TURKISH LAW AND THE UNCITRAL'S WORK ON THE ASSIGNMENT OF RECEIVABLES WITH A SPECIAL REFERENCE TO THE ASSIGNMENT OF FUTURE RECEIVABLES

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INTRODUCTION

Raising finance by the assignment of receivables is an important financing technique and its regulation varies under different legal systems. The UNCITRAL Convention on the Assignment of Receivables in International Trade ("the UNCITRAL Convention")[1] was adopted in 2001 by the General Assembly.[2] The UNCITRAL Convention was prepared to establish a sophisticated, comprehensive and potentially far-reaching model for the modernisation of domestic assignment laws of countries and a substantive step for harmonisation of the law of assignment of receivables in international trade.[3] The UNCITRAL Convention not only affects assignment transactions but also securitisation and project financing.[4] The key

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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] Although the Unidroit Convention on International Factoring precedes the UNCITRAL Convention, its scope of application and regulation of substantive issues such as Anti-assignment clauses, positive liability of assignee to debtor, debtor protection provisions, assignment of future and bulk receivables are far narrower than that of the UNCITRAL Convention. For the text of the Unidroit International Factoring Convention *see* www.unidroit.org (last accessed 24 May 2006)

[4] *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). 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); Bazinas, *An International Legal Regime For Receivables Financing: UNCITRAL's Contribution*, 8 Duke J. Comp. & Int'l L. 315 (1998); 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); Bazinas, *UNCITRAL's Contribution to the Unification of Receivables Financing Law: The United Nations Convention on the Assignment of Receivables in International Trade*, (2002) Uniform L. Rev. 49; 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); Ferrari, The UNCITRAL Draft Convention on Assignment in Receivables Financing: Critical Remarks on Some Specific Issues,

objective of the UNCITRAL 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.[5]

Turkish law has the essential elements of a modern secured transactions regime such as priorities in collateral, registration and, therefore, public notice of security interests on certain property[6] and non-possessory security interests. However, Turkish secured transactions law is fragmented and the elements that shape the system can be found[7] in the Civil Code, Code of Obligations, Commercial Code, Code of Execution and Bankruptcy and various other specialised laws.[8] In that context, the assignment of receivables under Turkish law is governed by the Code of Obligations ("CO")[9]

Empirical evidence[10] clearly demonstrates that less than 10% of borrowers use receivables as collateral in Turkey, as mainly land and buildings are used as collateral. This is a critical point. The future possible adoption of the UNCITRAL Convention would facilitate borrowers having access to finance using receivables as collateral more often.

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179 *in*: Private Law in the International Arena-Liber Amicorum Kurt Siehr (Jürgen Basedow et al., eds., T.M.C. Asser Press, The Hague, 2000).

[5] The UNCITRAL has been preparing a draft Legislative Guide on Secured Transactions ("draft Guide"). The draft Guide analyses the main issues in secured transactions and how they could be dealt with in domestic secured transactions legislation. The relationship between the Convention and the draft Guide is crucial and the draft Guide reflects the principles of the Convention and will supplement the Convention on matters referred by the Convention to domestic law. For a detailed analysis of the UNCITRAL draft Legislative Guide on Secured Transactions *see e.g.* Spiros Bazinas, *Modernising and Harmonising Secured Credit Law: The Example of the UNCITRAL Draft Legislative Guide on Secured Transactions Part 1 and 2*, (2006) 01 JIBFL 20 and (2006) 02 JIBFL 58.

[6] Such as Land Registry, Motor Vehicles Registry, Ship Register and Aircraft Registry.

[7] The rules relating to pledge of movables and mortgage can be found under Civil Code whereas assignment of receivables can be found under the Code of Obligations, pledge of commercial enterprise can be found under Commercial Enterprise Pledge Act, mortgage of ships can be found under Turkish Commercial Code and pledge of aircraft can be found under 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 Ian M. Fletcher and Odd Swarting (eds) *Remedies Under Security Interests* (Kluwer Law International and IBA, 2002) 233-244.

[8] Such as Financial Leasing Act, Banking Act, Commercial Enterprise Pledge Act, Turkish Civil Aviation Act etc.

[9] Türk Borçlar Kanunu, (TBK) 22.04.1926. It was adopted in 1926 from the Swiss Code of Obligations "Obligationenrecht" (OR). Apart from the black letter of the Code, academic opinions and precedents have also been adopted in order to adapt better the black letter text into business practice. 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 June 2006).

[10] *See* Mehnaz Safavian, *Firm Level Evidence on Collateral and Access to Finance*, Presentation made at the *International Workshop on Collateral Reform and Access to Credit*, EBRD, London on 8-9 June

This article will deal only with the assignment of future receivables. In this connection, formal validity of assignments and the assignment of future receivables under Turkish law and the UNCITRAL Convention will be discussed. In that context certain observations and suggestions will be made as to the feasibility and usefulness of ratification of the UNCITRAL Convention .

1. TURKISH CODE OF OBLIGATIONS

The Turkish Republic has been a modern, secular, Western and civilian democracy since 1923 and its legal culture is a combination of Swiss, German, Italian and French legal cultures and belongs to the Civil law system.[11] The Turkish CO is the complementary part of the Turkish Civil Code and the two are interrelated.[12] The CO regulates the commercial relationships between persons.[13] In that context, the CO regulates both the general contractual framework and special contracts.[14]

2006 available at http://www.ebrd.com/country/sector/law/st/new/develop/workshop/safavian.pdf (last accessed on 28 June 2006).

[11] Swiss Civil Code (Zivilgesetzbuch), Swiss Code of Obligations (Obligationenrecht) and Swiss Neuchatel Civil Procedure Law; German Commercial law (Handelsrecht), German Maritime law (Seehandelsrecht) and German Criminal Procedure Law (Strafprozeßordnung); Italian criminal code (Codice Penale); and French administrative law (Droit Administratif). For further information *see* Esin Örücü, *id.*, at http://www.ejcl.org/41/art41-1.html (last visited 30 March 2006); Alan 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 30 March 2006); Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law, 178 (3rd ed, Oxford University Press, 1998). For more information on the adoption and creation of modern Turkish civil and commercial laws *see e.g.* 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 5 February 2006); Esin Örücü, 'Turkey: Change under Pressure' in Esin Örücü et al. (eds) *Studies in Legal Systems: Mixed and Mixing* (London Kluwer Law International 1996) 89-111; Esin Örücü, 'The Impact of European Law on the Ottoman Empire and Turkey' in W.J. Mommsen and J.A. de Moor (eds) *European Expansion and Law* (Oxford Berg Publishers, Oxford, 1992) 39-58.

[12] Türk Medeni Kanunu (Turkish Civil Code). It entered into force on 17.02.1926 and it was reformed in 2001.

[13] *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." The Turkish Code of Obligations article 544 reads as follows: "This law, which is the supplementary of Civil Code, is adopted with attached corrections."

[14] These special contracts are sale of movables (art. 184-212) and immovables (art. 213-217), Barter (art. 232-233), Donation (art. 234-247), Rental agreement and usufructuary lease (art. 248-298), Loan of an Object for use (art. 299-305), Loan (art. 306-312), Employment contract (art. 313-354), Work contract (art. 355-371), Publishing contract (art. 372-385), Mandate (art. 386-398), Letter of Credit and Credit Orders (art. 399-403), Brokerage contract (art. 404-409), Conducting Business Without Mandate (art.410-415), Commission (art. 416-430), Procuration and other commercial mandates (art. 449-456), Order (art. 457-462). Bailment (art. 463-482), Guarantee (art. 483-503), Gambling and Betting (art. 504-506), Life Annuities and Contracts of Support for Life (art. 507-519), Simple Partnership (art. 520-541).

2. FINANCIAL PERSPECTIVE

In the last decade, Turkey has experienced a number of financial crises that have had a deterrent effect as regards foreign investors.[15] However, since the last crisis in 2001, economic and financial stability has been established and the financial sector generally has been gaining pace. In that context, priority has been given to the amendment of certain financial and commercial legislation as well as the adoption of new legislation and improvement of certain standards in the current legislation. The improvements are shown by, for example, a reduction in inflation from 65% to single digit figures, improvements in public finance such as reductions of the fiscal deficit and the public debt stock to GDP ratio, privatisation in key industries and reform in the banking sector including the recent Banking Law,[16] and the autonomy for institutions such as the Central Bank and the Banking Regulation and the Supervision Agency.[17]

The above improvements have been accompanied by a number of notable transactions. For example, BNP Paribas purchased a 50% stake in Türk Ekonomi Bankası[18] and became a joint venture partner. This led International Finance Corporation (IFC) to make a $50 million investment in Türk Ekonomi Bankası.[19] Also, Koç Holding-Uni Credito partnership purchased a 57.4% stake in Yapi Kredi Bankası,[20] Fortis Bank of Belgium/Netherlands acquired 93.3% of the shares of

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[15] For more information s*ee* Noyan Turunc *et al.*, *International Financial Services Turkey: 2001 Crisis, Before and After*, 36 Int'l Law. 309, 323 *et seq.* (2002).

[16] Turkish Banking Law 19.10.2005 dated and 5411 numbered available in English at http://www.tbb.org.tr/english/5411.doc (last accessed 20 October 2006). CAN YOU UPDATE THIS PLEASE???

[17] For this information *see also* World Bank Project Information Document (PID) Concept Stage Access to Finance for SMEs, Report No. AB1550 available at http://www4.worldbank.org/legal/leglr/ (last accessed 05 November 2005). The same document also lays out the deficiencies as follows:

> "[d]espite recent improvements, Turkey's macroeconomic balance remains fragile, a number of structural reforms still need to be finalized, and other reforms are yet to be initiated. Permanently lowering inflation to single digit levels, reducing the fiscal deficit and the public debt stock to GDP ratio toward EU averages, completing the restructuring of the banking sector and reforming the public sector are some of Turkey's current challenges. Increasing employment and improving the country's business environment by increasing firms' access to finance, technology, information and efficient services are equally challenging tasks awaiting Turkey as it embarks on the path toward EU accession and strives for steady economic growth and improved welfare."

[18] http://www.teb.com.tr/2004/investor_relations.asp?id=1 (last accessed 22 November 2005).

[19] http://www.ifc.org/ifcext/pressroom/ifcpressroom.nsf/PressRelease?openform&6783F4AD91E74FB28525702D00557408 (last accessed on 16 November 2005)

[20] *See* Herguner Bilgen Ozeke, *Securitization thrives with Novel Structures*, International Financial Law Review, March 2005, at 101; *see also* http://www.cnnturk.com.tr/EKONOMI/PIYASA_HISSE/haber_detay.asp?PID=41&HID=1&haberID=128625 (last accessed on 16 November 2005); http://216.239.59.104/search?q=cache:OiqqEuV7rZcJ:www.investor.reuters.com/GoTo.aspx%3Fnss%

Dışbank[21] and Rabobank of Netherlands acquired the majority stake at Şekerbank.[22] Very recently, another leading Turkish bank, Vakıfbank, sold approximately three quarters of its stock to institutional investors and the rest was sold to individual investors in Turkey.[23] These transactions have been important in helping the Turkish financial sector establish a presence in the international financial and securitisation sector and have also served to encourage foreign investors for future transactions.[24] Two Turkish banks have also been purchased by Greek banks. 46% of Finansbank, which is one of the leading private banks in Turkey, has been purchased by the National Bank of Greece for $2.77 billion, which increased the value of Finansbank to $6 billion. Following this politically and financial positive step, 70% of Tekfenbank has also been purchased by EFG Eurobank Ergasias S.A. for $182 million.[25]

The progress in the financial sector and increasing confidence in the market also triggered the possibility of using mortgages in the purchase of immovable property in Turkey (mainly for the consumers to purchase houses). It is believed that the Mortgage Act will enter into force at end of 2006, enabling buyers to purchase immovable property with low interest mortgages.[26]

Securitisation transactions in Turkey are being concluded in respect of consumer loans granted by banks, receivables from financial leasing contracts, receivables arising out of export contracts and receivables of companies. In the last decade securitisation transactions in Turkey involved credit card receivables, export

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3Dwww%26ticker%3DCRDI.MI%26.t%3D/stocks/news/keydevelopments+yapi+kredi+bankasi+koc+holding+unicredito&hl=en (last accessed 16 April 2006)

[21] *See* http://www.disbank.com.tr/en/index.jsp (Last visited 24 April 2006)

[22] http://www.sekerbank.com.tr//english/sekerbank-news.jsp (Last visited 24 April 2006) But recently, there had been slight problems between Rabobank and the Sekerbank Personnel Supplementary Social Security and Assistance Pension Fund, the majority shareholder of Sekerbank, regarding the price of shares *see* http://www.rabobank.com/pressroom/latest_news.jsp (last accessed 17 February 2006)

[23] http://www.whitecase.com/news/detail.aspx?id=21103e05-0723-4925-a68f-60a38f42f666 (last visited on 28 April 2006)

[24] Another regulation that facilitates foreign investment is the new Foreign Direct Investment Law No. 4875, June 5, 2003 dated; for a general overview of the new Foreign Direct Investment Law *see* Hatice Ozdemir Kocasakal, *New Rules Applicable to Foreign Direct Investment in Turkey,* 4 International Business Law Journal 477 (2005); *see also infra* for examples of securitisation transactions in Turkey. For a fiscal explanation of financial conditions of Turkish banks *see also* Hurşit Güneş, "Türkiye'de Bankacılık Nereye?/Quo Vadis Turkish Banking?" available in Turkish at http://www.milliyet.com.tr/2006/01/12/yazar/gunes.html (last accessed on 12 January 2006) where he explains that despite the negativity of fiscal statistical data and the present conditions in Turkish banking, the purchase of Turkish banks by foreign banks demonstrates that foreign investors purchase Turkish banks as future investment.

[25] http://www.milliyet.com/2006/05/09/ekonomi/aeko.html (last accessed 9 May 2006)

[26] The Draft Law Amending the Laws related to Housing Finance System, *see* http://www.cmb.gov.tr/ (last accessed 22 May 2006)

receivables, trade finance cash flows, equipment leasing and diversified payment rights.[27]

2. ASSIGNMENT OF RECEIVABLES UNDER TURKISH LAW

An assignment of receivables is the transfer of receivables that arise out of a debtor-creditor relationship to an assignee. The assignment should be in writing[28] and for an assignment to be valid the debtor's consent is not required.[29] Although it 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. 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.[30] According to these articles, 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. The following will first explain basic contractual substantive requirements under the CO and secondly the specific regulation on assignments to general finance companies and banks as regulated under capital markets legislation.

2.1 VALID CONTRACT BETWEEN THE ASSIGNOR AND THE ASSIGNEE

2.1.1 VALIDITY OF A CONTRACT IN GENERAL

According to the CO there must be a valid contract between the assignor and the assignee.[31] The subject of the contract of assignment should not violate public policy, bonos mores, basic personal rights, or mandatory provisions of law.[32]

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[27] *See generally* Herguner Bilgen Ozeke, *supra* note 20, at 101.
[28] Article 163(1)
[29] Article 162(1)
[30] 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." Emphasis added.
[31] 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."
[32] 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."

Two examples can be provided. According to article 162(1) of the CO, a receivable that is not assignable by law cannot be assigned. These include contracts of bailment of an object where the bailee is prohibited from allowing another party to use the object[33] and life annuities and contracts of support for life.[34] Another example with regard to basic personal rights is provided for by the Civil Code article 23 according to which a person cannot assign to a third party his present or future rights or receivables, without limiting them as to time and subject. The rationale is that an assignment of rights without limitation may violate basic personal rights of an individual.

2.1.2 FORMAL VALIDITY REQUIREMENT

Assignments of receivables are also subject to formal validity rules provided for by article 163 of the CO.[35] The CO requires assignments to be in writing; this is a statutory formal validity requirement. (On the other hand, a promise to assign a receivable may be entered into without a requirement as to form, by virtue of article 163(2).[36])

General requirements for contracts to be in writing 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 writing, must bear the signatures of all persons who are to be bound by it.[37] Article 14(1) was amended by article 22 of Electronic Signature Law[38] and now article 14 of the CO permits secure electronic signatures and grants them the same legal value as handwritten ones.[39] A recently prepared draft CO, which is under consultation,

[33] CO art. 300(2).
[34] CO art. 519(1)
[35] Article 163(1) of the Code of Obligations reads as follows: "Form of Contract 1. In order to be valid, an assignment must be in writing."
[36] Article 163(2) of the Code of Obligations reads as follows: "2. The obligation to conclude a contract of assignment may be entered into without requirement as to form."
[37] 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."
[38] 23.1.2004 dated, No. 5700 Electronic Signature Law; for more information *see e.g.* Pekin & Pekin, The Electronic Signature Law in Turkey, 1 E-Signature Law Journal 31 *et seq.* (2004).
[39] 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."

clarifies this point and provides for handwritten signature as well as an electronic one provided that it is a secure one.[40] The importance of this matter within the framework of assignment contracts is that the assignor must sign the contract but the assignee does not need to . Article 13 of the CO requires the signature of the party who assumes obligations under a contract.[41]

2.2 ASSIGNMENT OF FUTURE RECEIVABLES UNDER TURKISH LAW

The assignment of future receivables under Turkish law is one of the most controversial areas. Although the subject is straightforward in some jurisdictions,[42] 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 provided that the receivable is identifiable. The point has implications for factoring and securitisation practice.

In Turkish law, receivables that do not exist (or receivables arising out of contracts that have not been concluded) at the time of the conclusion of the assignment contract cannot be assigned.[43] Turkish law, however, does recognise assignments of future receivables that arise out of contracts that exist at or before the conclusion of the assignment contract.

Notwithstanding the above, some lawyers do hold the view that it is possible to assign rights under a contract that does not exist at the time of the assignment contract.[44] It is also arguable that it should be possible to assign receivables arising out of a contract that is not concluded at the time of the assignment, as long as, when

[40] Draft article 15 of the draft CO *see also supra* note 9.

[41] *See generally* S. S. Tekinay *et al 'Tekinay Borçlar Hukuku Genel Hükümler/Tekinay Law of Obligations General Provisions'* at 243 (7th ed. Istanbul 1993); Kemal Oğuzman and Turgut Öz *'Borçlar Hukuku Genel Hükümler/Law of Obligations General Provisions'* at 900 *et seq* (3rd ed. Filiz Istanbul 2000). However, of course, 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 Dayınlarlı, *'Borçlar Kanununa göre Alacağın Temliki/ Assignment of Receivables according to Code of Obligations* at 68-69 (İkinci baskı/2nd ed. Dayınlarlı Ankara 2000).

[42] For example 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.*

[43] For this view *see* Oğuzman and Öz, *id.,* at 900 where they argue that if the receivable does not exist at the time of the assignment contract, then it can be a promissory contract to assign, but not an assignment contract.

[44] *See e.g.* Tekinay, *supra* note 41, at 248-249; Kemal Tunçomağ, *Borçlar Hukuku Genel Hükümler/Law of Obligations General Provisions,* 1082 (6th ed. Istanbul 1976); Oruç Hami Şener, *Factoring'de Borçlunun Hukuki Durumu ve Özellikle Temlikin Sözleşmeyle Yasaklanması/The Status of the Debtor in Factoring and Especially Contractual Prohibition of the Assignment,* 22 (Seçkin, Ankara, 2005); *but cf.* Oğuzman and Öz, *supra* note 41, at 901.

they arise, they are identifiable as the subject matter of the assignment.[45] Identifiability is a crucial principle under Turkish law, as proprietary rights can only be established on an identifiable asset.

By virtue of the "conversion principle"[46] 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.[47] However, the receivables must be identifiable as being the subject of the assignment.

The bulk assignment of future receivables without being limited to subject matter and time is against the Civil Code article 23(2) and CO article 20(1) and these types of assignment where there is no limitation as to subject matter and time are null and void.

Even though the above arguments regarding the possibility of assignment of future receivables have some merit, the overall legal position involves a considerable amount of uncertainty. However, the UNCITRAL Convention provides for a solution to this matter. According to that Convention, future receivables will be assignable if they are identifiable as receivables to which the assignment relates at the time it is entered into.[48]

2.3 FREE ASSIGNABILITY

It is important to discuss, albeit briefly, the non-assignment element under Turkish law.[49] The basic rule under Turkish law is that rights to payment should be freely

[45] For a similar view *see* Şener, *id.*, at 22; Dayınlarlı, *supra* note 41, 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* Yargıtay 4.HD, 8.12.1976, E. 1976/2040, K. 1976/10645 /Court of Cassation 4th Chamber of Law 8.12.1976 dated E. 1976/2040, K. 1976/10645 decision; Yargıtay 14.HD, 13.06.2002, E. 2002/1489, K. 2002/4634/Court of Cassation 14th Chamber of Law 13.06.2002 dated E. 2002/1489, K. 2002/4634 decision where the Court of Cassation held that the assigned receivable may either exist at the time of the assignment contract or be a receivable that may arise out of a contract in the future or be a conditional receivable. For a similar reasoning *see also* Yargıtay 14.HD, 16.11.2001, E. 2001/7306, K. 2001/7991/ Court of Cassation 14th Chamber of Law 16.11.2001 dated, E. 2001/7306, K. 2001/7991 decision.

[46] Tahvil/Çevirme Prensibi, *see e.g.* Oğuzman and Öz, *supra* note 41, at 898 and 902.

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

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

[49] 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

assignable. This is also enshrined under CO article 162(1).[50] Under Turkish law, an assignment can be prohibited by virtue of statute,[51] contract[52] or of the characteristic of the transaction.[53] 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.[54]

According to article 162(2)[55] a debtor cannot rely upon an anti-assignment provision in an agreement between the debtor and the assignor, if the assignee relied upon an assignment 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 provision, the debtor could refuse to pay the assignee. In any case, the assignor may be liable to the debtor for breaching an anti-assignment provision.

2.4 ASSIGNMENTS TO GENERAL FINANCE COMPANIES AND BANKS

Apart from the basic contractual requirements under the CO, there is a special regulation under Capital Markets legislation in Turkey. When a contract of assignment is made to a general finance company or a bank, it must fulfil certain requirements for the purposes of securitisation transactions or assignment of receivables to banks and financial companies where asset backed securities are issued directly or indirectly by these companies and where the backing assets are receivables. These requirements 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."[56] The Communiqué regulates the registration of asset backed securities of which the

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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.

[50] *See supra.*

[51] 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.

[52] 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.

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

[54] *See generally* Oğuzman and Öz, *supra* note 41, at 904-905.

[55] *See supra.*

[56] Serial III, No. 14

backing asset will be receivables.[57] The types of receivables regulated by the Communiqué are set out in Article 4. According to article 4 of the Communiqué, receivables that may be subject to the process for issuing the asset backed securitisation include consumer credits, housing credits, receivables from financial leasing agreements, receivables from export transactions (credits extended for the purposes of creditors to export actually, by banks and private finance houses and receivables acquired by factoring companies in return for export transactions), notes receivables from instalment sales of goods and services producing joint stock companies other than banks and state owned enterprises, notes receivables of T.C. Ziraat Bankası (State owned bank to agriculture, special credits extended by T.C. Halk Bankası (state owned bank to finance trade men and artisans) and real estate investment companies' notes receivables from real estates sales or agreements representing a promise to sell.

By virtue of article 13 of the Communiqué, general finance companies and banks can acquire the receivables set out in article 4, in conformity with provisions about acquiring receivables in related articles of the CO.[58] Assignees (general finance companies and banks) cannot transfer these acquired receivables to third parties.[59] The assignment agreement will be concluded between associations assigning their receivables and a general finance company or bank. The assignment agreement should contain certain information by virtue of article 14 of the Communiqué when an assignment is made to a general finance company or bank for the purposes of asset backed securities. In that context, the assignment agreement 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. The assignor must guarantee the existence of

[57] Article 1 of the Communiqué reads as follows: "Principles regarding registration of asset backed securities, of which the backing asset will be receivables, regulated in articles 13/A and 22/c of Capital Market Law No: 2499 amended by Law No: 3794, with the Board and principles regarding the establishment and activities of general financial companies regulated in articles 22/c and 39 of Capital Market Law no: 2499 amended by Law No: 3794 are regulated by this communiqué ."

[58] For the assignment of receivables under the Turkish Code of Obligations *see supra* 2. Assignment of Receivables under Turkish Law

[59] Article 13(2) of the Communiqué.

receivables and the default of the debtor in payments. The guarantee of the assignor 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."

The assignment agreement should also contain a provision setting out the dispute resolution procedure in the event of a dispute between the parties. Although there is no clarity in the provision one can submit that the dispute resolution procedure can either be arbitration, alternative dispute resolution mechanism or litigation. Also, the assignment agreement should contain the procedure that will be followed on issuing warnings and denouncements to the party in default in accordance with the agreement. Finally, the assignment agreement should contain principles on payments that shall be made by general finance companies or banks to the assignor that assigns its receivables.[60]

3. THE UNCITRAL CONVENTION

The UNCITRAL Convention was completed in 2001.[61] It creates certainty and predictability on matters such as, among many others,[62] formal validity of assignments and the assignment of future and bulk receivables. The UNCITRAL Convention's scope is wider than receivables financing as such 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. 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.[63]

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[60] Art. 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)

[61] 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 March 2006)

[62] Such as priority issues, anti-assignment provisions, positive liability of assignee towards debtor, defences and set-off issues.

[63] 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 Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade*, 106 Dick. L. Rev. 159, 193 (2001).

3.1 FORMAL VALIDITY OF ASSIGNMENTS AND THE FORMAL VALIDITY OF THE CONTRACT OF ASSIGNMENT

3.1.1 FORMAL VALIDITY OF ASSIGNMENTS

Formal validity of assignments is regulated under the UNCITRAL Convention as a conflict of laws rule under article 22.[64] In that context, the form of an assignment is subject to the law of the assignor's location. Thus, for instance, if the assignor is located in Turkey, assuming that Turkey is a party to the UNCITRAL Convention, formal validity requirements of that law on assignments shall apply to the transaction.[65]

3.1.2 FORMAL VALIDITY OF THE CONTRACT OF ASSIGNMENTS

The Convention contains a conflict of laws rule on the formal validity of the contract of assignment in article 27 under Chapter V.[66] Chapter V deals with the autonomous conflict of laws rules and has a gap-filling character as it applies to matters within the scope of the Convention but not specifically settled elsewhere in it.[67] For the application of Chapter V there is no need for an assignment to be connected to the assignor's or the debtor's State.[68] The forum must be in a

[64] Formal validity of assignments under the Convention is a condition of priority thus article 5(g) and 22 are related to this mater. Article 22 reads as follows: "With the exception of matters that are settled elsewhere in this convention and subject to article 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." 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."

[65] 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)].

[66] Article 27 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."

[67] 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."

[68] 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

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 Chapter V. If the assignment is international[69] or the receivable is international,[70] then Chapter V will be applicable, as the Convention defines its applicability on the basis of internationality of either the assignment or the receivables.[71]

The formal validity of the contract of assignment provision of the Convention applies as a precondition of the formal validity of assignments. In that context, there is a similarity with the UNCITRAL Convention and Turkish law. Turkish law requires the contract of assignment to be formally valid for the assignment itself to be valid. The same consistency with Turkish law applies to the UNCITRAL Convention's Chapter V article 27. If Turkey becomes a party to the Convention its law will be in harmony with the Convention's approach.[72]

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). 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,[73] still the rules of Chapter V 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

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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."

[69] International assignment of domestic receivables or international assignment of international receivables.

[70] Domestic assignment of international receivables or international assignment of international receivables.

[71] Autonomous conflict of laws rules of the Convention will 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, autonomous conflict of laws 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. *See also* Explanatory Note *supra* note 68, at 43, para. 54

[72] 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. 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.

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.

3.2 THE ASSIGNMENT OF BULK AND FUTURE RECEIVABLES

The UNCITRAL Convention sets aside, by virtue of article 8,[74] the statutory limitations that restrict assignment of bulk and future receivables. In this context, the Convention especially facilitates financing practices such as securitisation, 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 in article 8 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."[75]

The UNCITRAL Convention defines "existing" and "future" receivable.[76] According to article 5(b)[77] an 'existing receivable' means a receivable that arises upon or before conclusion of the contract of assignment and a 'future receivable' means a

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[73] *See supra* note 71.

[74] Article 8 of the Convention reads 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."

[75] 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 art. 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.

[76] *See also* A/CN.9/489, para. 87.

[77] 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."

receivable that arises after conclusion of the contract of assignment.[78] Thus, the assignment contract is concluded prior in time to the original contract. In the assignment of future receivables when the time of transfer is closer to the time of assignment, more certainty and predictability can be achieved as to rights of the assignee.[79] This has an 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. Defining the terms problem is a correct approach in the process of validating assignments of bulk and future receivables.

Definitions of "existing" and "future" receivables under the UNCITRAL Convention have similarities with those applicable under Turkish law. However, since the Turkish law position on the assignability of future receivables arising out of future contracts is not as clear as one might wish for[80] (although the "conversion principle" may assist),[81] Turkey's is ratification of the UNCITRAL Convention would result in a favourable broadening of scope[82].[83]

3.2.1 THE RATIONALE OF THE EFFECTIVENESS OF THESE TYPES OF ASSIGNMENTS

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."[84] 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 and as a result the law may be restrictive. These

[78] Such as an assignor assigns to an assignee the right to payment which will arise in future sales contracts of refrigerators.
[79] For a similar assertion *see* A/CN.9/434, para. 119.
[80] 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. For discussion on this topic *See supra* 2.2 Assignment of Future Receivables under Turkish Law
[81] *See supra* on Conversion principle.
[82] That is to say that separation of assignment of receivables that arise of contracts concluded at or before or after the assignment contract.
[83] For further comparisons and suggestions *see infra.*
[84] 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)

restrictions are not consistent with the modern financing practices and the needs of the modern commercial life.

3.2.2 ARTICLE 8

Article 8(1) of the UNCITRAL Convention gives effectiveness to, and removes obstacles 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. With respect 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.

Article 8 states that 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. There is no need for a specific description of the receivables, and the description can even be general so long as the receivables may be identified to the contract of assignment. In the assignment of bulk receivables the debtor and the amount owed should be identifiable and the receivable should identifiable at the time of the assignment. The assignment of future receivables will 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. The rationale of this is to protect the interests of the assignor. A description such as "all my receivables from the sale of freezers" would be sufficient in bulk assignments as well as in assignments of future receivables.

The identification of the exact moment at which the transfer becomes effective will clarify doubts in those legal systems where bulk assignments and assignments of future receivables are not recognized due to different problems. The UNCITRAL Convention gives effectiveness to future receivables as of the time of the conclusion of the original contract. This approach "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."[85] It was correct 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; thus the Convention protects the interests of the assignee and takes a step towards the facilitation of credit.[86]

The UNCITRAL Convention's regulation is in line with the assignment of future receivables according to Turkish law where these types of assignments gain effectiveness at the time of the conclusion of the original contract (*i.e.* the time when the receivables actually arise).[87] The assignment prior to the conclusion of the original contract may then be regarded as a promissory agreement to assign the receivables, by virtue of conversion principle. However, it is thought that the regulation of UNCITRAL Convention will clarify the position under Turkish law better and will make the assignment of future receivables more attractive.

Article 8 also clarifies that 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 of not requiring for a new act of transfer is that future receivables arise after the contract of assignment therefore there is no need to have a new assignment document covering that receivable. A new act of transfer also runs contrary to the goal of lowering the cost of credit, as the assignee and assignor will have to deal with additional administrative issues. The problem becomes more acute if future bulk receivables are assigned where each document has to be checked and a new act of transfer has to be prepared. Therefore, the Convention's approach is certainly cost-effective.

CONCLUSION

The UNCITRAL Convention on the Assignment of Receivables in International Trade is a substantial development in the area of secured transactions. It successfully attempts to harmonise the law on receivables financing. The Convention introduces provisions such as formal validity of assignment, formal validity of the contract of

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[85] *See* A/CN.9/434, para. 118.

[86] *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.")

[87] *See supra* note 45 & the accompanying text thereof.

assignment and assignment of future and bulk receivables that will create certainty and predictability in cross border assignment transactions.

Formal validity of assignment and the formal validity of the contract of assignment provisions of the Convention will have no adverse effect on Turkish law as these provisions are conflict of laws provisions. The Convention will provide a good opportunity for the Turkish assignor to apply the Convention, as the formal validity of assignment will be subject to the law of the assignor's State. Even if Turkey decides not to ratify the Convention, the formal validity of the contract of assignment provision under article 27 will still enable the Turkish assignor or the debtor located in Turkey to benefit from the application of the Convention and its Chapter V.

The way the UNCITRAL Convention governs the assignment of future receivables will facilitate parties to apply Turkish law to the assignment contracts and in their securitisation transactions. Thus parties will not be forced to take into account two different laws while structuring their securitisation transactions,[88] if the Convention is chosen as the applicable law.

Finally, the UNCITRAL Convention, in general, will enable Turkish banks and enterprises to regain their financial strength in the international arena and facilitate the increased use of receivables as collateral. Particularly, the clarification of the assignability of future receivables will assist small and middle sized businesses in Turkey to obtain low cost credit.

[88] *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.