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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

STUDY GROUP FOR THE PREPARATION OF UNIFORM RULES

ON THE CONTRACT OF FACTORING

Extract from the Minutes of the 57th Session of the Governing

Council relating to the contract of factoring

Rome, December 1978

In introducing this subject, Mr. Limpens alluded to the preparatory work which had led up to the convening of the restricted exploratory Committee of members of the Council which had met in Rome on 13 and 14 February last under his chairmanship. Factoring was, he recalled, a method of obtaining short-term credit which had originated in the United States and developed widely in Europe over the last fifteen years. Essentially it permitted an industrialist or merchant to realise debts owing to him under contracts of sale by assigning them en bloc to a factor, usually a bank, who would receive a commission for his services, while at the same time protecting himself against the risk of defaulting clients of the vendor of the goods.

The restricted group had based its work on the analysis of the replies to the questionnaire prepared by the Secretariat and while it had been agreed unanimously by the members of the group that it was desirable to undertake an initiative in the field, it had been recognised that not all the problems raised could be dealt with together. One of the principal questions examined was whether the future rules should cover all factoring transactions or only these of an international character. In the first place it had been argued that the time was ripe for attempting to unify domestic law relating to factoring in view of the absence in most countries of any specific legislation on the subject. Again, the utility of factoring as an aid to economic recovery was stressed and furthermore it was suggested that uniform rules adopted by all member States of the European Communities would be highly desirable. On the other hand, the view, which ultimately prevailed, was expressed that it would be easier to get States to accept in the first place rules governing international factoring which might subsequently influence, and indeed be introduced into, internal law. It had been recognised that the definition of the international character might give rise to some difficulties but these were not considered to be insuperable.

The next important point discussed by the group concerned the nature of the future instrument to be elaborated. Here again unanimity had been achieved in the sense that a Convention containing a uniform law should be preferred to a standard contract since on the one hand there already existed a large number of such contracts and on the other that kind of solution could not deal with the problems relating to the rights and interests of third parties. For the same reasons the group had also excluded a solution along the lines of the I.C.C. Uniform Customs and Practice for Documentary Credits. Another matter discussed at length by the group was whether the future rules should be limited in their application to relations between the factor and the vendor/supplier or rather extend to cover their

relations with third parties, which latter could themselves be divided into two categories, namely the purchasers of the goods and other third parties. As to the first category it was evident that the factor should be able to set up against the purchaser of the goods any rights of the vendor/supplier but it had been considered preferable to state this expressly. In addition, problems relating to set-off between the vendor and the purchaser arising before the assignment of the debt to the factor would not seem to create any serious difficulties although problems might well arise in relation to obligations arising thereafter. Priority issues were also relevant and it was therefore clear that serious attention would have to be paid to the whole question of third parties. A further complication arose from the fact that sometimes as many as four parties might be involved in a factoring transaction, namely a seller exporting goods, his export factor, the import factor in the purchaser's country and the purchaser himself. In such cases it had been suggested that recourse might have to be made to the rules of private international law to determine which law should be applicable.

Finally, Mr. Limpens drew attention to another complex problem, namely that of retention of ownership clauses which caused very great difficulties in international transactions. It was important to establish criteria for deciding whether, and if so on the basis of which criteria, retention of ownership clauses enforceable in one country should be recognised in others and even here, in the already complex field of factoring operations, further problems could arise as, for example, in a dispute between on the one hand a first supplier, who had sold goods under a contract containing a retention of ownership clause to a second vendor who in his turn sold the goods to a third person, and on the other the factor to whom the second vendor had assigned the debt.

The President thanked Mr. Limpens for his most illuminating report on the work of the restricted group and requested the Council to consider whether it was prepared to endorse the recommendation of the group that work be continued in the field and, if so, whether the most appropriate forum for the preparation of uniform rules on the factoring contract would be a Study Group or a Committee of Governmental Experts.

Mr. Popescu, who had sat on the restricted group, also stressed the complex character of the factoring contract. In his view the principal question facing the Council was however the procedural one referred to by the President and he expressed a preference for the constitution of a Committee of Governmental Experts.

Mr. Ogundere congratulated Mr. Limpens and the group which he had chaired on the work it had carried out. He favoured pursuing the study of the subject and expressed the view that an international Convention should be prepared. He also referred, as being relevant to the discussion, to the growing phenomenon in African countries of performance guarantee agreements which were akin to factoring contracts. The aim of such agreements was to offer protection against the danger of foreign contractors who had entered into agreements, usually for construction, with African States, absconding prior to the expiry of a time contract when it had become apparent that the contract would not be performed on time. The machinery of the performance guarantee agreement was that a local bank would guarantee performance by the contractor and he felt that the Committee to be set up might profitably consider these types of contract, which he defined as aspects of pseudo-factoring, in the course of its future work.

Mr. Diamond stated that the United Kingdom authorities were happy to see a continuation of the work begun by the restricted group although they had at present no firm views as to the nature of any future instrument on factoring contracts and would prefer to consider that question in the light of the progress which could be made. On the question of the forum in which the work should be pursued he stressed that factoring constituted a new development in the United Kingdom so that there was little experience of it, as well as little caselaw. Nor had any special statute law been developed in this connection. In view therefore of the lack of expertise on this subject in government departments the United Kingdom had a strong preference for the setting up of a Study Group rather than a Committee of Governmental Experts since it would be easier to find experts on factoring in the world of commerce.

On this latter point, Mr. von Overbeck noted that there was nothing to prevent Governments nominating representatives from outside government departments to sit on Committees of Governmental Experts.

Mr. Loewe also paid tribute to the work of the restricted group and expressed interest in the subject. In his opinion, the choice between entrusting the continuation of the work to a Study Group or to a Committee of Governmental Experts would largely depend on whether it was intended to transfer the resultant text at some stage to a more political organisation, whether regional or worldwide, in which case it would be preferable to convene a Study Group, or rather to complete the work within the framework of UNIDROIT, which would suggest that the appropriate form for the future Committee would be one composed of governmental experts. What should be avoided, he believed, was the convening first of a Study Group then of a Committee of Governmental

Experts both within UNIDROIT. Another factor to be taken into consideration was whether the subject might find a place in the new UNCITRAL Work Programme and he therefore suggested that the character of the Committee should be determined by the President of the Institute on the basis of his evaluation of the various factors at play.

This proposal was seconded by Mr. Sperduti.

Mr. Sauveplanne also supported this approach but recalled that, in view of the connection between leasing and factoring, whatever solution were finally to be adopted should avoid any contradictions arising between the work on the two subjects.

In these circumstances the Council decided to defer for the present any decision as to the form which the future rules on the factoring contract might assume and to empower the President to decide, in the light of all the relevant considerations, whether the work should be pursued by a Committee of Governmental Experts or by a Study Group.