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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

R E P O R T

of the Secretariat of UNIDROIT on the first session of the Group held in Rome on 5 and 6 February 1979

Rome, February 1979

1. In accordance with the power conferred upon him by the Governing Council at its 57th session (Rome 5 to 7 April 1978), the President of UNIDROIT decided, after consultation and in the light of all the relevant considerations, to set up a Study Group empowered to prepare uniform rules on the factoring contract. The first session of the Group was held in Rome on 5 and 6 February 1979. Its membership was the following:

Members of the Study Group:

Mr.Royston M.GOODE	Crowther Professor of Credit and Commercial Law, Queen Mary College, University of London, Chairman of the Study Group. (°) Mile End Road - LONDON E1 4 NS
Mr.Berardino LIBONATI	Professeur ordinaire de droit commercial Université de Florence Via Condotti, 91 - ROME
Mr.Claude LUCAS de LEYSSAC	Professeur de Droit, Avocat à la Cour de Paris, 114, Avenue de Wagram - 75017 PARIS
Ms.Tinuade OYEKÜNLE	Assistant Director, International and Comparative Law Division, Federal Ministry of Justice, Old Secretariat, Marina, LAGOS
Mr.Heinrich Johannes SOMMER	Managing Director, Diskont und Kredit AG - Düsseldorf Couvenstr.6 - 4 DÜSSELDORF

(°) In the absence of Professor Jean LIMPENS, prevented from attending the session by health reasons.

Observers:

Ms.Caroline BILLIOUD de NUZILLET	Attaché, Secrétariat juridique Chambre de Commerce internationale 38 Cours Albert 1er - 75008 PARIS
Mr.Paolo CLAROTTI	Chef de la Division "Banques" Commission des Communautés Européennes Rue Archimède, 25 - BRUXELLES
Mr.Lars KINANDER	Assistant Vice President Svenska Finans/Svenska Handelsbanken Handelsbanken - S-10328 STOCKHOLM

Secretariat of UNIDROIT:

Mr.Mario MATTEUCCI	President
Mr.Riccardo MONACO	Secretary General
Mr.Malcolm EVANS	Deputy Secretary General
Ms.Marie-Christine RAULT	Research Officer Secretary of the Study Group
Mr.Michael Joachim BONELL	Collaborator

2. The Study Group had before it the following documents:

(i) Report on the contract of factoring prepared by the Secretariat (Study LVIII - Doc.1, UNIDROIT 1976);

(ii) Questionnaire on the contract of factoring prepared by the Secretariat (Study LVIII - Doc.2, UNIDROIT 1976);

(iii) Analysis of replies received by the Secretariat to the questionnaire on the contract of factoring (Secretariat memorandum) (UNIDROIT 1977, Study LVIII - Doc.3);

(iv) Report on the session of the restricted Exploratory Working Group of the Governing Council on the contract of factoring held in Rome on 13 and 14 February 1978 (UNIDROIT 1978, Study LVIII - Doc.4);

(v) Extract from the Minutes of the 57th session of the Governing Council relating to the contract of factoring (UNIDROIT 1978, Study LVIII - Doc.5);

(vi) Questions which might be considered by the Study Group at its 1st session (prepared by the Secretariat) (UNIDROIT 1979, Study LVIII - Doc.6).

3. In opening the session, the Chairman recalled that a restricted Exploratory Working Group of the Governing Council of UNIDROIT had, at its one and only session held in February 1978, unanimously considered that it would be desirable to proceed to the elaboration of uniform rules on the contract of factoring. On the question of whether the uniform rules should be limited to international factoring or also include domestic factoring, the Group had been of the opinion that it would, at least at first, be preferable to deal only with international factoring. As to the form of the rules, the Group was unanimously in favour of a uniform law. In the light of these general considerations, the Study Group had a twofold task before it: in the first place to decide which of the different questions concerning international factoring should be dealt with in the future uniform rules and secondly to determine, as far as possible, the content of those rules. The Group having agreed with the suggestions made by the Chairman, it proceeded to a lengthy discussion which yielded the following conclusions:

a) Definition of the contract of factoring

It is a commonly known fact that factoring operations have arisen out of, and have been developed through, practice. Hitherto, no legislative definition of its essential characteristics is to be found either in national law or at an international level. Whence the necessity, which was stressed by the Group, of providing a definition in the future uniform rules. In the opinion of the Group, however, such a definition should be sufficiently general as to permit the greatest possible number of the varieties of factoring which exist in practice to be covered. In other words, it would be enough to provide that a factoring contract means a contract whereunder one party (the supplier) undertakes to assign on a regular basis to the other (the factor) his trade debts; whereby the debtor must be informed of the assignment and whereby the factor assumes the responsibility of recovering the debts. All other questions, such for example as that of whether the factor should have a right of recourse against the supplier, should be left to be regulated by the exercise of the parties' freedom of contract. In this connection it was recalled that factoring contracts are concluded on the basis of extremely detailed standard agreements and that it would therefore be impossible for the legislator to succeed in dealing with all those aspects normally provided for in such agreements.

b) Sphere of application

Once the decision had been taken to the effect that the future rules should regulate international factoring only, the question arose of what was to be understood by international factoring. Here, the Group considered two possibilities: that of basing the international character of factoring operations on the fact that the debts arise from a contract of sale or for the provision of services between parties whose places of business are in different States and that of taking as the criterion the fact that the factor conducts his business in a different country from that of the supplier. Finally, the Group decided in favour of the first solution as indeed had also the restricted Working Group.

Another question which arises in connection with the field of application of the future uniform rules is that of the desirability of limiting their application to Contracting States, a question of legislative policy on which the Group preferred to take no decision for the time being.

c) Formalities of the assignment

The question of the manner of assignment and the possible requirements as to its form constitutes one of the most important aspects of international factoring, given the considerable differences which exist in this connection between the different national laws.

As regards the manner of the assignment, the principal issue to be determined is whether the supplier can by a single act assign to the factor all his debts, including future debts. On this point the Group replied unanimously in the affirmative.

As to the question of formal requirements, it is well known that differences exist according to whether one is concerned with the validity of the assignment as between the parties thereto or with its validity against the debtor. On the first point, the Group decided that the agreement between the parties should be in writing, if only for evidentiary purposes. For the assignment to be effective against the debtor, on the other hand, it must in addition be notified to him in writing; such notification should also indicate the debts which have been assigned and the name of the factor who has been authorised to ensure their recovery.

d) Relations between the export factor and the import factor

It goes without saying that the rules governing the assignment of debts by the supplier to the export factor must also apply to any further assignment of the same debts by the export factor to the import factor. It should however be pointed out in this connection that it may happen in practice that the debt passes directly from the supplier to the import factor, the rôle of the export factor being limited in such cases to providing ancillary services to the supplier (bookkeeping, etc.).

Another problem which arises relates to the effectiveness of a retention of ownership clause contained either in the contract between the supplier and the debtor or in the contract between the supplier and the export factor. In the view of the Group, the benefit

of such a clause could be transferred automatically, as the case might be, in the contract between the supplier and the factor or in the contract between the export factor and the import factor, subject always to the condition that the law of the place where the debt is to be recovered recognises the validity of such a clause.

e) Availability against the factor of defences which the debtor may have against the supplier

In the first place, the Group reaffirmed the principle that as a general rule the debtor should be able to set up against the factor any defences available against the supplier, in conformity with the rule Nemo dat quod non habet.

Furthermore, the Group was of the opinion that the uniform rules should follow the criterion according to which the debtor may only set up against the factor those defences which he could have raised against the assignor at the time he was given notice of the assignment.

As regards the legal régime to govern defences, it was decided that this should be the law applicable to the basic relationship between the supplier and the debtor. However, in connection with rights of set-off, the possibility was not excluded of the uniform law itself laying down the conditions for their being effective on the basis of a distinction to be drawn between existing debts which are enforceable and existing debts which are not yet enforceable.

f) Right of the debtor to recover sums which he ought not to have paid

It may happen in practice that the debtor pays the factor a sum which he ought not to have paid. One might, for example, take the case where there have been successive assignments of the same debt to different factors and where the person requesting payment from the debtor is not, or is no longer, entitled to payment; or a simpler situation in which the debtor has mistakenly paid a sum in excess of that due. In all such cases, the problem naturally arises of ensuring that the debtor is reimbursed the sum which he should not have paid and in the opinion of the Group a rule to this effect should be laid down expressly in the future uniform law.

g) Relations between the factor and third parties other the debtor

It is a well known fact that the problem of the conflicts which may arise between the factor and the supplier's creditors when the latter has assigned the debts in question several times over has met with different solutions in the various national legal systems. Thus, while it is the case in some countries (for example the Federal Republic of Germany) that priority is accorded to the first assignee, in others it is granted to the first assignment to be notified to, or accepted by, the debtor (for example, Italy) or simply the first of which he receives notice (the United Kingdom) or again the first to be filed in a public register (the United States of America). Given this state of affairs, the Group first gave consideration to whether it was possible, and even desirable, to search for some common denominator in the different existing systems. Such a solution was however excluded, not just on account of the technical difficulties facing the unification of such widely differing criteria, but also because of the fact that none of them seemed to be completely satisfactory in the context of international factoring operations. It was therefore proposed that a choice should be made between two different approaches: either to make provision in the future rules for a totally new criterion which would meet the particular needs of factoring (for example by providing that once the factoring contract has been concluded the supplier must refer to it in his commercial papers) or alternatively to have recourse for the resolution of conflicts which may arise between the interests of the factor and those of the supplier's creditors to the various national laws on the basis of a uniform connecting factor.

4. In conclusion, the Group noted that since only certain problems related to international factoring operations seemed to be capable of being dealt with in the context of a uniform regulation of the substantive law, thought should be given to the question of what should be done in regard to those points which would not be covered by the uniform law. The traditional approach would be to leave them to be determined by the various national laws which would be applicable by virtue of the conflicts rules of the lex fori. In view, however, of the wide differences between the national conflicts of law rules in

question, this solution would naturally leave a considerable degree of uncertainty. For this reason the Group considered that it would be preferable to attempt to include in the instrument containing uniform rules of a substantive character concerning international factoring operations additional uniform rules governing conflicts of law. In this event, it was evident that the future rules would have to be contained in a Convention and not, as the restricted Exploratory Group had suggested, simply in a uniform law. As regards the specific points in respect of which uniform conflicts rules should be elaborated and as to their content, the Group expressed the wish that the Secretariat of UNIDROIT contact the Hague Conference on Private International Law which, given its vast experience in this field, could most certainly provide it with the most valuable assistance.