UNIDROIT 1984
Study LVIII - Doc. 17
(Original: English/French/German)

Unidroit

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

OBSERVATIONS OF GOVERNMENTS ON THE PRELIMINARY DRAFT UNIFORM RULES ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING AS ADOPTED BY THE GOVERNING COUNCIL OF UNIDROIT ON 5 MAY 1983 AT ITS 62nd SESSION

Rome, April 1984

1. Introduction

At its 62nd session, held in May 1983, the Governing Council of Unidroit adopted the text of the preliminary draft rules on certain aspects of international factoring which had been prepared by the Study Group on the contract of factoring in the course of three sessions.

The text of the preliminary draft rules, accompanied by an Explanatory Report prepared by the Secretariat of Unidroit, was circulated to the Governments of the member States on 27 May 1983 together with a request for observations which would permit the Governing Council to decide whether a committee of governmental experts should be convened to consider the content of the rules and the form which they should assume.

Replies have so far been received from the Governments of Czechoslavakia, France, the Federal Republic of Germany, Norway and Sweden while the arrival of observations has been announced by other Governments. The present document reproduces the observations so far received.

2. Preliminary and general observations

FRANCE

The novelty of factoring renders its description complex and its understanding difficult. It is at the crossroads between legal institutions belonging to the fields of commercial law and the law relating to finance, which themselves assume many forms, and in consequence it can only develop at cross-border level if the rules governing it are sufficiently clear to be interpreted in a uniform manner by the international community.

It seems to us that the draft rules realise this aim.

As is known, factoring is in France, unlike the Anglo-Saxon countries, at an embryonic stage. It has only been known for twenty years or so and has not been subjected to legal rules specifically designed for it. It operates through institutions which are better known to the civil law and to commercial law such as mandate, subrogation, discounting, credit insurance and the assignment of debts.

For this reason, the French Government can only welcome the initiative which Unidroit proposes to undertake. It might even be advisable to study the question of whether uniform rules could not also govern purely domestic factoring operations.

It would in fact seem paradoxical for a State which has no rules of the latter type to accept a system, which would of necessity be more elaborate, limited to international operations.

At this very preliminary stage of the work, it is not possible for us to take a sufficiently firm position on the question of the form of the instrument which should contain the uniform rules. However there would seem to be no obstacle to the future negotiations having in view an international convention establishing a uniform law in accordance with the tradition in Unidroit.

FEDERAL REPUBLIC OF GERMANY

1. Preliminary remarks

The Government of the Federal Republic of Germany has submitted the draft to the competent bodies of the credit sector as well as to some important organisations in the sectors of industry and commerce, asking for their comments. As to the sectors of credit and commerce, they welcomed in principle the attempt to unify the law governing the transfer of debts of an international character. The majority of the credit circles, however, would prefer to elaborate uniform rules covering not only factoring, but in general all cases of transfer of debts. Trade circles on the other hand insist on dealing only with the so-called true or veritable factoring, i.e. where the factor accepts the risk of the insolvency of the customer. The industry circles on the contrary deny the necessity of any rules whatsoever and moreover are opposed to the present draft since in their view it unduly favours the factor's position.

2. General observations

2.1 The final form of the draft must be a convention; as rules of a mere contractual nature they could not achieve their unifying purpose, since (a) they deal not only with the relationship between the factor and the supplier but also with the legal position in which the debtors will be placed as a consequence of the transfer of the debts in the context of a factoring operation; (b) at least some provisions of the draft (i.e. Articles 4 and 6) derogate from the existing German law on the transfer of debts.

2.2 The entry into force of the Convention in the State whose law governs the contract of factoring between the factor and the supplier would not be sufficient in order to eliminate the existing difficulties deriving from the different national rules on the assignment of debts and the uncertainty as to the applicable law. According to the rules of

private international law it is the law applicable to the debts transferred which governs important issues of the assignment of debts such as their assignability, the relationship between the assignee and the debtor and the effective payment by the debtor. In the case of factoring this is the law governing the contracts of supply between the supplier and his customers/debtors. Since parties are free themselves to choose this law, in theory it could be the law of any State in the world. Yet even in practice one has to expect a possible choice at least of the laws of those States where the foreign customers of the supplier have their place of business. As a consequence a convention containing the proposed uniform provisions would be useful only if it were adopted by a large number of States. If this is not the case, the uniform rules may rather cause confusion as, due to priority accorded to the parties' choice of the law of a non-contracting State, they will in practice very often not apply.

2.3 The scope of the uniform rules - the assignment of debts in the context of a factoring contract of an international character - appears to be too restrictive. Indeed the difficulties which arise in the case of an assignment of debts of an international character and to which reference is made in the Explanatory Report exist not only in connection with factoring, but also with respect to other kinds of transactions, such as forfeiting, discount, etc. The adoption of the uniform rules would lead to a different treatment of assignments of debts of an international character according to whether they take place in the context of a factoring contract or in that of any other transaction. Such differences as to the legal regime are far from being desirable and give rise to considerable doubts as to the utility of the project under consideration. In addition there would, for the Federal Republic of Germany, also be a different legal regime within the law on factoring itself since the uniform rules are intended to apply only to assignments of debts with an international character and at the same time derogate partly from the existing German rules on the assignment of debts. It would therefore be desirable to elaborate uniform rules on the assignment of debts capable of being applied to all cases of assignment.

2.4 The Government of the Federal Republic of Germany has strong doubts as to whether the expected benefits for international factoring are great enough to justify the effort involved in preparing an international convention. The inquiry among the business circles has shown that in the Federal Republic of Germany international factoring is not so important that any significant difficulties have so far arisen with repect to it and that consequently there does not exist a real need for a convention limited to international factoring, and this apart

from the above-mentioned reservations as to the feasibility of the uniform rules (see above 2.2) as well as with respect to the differences in the legal regime which have to be expected (see above 2.3).

The observations on the individual articles do not affect the general reservations already expressed.

NORWAY

The Norwegian Ministry of Justice appreciates the initiative taken to give uniform rules on certain aspects of international factoring.

The preliminary draft rules as approved by the Unidroit Study Group seem to serve as an appropriate basis for the coming work on this subject.

With regard to the question of the form to be given to the future uniform rules, it seems to be most appropriate to choose the convention form - if necessary - combined with steps taken by the respective countries to incorporate the rules in their internal legal system. However, the question of form has to be examined in depth at a later stage of the work.

We also take the opportunity of mentioning that it seems desirable to us that the further work with the uniform rules on international factoring should be coordinated with the Unidroit project on international leasing, so that the drafts may be given common consideration. The factoring contract and the leasing contract to some extent serve equal functions, raise homogenous legal questions or involve the same parties and interested circles.

With regard to the present draft on international factoring the principles approved by the Study Group in most respects seem to be founded on legal rules accepted in Norwegian internal law to-day.

SWEDEN

1. The Ministry of Justice has invited interested authorities and organisations to give their preliminary opinions on the draft. The answers indicate a clear interest in the project, on condition that it receives a positive response from a sufficiently wide circle of States. Assuming that this condition is met, the efforts of the Institute in this field ought to be carried on.

2. In the Swedish view, the preliminary draft offers a good basis for

future work. It seems that a Convention would be the most appropriate instrument for uniform rules on international factoring.

3. It is too early to express any more precise opinion on the contents of the proposed uniform rules and the drafting of the individual provisions although at this stage we would, however, like to mention some points for further consideration.

a) The need for and the possibility of including, in a future instrument, a wider range of operations of bulk factoring should be studied further (cf. Section 22 of the Explanatory Report). It has been indicated that bulk factoring operations under which the factor provides only one of the services mentioned in Article 2 paragraph 1, namely finance, are of a growing importance also at international level.

b) Swedish organisations in the field of finance have underlined the importance of a satisfactory coordination, in substance and in drafting, between future uniform rules on international factoring and the U.S. Uniform Commercial Code, and have expressed some uncertainty whether there is such a coordination as regards the preliminary draft. This question could perhaps be dealt with in a preparatory paper by the Secretariat of Unidroit.

3. Comments on the preliminary draft rules, article by article

Article 1

FRANCE

The definition of factoring in Article 1 seems to be too broad in some cases. Is it possible to say that that there is really factoring if the two services provided are financing and the collection of debts? In these circumstances it would seem rather to be a clear case of a contractual subrogation by the creditor.

FEDERAL REPUBLIC OF GERMANY

According to the organisations consulted the language "on a continuing basis" in paragraph 1 is not sufficient to differentiate factoring from other similar transactions, such as forfeiting. However, instead of trying to differentiate more precisely it seems preferable to delete the wording altogether, so as to render the rules applicable also to the purchase of individual debts.

Also the obligations mentioned in paragraph 2 need to be defined

in a clearer manner. The mere "maintenance of accounts" in itself does not necessarily imply an assignment of debts and is therefore not sufficient.

Article 2

FRANCE

The scope of the Convention should be restricted to sales where the relations between the supplier and the debtor have a professional character.

FEDERAL REPUBLIC OF GERMANY

Paragraph 1 seems to suggest that for the application of the uniform rules it would be sufficient that in the context of a factoring transaction there has been an assignment of a debt of an international character. As already mentioned, it is in addition necessary that according to the rules of private international law the factoring contract as well as the single debt which has been assigned are subject to a national law which has adopted the uniform rules.

In paragraph 2 (a) the alternative concept of "trade or professional customers" is unclear.

NORWAY

According to Norwegian law only professional business enterprises may conclude factoring contracts on a continuing basis as a factor client. In any event this will be the only practical situation. Nevertheless it may perhaps be considered by an express stipulation in Article 2 paragraph 2(a) to exclude from the application of the rules also sales by non-professionals.

SWEDEN

According to Article 2 of the preliminary draft it is not required that the parties to an underlying sales contract (the supplier and the debtor) have their places of business in Contracting States. This seems to give the effect that the supplier and the factor can one-sidedly bring the uniform rules into operation towards a debtor merely by giving notice to him according to Article 6, even if both the supplier and the debtor have their places of business in a State that has found the uniform rules unacceptable. It is of special importance in this context that under Article 4 the assignment of a receivable by the sup-

plier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such an assignment. It can be questioned whether it is advisable to go that far in excluding the autonomy of the parties to the underlying contract for the purpose of encouraging international factoring operations.

Paragraph 1 of Article 2 as presently worded appears to have the effect that the uniform rules shall aplly also to national contracts of sale in cases where the receivables arising from such a contract are assigned under a factoring contract that to any part is related to receivables arising from an international contract of sale. This seems in contradiction with the point of view put forward in Section 14 of the Explanatory Report. Any ambiguity that may exist in this regard ought to be removed.

Article 3

FRANCE

There seems to be a lacuna in Article 3 as to the global nature of the assignment of debts by the supplier to the factor.

Article 4

CZECHOSLOVAKIA

In cases where the agreement between the supplier and the debtor prohibits the assignment of a receivable, the draft uniform rules should contain a provision contrary to the provisions of Article 4 of the draft.

FRANCE

The regulation of the legal relations regarding the debtor seems to be too favourable to factoring: on the one hand the client should not be opposed to the factoring of debts contrary to what is provided for in Article 4.

On the other hand, it should not be possible to derogate from the ordinary rules of law concerning the validity of the payment (even though Article 7 has expressly laid down a rule to the contrary).

FEDERAL REPUBLIC OF GERMANY

The rules according to which any agreement prohibiting the

assignment of the debt shall be without any effect is contrary to German law. Moreover there may be cases where there is a legitimate interest to avoid repeated changes in the person of the creditor or to make the assignment dependent on the prior assent of the debtor. Article 4 should at least be restricted in its scope so as to admit that the legitimate interests of the creditor and the debtor may be preserved. One trade organisation has suggested that only those agreements prohibiting the assignment which are contained in general conditions should be considered ineffective.

NORWAY

Article 4, providing that the assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment, concerns basic questions of the autonomy of the parties to the underlying contract of sale, and should be given further consideration.

Article 5

FEDERAL REPUBLIC OF GERMANY

The utility of this provision is doubtful. The Government of the Federal Republic of Germany assumes that according to it not only the claim for the payment of the price but also the supplier's rights interded to secure actual payment are transferred to the factor. Whether or not these rights are of an accessory nature and may be transferred to the assignee of the secured debt may, according to the rules of private international law, very well depend on a law different from the law governing the secured right for payment or the factoring. It follows that the result envisaged by this provision will often not be achieved - at least not by the operation of this provision alone.

Article 6

FEDERAL REPUBLIC OF GERMANY

The wording "assignment ... effective against the debtor" to be found in paragraph 1 appears to be unclear from a dogmatic viewpoint. It should be reformulated in the sense indicated in the Explanatory Report (Para.37) in order to make it clear that it will now be only the factor and no longer the supplier to whom the debtor must make payment.

Paragraph 1 (a) should clarify who has to give notice. It should be the supplier and he should be requested to give notice in writing.

Article 7

CZECHOSLOVAKIA

Some doubts arise from the provisions regulating the questions which cannot be agreed effectualy in the relations between the supplier and the factor (Articles 7 and 9).

FEDERAL REPUBLIC OF GERMANY

The protection which Article 7 (a) accords to the debtor is weaker than the protection accorded to him under the existing German law, since in addition to the notice also the "good faith" of the debtor is required. According to German law it is sufficient that a notice has been given. It is our belief that at least only the actual knowledge of the debtor of the invalidity of the assignment should exclude the protection.

NORWAY

In Article 7(a) it may be considered to make an express exception for "strong" defences such as forgery, lack of authorisation, legal incapacity etc.

Articles 8 and 9

CZECHOSLOVAKIA

(See comments on Article 7).

NORWAY

We would draw attention to Article 9 which to a certain extent seems to limit the rights of the debtor given in Article 8. Seen from a legal point of view, it is not evident that the debtor's rights against the factor should be dependent on his payment of receivables. Such a payment will be the result of an error on the part of the debtor not knowing the supplier's non-performance, defective or late performance of the contract of sale. Taking into consideration the fact that the debtor may according to Article 8 set up all defences against the factor of which a claim has been made by the supplier, it seems to be somewhat inconsequent to deprive him of this right in the situation where the debtor pays before having received the goods or before having examined the goods.

Proposed additional articles

CZECHOSLOVAKIA

The preliminary draft uniform rules should also contain the final clauses, i.e. law applicable clause and arbitration clause.

UNIDROIT 1984
Study LVIII - Doc. 17 Corr.
(English: only)

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

OBSERVATIONS OF GOVERNMENTS ON THE PRELIMINARY DRAFT UNIFORM RULES ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING AS ADOPTED BY THE GOVERNING COUNCIL OF UNIDROIT ON 5 MAY 1983 AT ITS 62nd SESSION

At page 10, two lines from the end, the sentence should read: "which he could have availed himself under the contract if such claim has been made by the supplier", etc.

Rome, April 1984