The problem regarding the assignability of future receivables which affect securitisation transactions can be summarised as the position being that the future receivables that are the subject matter of securitisation transaction may be assessed by the bankruptcy administration under Turkish law. Since there is lack of clarity as to whether every type of future receivable is assignable, there may be problems in the application of Turkish law for these receivables. In that respect if the receivables arise out of a transaction that is not concluded at the time of the contract of assignment then they may be set aside. However, the UNCITRAL Convention provides for a solution to this matter and the future receivables will be assignable if receivables are identifiable as receivables as to which the assignment relates at the time of the conclusion of the original contract[49] .

C. Free Assignability

It is important to discuss, albeit briefly, the non-assignment element under Turkish law[50] . The rule under Turkish law is the free assignability of rights to payment. This is also enshrined under Article 162(1) CO[51] . Unless a right to payment is prohibited by law or contract, any right to payment can be assigned. This can be a partial right to payment, statutory or contractual right to payment, or a right to payment arising out of tort or unjust enrichment[52] . Under Turkish law an assignment can be prohibited by virtue of statute[53] , contract[54] or of the characteristic of the transaction[55] .

Under Turkish law, according to Article 162(2)[56] a debtor cannot rely upon the anti-assignment agreement between the debtor and the assignor, if an assignee has relied upon an assignment contract where no anti-assignment provision is included. The rationale of this provision is to protect good faith third parties. However, if the assignee knew or ought to have known the anti-assignment agreement or if he has not seen the assignment agreement that did not contain an anti-assignment provision, the debtor could refuse to pay the assignee. In any case, the assignor may be held liable on grounds of breaching the anti-assignment agreement.

III. THE UNCITRAL CONVENTION

The UNCITRAL Convention was completed in 2001 after a decade of careful work[57] . It creates certainty on matters, such as formal validity of assignments and the assignment of

future and bulk receivables. Other matters dealt with by the UNCITRAL Convention include (*inter alia*) priority issues, anti-assignment provisions, positive liability of assignee towards debtor, defences and set-off issues. Although the UNCITRAL Convention's title includes the "assignment of receivables" which exhibits the receivables financing, its scope is wider than that and covers financing practices such as securitisation and project financing. Under the Convention the term "receivable" is defined, by virtue of Article 2(a), as a contractual right to payment of a monetary sum. Also, the term "assignment" is used to cover both the outright (true) sale of receivables and the creation of rights in receivables as security for debt[58] . In the following part a comparison of the UNCITRAL Convention's formal validity of assignments and the assignment of bulk and future receivables regulation with that of Turkish law will be made.

A. Formal Validity of Assignments and the Formal Validity of the Contract of Assignment

1. Formal Validity of Assignments

Formal validity of assignments is regulated under the UNCITRAL Convention. The provision that regulates the formal validity of assignment is not a substantive law rule, but a choice of law rule. In the Convention, the form of an assignment is a condition of priority and was referred to the law of the assignor's location. By virtue of Articles 5(g) and 22, the form of assignment[59] is referred to the law of the assignor's location. Therefore, for instance, if the assignor is in located in Turkey, assuming that Turkey is a party to the UNCITRAL Convention, formal validity requirements of Turkish law on assignments shall apply to the transaction[60].

The UNCITRAL Convention does not contain a substantive law rule governing formal validity of the assignment itself. The Convention's concerns with the questions of formal validity of the assignment relate exclusively to the conditions required for the establishing of priority. The form of assignment is referred in the Convention only as a condition of priority and not by itself so as to regulate just the formal validity of the assignment. Articles 5(g) and 22 deals with that matter. Article 5(g) reads as follows:

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

The last two lines of this article show that the formal validity of the assignment is a condition of priority. In other words, if a party has a priority, he satisfies the necessary requirements of the form of assignment. This can be deduced from the words "requirements necessary to render the right effective against a competing claimant". In order to render a right effective against a

competing claimant, an assignment must be formally valid. This right is the 'right to payment.' In order to render this right effective against the competing claimant in the assignment, the party has to satisfy the formal validity requirements of the assignment.

These requirements and the law that should apply in order to establish priority are set out in Article 22, which reads as follows:

"*With the exception of matter that are settled elsewhere in this convention and subject to Articles 23 and 24, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant* ".

The law of the assignor's state shall govern priority matters. In this connection, the form of assignment, as it is the condition of priority, shall be governed by the law of the assignor's State. From this perspective, it can be argued that this provision is fair and appropriate, because it creates some certainty. The assignee can be expected to predict that the validity requirements will be governed by the assignor's law.

Finally, one can conclude on this matter that even though the Convention does not provide a substantive law rule on the formal validity of the assignment, it provides a certain amount of certainty and predictability for the assignee and the assignor. This is because they can be able to know, by virtue of Article 22, which law applies to the form of assignment as a condition of priority.

2. Formal Validity of the Contract of Assignments

The Convention also contains a choice of law rule for the formal validity of the contract of assignment. This provision is contained in Chapter V of the Convention which deals with the autonomous choice of law rule. The provision dealing with the formal validity of the contract of assignment reads as follows:

"Article 27 Form of a contract of assignment

1. A contract of assignment concluded between persons who are located in the same State is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of the State in which it is concluded.

2. A contract of assignment concluded between persons who are located in different States is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of one of those States ".

Before explaining the provision regulating the form of a contract of assignment the status of Chapter V of the UNCITRAL Convention should briefly be explained. Chapter V of the Convention deals with the autonomous choice of law rule in the Convention. For the application of Chapter V there is no need for an assignment to be connected to the assignor or the debtor's State[61] . The forum must be in a Contracting State and Chapter V acts as the private international law rules of the forum. Meeting the internationality requirement is sufficient for

the applicability of the Chapter V. So for instance if the assignment is international[62] or the receivable is international[63] , then Chapter V will be applicable, as the Convention defines its applicability on the basis of internationality of either the assignment or the receivables. Chapter V of the Convention has a gap filling role as it applies to matters within the scope of the Convention but not specifically settled elsewhere in it[64] . Accordingly, the autonomous choice of law rule of the Convention fill the gaps where the assignor or the debtor is located in a State that is a Contracting State to the Convention or the law governing the underlying contract is the law of a State that is a party to the Convention. Also, the autonomous choice of law rules of the Convention shall apply if the assignor or the debtor is not located in a State that is a party to the Convention or the law governing the underlying transaction is not the law of a State that is a party to the Convention Chapter V rules may apply to the transaction where other provisions of the Convention do not apply[65] .

In the light of the above introduction, one can argue that the formal validity of the contract of assignment provision of the Convention applies under the above circumstances as a precondition of the formal validity of assignments. From that perspective there is a similarity with the UNCITRAL Convention and Turkish law. That is that Turkish law requires the contract of assignment to be formally valid before the assignment itself may be valid. The same requirement is equally applicable under the UNCITRAL Convention's Chapter V Article 27. Therefore, if Turkey is to become a party to the Convention its law will be in harmony with the Convention's approach, as under Turkish law the formal validity of the contract of assignment is a precondition of the formal validity of the assignment.

From the perspective of Chapter V, for instance if the forum is in Turkey, the autonomous rules of Chapter V will apply as the private international law rules of the forum (*i.e.* as Turkish private international law rules). Or from another angle, assuming that Turkey is not a party to the Convention, if the debtor or assignor is located in Turkey or if the law of Turkey is the governing law of the original transaction, the rules of Chapter V will still apply to transactions to which the other provisions of the Convention would not apply. This extends the applicability of the Convention. From a further perspective, assuming that Turkey is a party to the Convention, if the assignor or the debtor is located in a State party to the Convention (Turkey) or the law governing the original contract is the law of the State party to the Convention (Turkish law applies as the governing law) Chapter V may apply to fill the gaps in the Convention if a solution cannot be derived from the principles underlying the Convention.

In any case formal validity of the contract of assignment will be in line with Turkish law by virtue of Article 27, for example, when the assignee and the assignor are located in Turkey by virtue of paragraph (1) satisfaction of the formal validity rules of either the law which governs it (any law that is agreed upon by the parties on the contract) or the law of Turkey as the State where the assignment contract is concluded will be required. Also, by virtue of paragraph (2), if a Turkish assignor concludes an assignment contract with an assignee in a different State satisfaction of the formal validity rules of either the law which governs it (any law that is agreed upon by the parties on the contract) or the law of either Turkey or the other country will

be required.

B. The Assignment of Bulk and Future Receivables

The Convention regulates assignments of bulk and future receivables under Article 8 under the title "Effectiveness of Assignments". Article 8 deals with statutory limitations inherent in national laws. In this context, the Convention especially facilitates financing practices such as securitization, project financing and asset based financing by giving effectiveness to assignment of future and bulk receivables. The effectiveness given by the UNCITRAL Convention to assignments of bulk and future receivables represents a significant difference from many national laws and "*is [also] intended to facilitate receivables financing in a number of jurisdictions where the validity of the assignment of future receivables is questionable* "[66] . Article 8 of the UNCITRAL Convention provides as follows:

"*1. An assignment is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant, and the right of an assignee may not be denied priority, on the ground that it is an assignment of more than one receivable, future receivables or parts of or undivided interests in receivables, provided that the receivables are described:*

a) individually as receivables to which the assignment relates; or

b) in any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates.

2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.

3. Except as provided in paragraph 1 of this article, Article 9 and Article 10, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law ".

1. "Existing Receivable" and "Future Receivable" Defined

The UNCITRAL Convention in Article 5(b) defines "existing" and "future receivable"[67] . According to Article 5(b)[68] an 'existing receivable' means a receivable that arises upon or before conclusion of the contract of assignment and a 'future receivable' means a receivable that arises after conclusion of the contract of assignment. For example, an assignor assigns to an assignee the right to payment which will arise in future sales contracts of dried figs. Therefore, the assignment contract is concluded prior in time to the original contract. With respect to future receivables, one can also argue that when the time of transfer is closer to the time of assignment, more certainty and predictability could be achieved as to rights of the assignee[69] . This has a great effect on the cost of credit and the availability of the credit based receivables because the assignee will be able to predict his position and the possible risks in the transaction. Moreover, defining the terms is a correct approach in the process of validating

assignments of bulk and future receivables. This is due to these definitions bringing certainty to what these terms mean when questions of interpretation arise. There is harmonised terminology and thus legal language assumes greater currency and value in international trade.

From this perspective, definitions of existing and future receivables under the UNCITRAL Convention have similarities with that under Turkish law. However, since under Turkish law assignability of future receivables arising out of contracts concluded after the assignment contract are not granted straightforward effectiveness[70] ("conversion principle" may assist under those circumstances)[71] , if Turkey is to ratify the UNCITRAL Convention refining process similar to that which is currently in progress will be likely to continue[72] unless a change within the terms of the UNCITRAL Convention is made[73] .

2. The Rationale behind the Effectiveness of these Types of Assignments

The Convention sets aside, by virtue of Article 8, the statutory limitations that restrict assignment of bulk and future receivables. One of the main reasons why States restrict these assignments is to protect "*the assignor from excessive limitations on its economic activity, addressed by requirements for a specific description of the assigned receivable* "[74] . In other words, in some systems statutory limitations require an assignor to specify each and every receivable before assigning them. However, as far as bulk and future receivables are considered, it is not always possible to specify them. In this regard the assignor is not able to assign due to these statutory restrictions. One can notice that these types of restrictions are not consistent with the modern financing practices and the needs of the modern commercial life. In this context, the UNCITRAL Convention's approach, as specified in Article 8, in effecting these assignments and setting aside the statutory restrictions that limit these assignments is correct and consistent with the needs of the modern commercial life and certainly lowers the cost of credit.

3. The Rule in Article 8

Article 8(1) gives effectiveness to the assignment of bulk and future receivables as between the assignor and the assignee or as against the debtor or as against a competing claimant. The Convention removes obstacles before the assignment of bulk and future receivables and their effectiveness as against the debtor and third parties. Also, with regard to priority issues, Article 8(1) expressly states that the right of the assignee cannot be denied priority just because there was an assignment of bulk and future receivables.

Furthermore, according to the Convention, an assignment cannot be deemed as ineffective as against the assignor, the assignee, and the debtor or a third party just because it is an assignment of future receivables or a receivable that is not individually identified at the time of the assignment. The only condition that the Convention provides, by virtue of Article 8(1)(a) and (b), is that these receivables should be identified as receivables to which the assignment

relates. In other words, the Convention does not need a specific description of the receivables, and the description can even be general so long as the receivables may be attributed to and identified in the contract of assignment. The rationale behind this is to protect the interests of the assignor and that is why Article 8(1) brings the condition that the receivables should be identifiable as receivables to which the assignment relates. Therefore, a description such as "all my receivables from my dried figs business" would be sufficient in bulk assignments as well as in assignments of future receivables.

In the UNCITRAL Convention, by virtue of Article 8(1)(a) with regard to bulk assignments, if the parties give general descriptions in an assignment this will be effective as long as the receivables are described in such a manner that they can be identified as receivables to which the assignment relates. This means that the debtor and the amount owed should be identifiable. If the debtor and the amount owed are identifiable then assignments made in bulk would be valid.

Article 8(1)(b) provides that assignments of future receivables are to be given effect provided that the receivables can, at the time of the conclusion of the original contract, be identified as receivables to which the assignment relates. Article 8(1)(b) also provides for bulk assignments that they should be identifiable at the time of the assignment, if they cannot be identified individually by virtue of Article 8(1)(a). Once again identification of the exact moment at which the transfer becomes effective would clarify doubts in those legal systems where bulk assignments and assignments of future receivables are not recognized due to different problems. Under the UNCITRAL Convention the exact time when the future receivables gain effectiveness is the time of the conclusion of the original contract. Giving effectiveness to future receivables as of the time of the conclusion of the original contract "*would not compromise the rights of the assignee, since in practice credit was extended at the time when an actual transaction from which receivables might flow was concluded* "[75] . Also, it was wise not to deem the future receivables effective as of the time of the assignment, as the assignor might assign the same receivable to another person; therefore the Convention protects the interests of the assignee and takes a step towards the facilitation of credit[76] .

This approach is in line with the Turkish law. This is because when a future receivable is assigned it gains effectiveness at the time of the conclusion of the original contract according to the UNICTRAL Convention and similar approach is equally applicable under Turkish law as it is not possible to assign a receivable that has not gained effectiveness. The assignment will then be regarded as a promissory agreement to assign the receivables, by virtue of the conversion principle. In fact, the regulation of UNCITRAL Convention will clarify the position under Turkish law better and will make the assignment of future receivables more attractive. One should also make it clear that the UNCITRAL Convention's approach does not allow the assignment of speculative receivables. It clearly requires the identifiability of receivables to the assignment contact to which they relate.

4. Assignment of Future Receivables Does not Require a New Act of Transfer

The Commission also supported the effectiveness of the assignment of future receivables in Article 8(2). Accordingly, there is no need of a new contract of assignment to be executed when there is an assignment of future receivables and the future receivable thereafter arises or is created and naturally, can be identified to the contract of assignment. The rationale behind the fact that there is no requirement for a new act of transfer is that future contractual receivables arise after the contract of assignment therefore there is no need to have a new assignment document covering that receivable. In addition, a new act of transfer runs contrary to the goal of lowering the cost of credit. This is due to that fact that the assignee and assignor will have to deal with administrative issues in the process of preparing a new act of transfer and when the future receivables are bulk receivables the efforts have to be doubled, in the form of checking each document and preparing a new act of transfer. In this regard the Convention does not require a new act of transfer in the assignments of future receivables. This approach is certainly a cost-effective.

CONCLUSION

It is possible to argue that the UNCITRAL Convention on the Assignment of Receivables in International Trade has similarities with the Turkish law of assignments. Formal validity of assignments and the formal validity of the contract of assignments provisions of the Convention will have no negative effect on the Turkish law as these provisions are not substantive law provisions and rather are choice of law provisions. In that context, the Convention provides a perfect opportunity for the Turkish assignor as the Turkish assignor will be able to apply the Convention so that the formal validity of assignment is subjected to the law of the assignor's State. Therefore, Turkish law will apply to the formal validity of the assignment if the Convention is chosen as the applicable law.

The formal validity of the contract of assignment provision contained in Article 27 of the Convention is an important provision. Turkish assignor or a Turkish debtor who is located in Turkey will still be able to benefit from the application of the Convention and its Chapter V even if Turkey is not a party to the Convention.

Especially the effectiveness of the assignment of future receivables by the UNCITRAL Convention will allow the parties to apply Turkish law to their assignment contracts and, for instance, in a securitisation transaction parties will not be forced to take into account two different laws while drafting their transactions (*i.e.* foreign law to the assignment contract and Turkish law as to the bankruptcy of an originator where the bankruptcy administrator evaluates the assignability of future receivables) if the Convention is chosen as the applicable law.

Finally, the potential ratification of the UNCITRAL Convention will enable Turkish banks and businesses to regain their financial strength in the international arena. By virtue of eliminating complexities and clarifying the assignability of future receivables, small and middle-sized businesses in Turkey will also be able to obtain low cost credit.

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1. *See* http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf (last accessed 5 December 2005).

2. *See* Resolution 56/81, of 12 December 2001.

3. *See generally* Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on the Assignment of Receivables in International Trade 27 *et seq.* (United Nations Publications, New York, 2004).Although the Unidroit Convention on International Factoring (the so-called Ottawa Convention 1988) precedes the UNCITRAL Convention, its scope and effectiveness are far narrower than that of the UNCITRAL Convention. That is why one can argue that the UNCITRAL Convention is the first truly comprehensive legislation on the assignment of receivables as it does not only affect assignments but also securitisation and project financing.For a discussion of the UNCITRAL Convention, *see generally* Spiros Bazinas, *Key Policy Issues of the United Nations Convention on the Assignment of Receivables in International Trade,* 11 Tul. *J. Int'l & Comp. L.* 275 (2003); Spiros Bazinas, *An International Legal Regime For Receivables Financing: UNCITRAL's Contribution,* 8 Duke *J. Comp. & Int'l L.* 315 (1998); Spiros 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); Spiros Bazinas, *UNCITRAL's Contribution to the Unification of Receivables Financing Law: The United Nations Convention on the Assignment of Receivables in International Trade, Uniform L. Rev.* 49 (2002); Carsten Böhm, *Die Sicherungsabtretung im UNCITRAL-Konventionsentwurf "Draft Convention on Assignment in Receivables Financing" - Ein Vergleich der Sicherungsabtretung ... mit den Regelungen im deutschen Recht* (Shaker Verlag, Aachen, 2000); Franco Ferrari, *The UNCITRAL Draft Convention on Assignment in Receivables Financing: Applicability, General Provisions and the Conflict of Conventions,* 1 Melbourne *J. Int'l L.* 1 (2001); Franco Ferrari, *The UNCITRAL Draft Convention on Assignment in Receivables Financing: Critical Remarks on Some Specific Issues,* in: *Private Law in the International Arena - Liber Amicorum Kurt Siehr* 179 (Jürgen Basedow *et al.* eds., T.M.C. Asser Press, The Hague, 2000).

4. Such as Land Registry, Motor Vehicles Registry, Ship Register and Aircraft Registry.

5. The rules relating to pledge of movables and mortgage can be found in the Civil Code whereas the rules on assignment of receivables can be found in the Code of Obligations; the rules relating to pledge of commercial enterprise can be found in the Commercial Enterprise Pledge Act, whereas those relating to mortgage of ships can be found in the Commercial Code; finally, those relating to pledge of aircraft can be found in the Turkish

Civil Aviation Act. For a summary information on the background information on pledge and mortgage under Turkish law *see* Noyan Turunç and Esin Taylan, *'Security Interests under Turkish Law' in: Remedies Under Security Interests* 233-244 (I.M.Fletcher & O. Swarting *eds.,* Kluwer Law International and IBA, London, 2002).

6. Such as the Financial Leasing Act, the Banking Act, the Commercial Enterprise Pledge Act, the Civil Aviation Act etc.

7. Türk Borçlar Kanunu, (TBK) 22.04.1926.

8. "Obligationenrecht"; recently, in Turkey, a new draft Code of Obligations, again parallel to the Swiss Obligations Code, has been drafted and it is in the consultation period. A copy of the draft Turkish Code of Obligations is available online, in Turkish, at http://www.kgm.adalet.gov.tr/borclarkanunu.htm (last accessed on 1 December 2005).

9. This matter has been, in a lengthy manner, discussed in *e.g.* Esin Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition,* vol. 4.1 *Electronic Journal of Comparative Law,* (June 2000), available at http://www.ejcl.org/41/art41-1.html (last visited 5 February 2005); Esin Örücü, *Turkey: Change under Pressure,* in *Studies in Legal Systems: Mixed and Mixing* 89 (Esin Örücü ed., *Kluwer Law International,* London, 1996); Esin Örücü, *The Impact of European Law on the Ottoman Empire and Turkey,* in *European Expansion and Law* 39 (W.J. Mommsen and J.A. de Moor eds., Oxford Berg Publishers, Oxford, 1992).

10. Swiss Civil Code (Zivilgesetzbuch), Code of Obligations (Obligationenrecht) and Swiss Neuchatel Civil Procedure Law; German Commercial law (Handelsrecht), Maritime law (Seehandelsrecht) and criminal procedure law (Strafprozeßordnung); Italian criminal code (Codice Penale); and French administrative law (Droit Administratif).

11. *See generally* Esin Örücü, *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition,* vol. 4.1 *Electronic Journal of Comparative Law,* (June 2000), http://www.ejcl.org/41/art41-1.html (last visited 31 January 2005) where she also explains the rationale of these adoptions as "[t]he main purpose behind the receptions was to tear up the foundations of the old legal system by creating completely new laws, and 'to regulate and legislate the … relationships of the people according to what was thought these relationships ought to be, and not according to existing customs, usages, and religious mores. This … was revolutionary and radically reformist, and can be summed up as a prime example of "social engineering through law"; for more information *see also* A. Watson, *Legal Transplants and European Private Law,* vol 4.4 *Electronic Journal of Comparative Law,* (December 2000), http://www.ejcl.org/ejcl/44/44-2.html (last visited 31 January 2005); *see also* Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* 178 (3rd ed, Oxford University Press, Oxford, 1998).

12. Mustafa Kemal Atatürk, the founder of the modern Turkish Republic, gave this surname to Mahmut Esat Bey in 1934 after the enactment of Surnames Act, in honour of his success in the case *Bozkurt v Lotus* against France, where he was the representative of Turkey, before the International Court of Justice in The Hague in 1927.

13. Mahmut Esat Bozkurt studied law in Istanbul Law School and he also graduated from Fribourg University Law School, Switzerland. He was familiar with both the Turkish and Swiss laws and the social conditions in both countries. *See also* Alan Watson *The Making of the Civil Law* 130 (Harvard University Press, Cambridge, 1981) where he mentions that it is not clear whether the adoption of Swiss Code of Obligations and Civil Code was "because of their merits or because the then Turkish minister of justice had studied law in Switzerland". *But cf.* Sauser-Hall 'La réception des droits européens en Turquie' *Recueil de travaux publié par la Faculté de Droit de l'Université de Genève* 323, 345 *et seq* (1938). (as cited in Konrad Zweigert and Hein Kötz *Introduction to Comparative Law* 178) where it was stated that "… the decision of the Turkish legislature was based also on the formal merits of the Swiss ZGB [Zivilgesetzbuch], especially its brevity, lucidity and comprehensibility, as well as on the fact that it would be much easier to translate the French version of the ZGB and use commentaries in French because French is much more commonly understood in Turkey than German".

14. *See e.g.* Alan Watson *ibid*, at 130 where he states that "[t]he Swiss codification has been very much praised, and for a time there was a call to adopt it in Germany". *See* generally Zweigert and Kötz *supra* note 11, 167 *et seq.*

15. Türk Medeni Kanunu, 17.02.1926.

16. *See* Turkish Civil Code Article 5 reads as follows: "This Code and the general provisions of the Code of Obligations shall apply as applicable to all private law transactions". Also the Turkish Code of Obligations Article 544 reads as follows: "This law, which is the supplementary of Civil Code, is accepted with attached corrections".

17. *See generally* Alan Watson, *Legal Transplants and European Private Law*, Ius Commune Lectures on European Private Law, 2.

18. These special contracts are sale of movables (Articles 184-212) and immovables (Articles 213-217), Barter (Articles 232-233), Donation (Articles 234-247), Rental agreement and usufructuary lease (Articles 248-298), Loan of an Object for use (Articles 299-305), Loan (Articles 306-312), Employment contract (Articles 313-354), Work contract (Articles 355-371), Publishing contract (Articles 372-385), Mandate (Articles 386-398), Letter of Credit and Credit Orders (Articles 399-403), Brokerage contract (Articles 404-409), Conducting Business Without Mandate (Articles 410-415), Commission (Articles 416-430), Procuration and other commercial mandates (Articles 449-456), Order (Articles 457-462). Bailment (Articles 463-482), Guarantee (Articles 483-503), Gambling and Betting (Articles 504-506), Life Annuities and Contracts of

Support for Life (Articles 507-519), Simple Partnership (Articles 520-541).

19. *See* Herguner Bilgen Ozeke, *Securitization thrives with Novel Structures, International Financial Law Review,* March 2005, at 101.

20. Article 163(1).

21. Article 162(1).

22. Emphasis added.

23. Serial III, No. 14.

24. This undertaking should be in the following form: "*If the debt is not paid in three days following the maturity date we shall pay the amount of outstanding debt to the general finance company or bank, without any requirement of warning, denouncement, protest, enforcement proceeding or lawsuit substitution to obligors* ".

25. Article 14 of the Communiqué on Principles Regarding Registration of Asset Backed Securities with the Board and Principles Regarding the Establishment and Activities of General Financial Companies (Serial III no. 14) available in English at http://www.cmb.gov.tr/(last visited on 6 April 2006).

26. CO Article 1 reads as follows: "*1. For a contract to be concluded, a manifestation of the parties' mutual assent is required. 2. Such manifestation may be either express or implied* ".

27. CO Article 19 reads as follows*:* "*1. The content of a contract may, within the limits of the law, be established at the discretion of the parties. 2. Agreements deviating from what is provided for by law are valid only if the law does not contain mandatory provisions which may not be modified, or where such deviation does not violate public policy, bonos mores, or basic personal rights* ".

28. CO Article 300(2).

29. CO Article 519(1).

30. These are expressed in CO Articles 23-31.

31. CO Article 21 which reads as follows*:* "*1. Where a contract establishes an obvious disparity between the respective considerations given by the parties, and where the conclusion of the contract was induced by one of the parties exploiting the distress, inexperience, or improvidence of the other, then the other party prejudiced thereby may, within one year, declare rescission of the contract, and demand restitution for the consideration already given. 2. Such one year period commences with the conclusion of the contract* ".

32. Article 13 of the CO reads as follows: "*1. A contract which by law must be in written form must bear the signatures of all persons who are to be bound by it. 2. Where the law contains no provision to the contrary, a letter or a telegram is deemed to be in writing, provided that the letter or the telegram form bears the signatures of the persons binding themselves* ".

33. 15.1.2004 dated, No. 5700 Electronic Signature Law.

34. Article 14(1) of the CO reads as follows*:* "*A signature must be handwritten by the party who assumes obligation. A secure electronic signature has the same power of proof as a handwritten one* ".

35. Draft Article 15 of the draft CO *see also supra* note 8.

36. *See generally* S. S. Tekinay *et al 'Tekinay Borçlar Hukuku Genel Hükümler/Tekinay Law of Obligations General Provisions* 243 (7th ed., Istanbul, 1993); Kemal O_uzman and Turgut Öz *Borçlar Hukuku Genel Hükümler/Law of Obligations General Provisions* 900 *et seq* (3rd ed., Filiz, Istanbul, 2000). However, if the assignee also assumes an obligation such as if there is an assignment with consideration then both parties should sign the contract. *See infra paragraph; see also* Kemal Dayinlarli, *Borçlar Kanununa göre Alaca_in Temliki/ Assignment of Receivables according to Code of Obligations* 68-69 (_kinci bask ##2nd ed., Dayinlarli, Ankara, 2000).

37. Article 169(3) of the CO reads as follows: "*3. In the case of an assignment without consideration, the assignor does not even warrant the existence of the claim* ".

38. Article 238(1) of the CO reads as follows: "*1. A promise to make a donation requires written form to be valid* ".

39. *See* Tekinay *et al., supra* note 36, at 243.

40. *See also* O_uzman and Öz, *supra* note 36, at 896-897. *See also infra* regarding the Assignment of Future receivables.

41. For instance under English law by virtue of *Tailby v. Official Receiver* (1888) 13 App. Cas. 523 and *Holroyd v Marshall* (1861) 10 HLC 191; [1861-1873] All ER Rep 414 and under American UCC Article 9 §9-204 *et seq.*

42. *See e.g.* Tekinay, *supra* note 36, at 248-249; Kemal Tunçoma_, *Borçlar Hukuku Genel Hükümler/Law of Obligations General Provisions* 1082 (6th ed., Istanbul, 1976); *but cf.* O_uzman and Öz, *supra* note 36, at 901.

43. For a similar view *see also* Dayinlarli, *supra* note 36, at 142 where he states that "… *in accordance with the general principles of the Code of Obligations, assignment of an existing or non-existing right or a right to payment is valid…* " *see also* Yargitay 4.HD, 8.12.1976, 1976/2040 E., 1976/10645 K./Court of Cassation 4th Chamber of Law

decision 8.12.1976 dated 1976/2040 E., 1976/10645 K. decision.

44. Tahvil/Çevirme Prensibi, *see e.g.* O_uzman and Öz, *supra* note 36, 898 and 902.

45. *But cf.* Fikret Eren, *Borçlar Hukuku Genel Hükümler Cilt III/Law of Obligations General Provisions Volume III* 426 (Ankara, 1991).

46. *See* O_uzman and Öz, *supra* note 36, at 902.

47. But for an exception to this *see* Article 18(2) CO which reads as follows: Concealment "*(2) Where a third party has acquired a claim relying upon a written acknowledgment of debt, the debtor cannot argue in defence that his real intent was not expressed in the acknowledgment* ".

48. Eren, *supra* note 45, at 420; O_uzman and Öz, *supra* note 36, at 904.

49. *See infra* for the regulation under the UNCITRAL Convention and for a comparison with the Turkish Law.

50. A comparison between the free assignability rules and the UNCITRAL Convention's rules will not be made here, as the main discussion of this article is about the assignment of future receivables and the formal validity of assignments. It suffice here to state that the UNCITRAL Convention's approach on anti-assignment provisions differs from that of the Turkish law where the former grants effectiveness to an assignment made notwithstanding an anti-assignment clause in the original contract.

51. *See supra.*

52. *See generally* O_uzman and Öz, *supra* note 36, at 904-905.

53. Article 284(1) CO The right of the usufructuary lessee where without the consent of the lessor lessee cannot transfer or sublease; Article 300(2) Loan of an object for use where the borrower may not allow another party to use the object etc.

54. In Latin this agreement is called as "*pactum de non cedendo* " Under Turkish law this anti-assignment agreement is a separate agreement and not subjected to any formality requirements.

55. For instance in the contracts of mandate, the right of the principal to ask the agent to carry out the contract cannot be assigned.

56. *See supra.*

57. For more information and an Explanatory Note on the Convention *see* http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf (last accessed on 23 January 2006).

58. Article 2(a) of the UNCITRAL Convention reads as follows: "*(a) "Assignment" means the transfer by agreement from one person ("assignor") to another person ("assignee") of all or part of or an undivided interest in 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". See also* Catherine Walsh, *Receivables Financing and the Choice of law: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade,* 106 *Dick. L. Rev.* 159, 193 (2001).

59. A/CN.9/557, at 8, para. 24.

60. For the formal validity requirements *see supra.* The UNCITRAL Convention, with the exception of the debtor related provisions [Article 1(3)], applies to international assignments and to assignments of international receivables if the assignor, at the time of the conclusion of the contract of assignment, is located in a State that is a party to the Convention [Article 1(1)(a)].

61. Explanatory Note of the UNCITRAL Secretariat on the United Nations Convention on the Assignment of Receivables in International Trade, at 43, para. 54 (United Nations Publication, New York, 2004) where it was stated that "*Chapter V contains a set of conflict of laws rules that may apply independently of any territorial link with a State party to the Convention* ". *See also* Article 1(4) which reads as follows: "*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 to 3 of this article. However, those provisions do not apply if a State makes a declaration under Article 39* ".

62. International assignment of domestic receivables or international assignment of international receivables.

63. Domestic assignment of international receivables or international assignment of international receivables.

64. Article 26 of the Convention reads as follows: "*Application of Chapter V The provisions of this chapter apply to matters that are (a) within the scope of this Convention as provided in Article 1, paragraph 4; and (b) otherwise within the scope of this Convention but not settled in it* ".

65. Explanatory Note *supra* note 61, at 43, para. 54.

66. Spiros Bazinas, *An International Legal Regime for Receivables Financing: UNCITRAL's Contribution,* 8 Duke *J. Comp. & Int'l L.* 315, 329 & n. 69 (1998) (where he states that "[t]he restrictions as to the assignability of future receivables may be direct [such as in the case of Spanish Civil Code Article 1529] or indirect, such as when assignment

requires notification of the debtor, the identity of whom may not be known, at the time of assignment, in the case of future receivables".); *see also* Bruce Markell, *UNCITRAL's Receivables Convention: The First Step, But not the Last,* 12 Duke *J. Comp. & Int'l L.* 401, 403 (2002) where he states generally in favour of effectiveness of assignments of bulk and future receivables that if such limitations continue to exist, then an assignor has to describe every receivable definitely upon its creation and the debtor must be notified for every receivable and necessary administrative work must be ensured for an effective transfer, thus the increase in the cost of credit will be inevitable.

67. *See also* A/CN.9/489, para. 87.

68. Article 5(b) of the UNCITRAL Convention reads as follows: "*(b) "Existing receivable" means a receivable that arises upon or before conclusion of the contract of assignment and "future receivable" means a receivable that arises after conclusion of the contract of assignment* ".

69. For a similar assertion *see* A/CN.9/434, para. 119.

70. This is because assignments under the Turkish law are dispositive act and an assignor must have the receivables or right to payment under its ownership, at the latest, at the time of the contract of assignment in order to assign them. Otherwise, the rationale of the law is that future receivables that arise out of speculative contracts (contracts that may be concluded after the conclusion of assignment contract) cannot be assigned as the assignor at any moment in the future will not have the ownership or at least possession of them.

71. *See supra* on Conversion principle.

72. That is to say that separation of assignment of receivables that arise of contracts concluded at or before or after the assignment contract.

73. For further comparisons and suggestions *see infra.*

74. Spiros 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, at 265 (2001).

75. *See* A/CN.9/434, para. 118.

76. *See also* A/CN.9/445, para. 224 (where it was stated that "*[t]here was general support for the principle that a future receivable should be deemed as having been transferred at the time of the contract of assignment. It was observed that, in view of the risk that, after the conclusion of the contract of assignment, the assignor might assign the same receivables to another assignee or become insolvent, it was essential to set the time of the transfer of the assigned receivables at the time of the conclusion of the contract of assignment … in practice, the assignee would acquire rights in future receivables only when they arose, but in legal terms the time of transfer would be deemed to be the time of*

the contract of assignment ”.).