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U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF UNIFORM

RULES ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING

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 62<sup>nd</sup> SESSION

Rome, September 1984

## 1. Introduction

1. At its 62<sup>nd</sup> 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.

2. The text of the preliminary draft rules and the accompanying Explanatory Report prepared by the Secretariat of Unidroit (Study LVIII - Doc. 16) were 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 were received from the Governments of Czechoslovakia, France, the Federal Republic of Germany, Norway and Sweden and in the light of those observations, as well as the statements made by a number of its members, the Governing Council decided at its 63<sup>rd</sup> session, held in May 1984, to set up a committee of governmental experts to pursue work on the preliminary draft rules on certain aspects of international factoring.

Since then observations have been received from the Governments of Austria and Mexico and these, together with the comments of the States referred to in paragraph 2 above, are included in the present document.

## 2. Preliminary and general observations

### AUSTRIA

The objective of the draft - i.e. to render a contribution toward facilitating international trade by promoting international factoring as an instrument for financing sales - is welcome. However, this objective must not be attained by curtailing the rights of the debtor in an inequitable way. The draft is precisely and clearly formulated and confines itself to essential problems of international factoring. These are advantages which enhance the likelihood that it will be accepted by States.

### 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, discounting, 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 respect 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 régime which have to be expected (see above 2.3).

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

#### MEXICO

The concept of receivables corresponds in Mexico to that of "cuentas per cobrar". The factoring contract ("contrate de factoraje") consists in the assignment of debts by the supplier to the factor. This operation is in some ways similar to the contract "descuento de créditos en libros" which is governed by the Ley General de Títulos y Operaciones de Crédito (LGTOC), arts. 288 to 290.

The factoring contract does not require that documents such as invoices, bills of exchange and promissory notes which are handed over at the time of the underlying sales contract should be delivered and transferred (for example by endorsement). The assignment which takes place concerns the receivables to be recovered independently of whether those documents have been issued in favour of the seller by the purchaser who becomes the debtor in the subsequent factoring contract. The draft uniform rules do not directly envisage the treatment to be accorded to those documents although they may affect the factoring contract as the debtor may be obliged to pay the factor by virtue of the assignment and the supplier or third parties by virtue of the documents issued in favour of the supplier (the seller in the contract of the sale) which the latter may endorse or transfer to third parties. Under the terms of Article 8 of the preliminary draft the debtor may set up as a defence against the factor payments which he may already have made to the supplier.

Factoring operations may be seen as credit operations and one could - by analogy with the provisions of Article 290 of the LGTOC - consider those who act as factors to be credit institutions. Accordingly,

if the factoring services are provided by public bodies, and this seems to be the case in practice, factoring activities would, in accordance with a constitutional provision (Article 28) be banking operations which may be performed only by the State through national credit companies and institutions (Article 20 of the Ley Reglamentaria del Servicio publico de Banca y Crédito).

#### 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 homogeneous 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 today.

#### 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

AUSTRIA

The definition of factoring in Article 1 is somehow misleading, notably in connection with paragraph 2. One might assume that if, for instance, the factor offered only the maintenance of accounts and the collection of receivables (not finance and protection against credit risks) as services, this would also amount to a factoring contract within the meaning of the draft. Apparently, this is an error. In order for factoring to fall within the scope of application of the rules, the title of the assignment must be a purchase or a loan of money on the security of receivables. Yet economically speaking, the purchase or the loan serve to finance the sale of goods. The provision of finance must thus always be the purchase of a contract. That this opinion is accurate is also supported by the explanatory remarks (paragraph 21) according to which the mere collection of the receivables, which per se does not serve the purpose of finance, is to be excluded from the scope of application of the rules because the title of the assignment, according to the definition, may only be a purchase and a loan of money on the security of receivables.

Thus, it is not clear whether finance does not always - independent of the reference in paragraph 2 - have to be a service to be supplied by the factor. Therefore, it would be recommendable to delete finance as a service in Article 1(2) and explicitly to include it - for clarification purposes - in paragraph 1. If the definition of paragraph 1 were formulated in such a fashion, it would also do justice to the purpose of the draft, namely the promotion of international trade (by bridging finance).

#### FRANCE

The definition of factoring in Article 1 seems to be too broad in some cases. Is it possible to say 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.

#### MEXICO

The preliminary draft uniform rules contain some omissions which should be rectified; in the first place, neither is the debtor defined nor is he mentioned in Article 1 (see below Article 2) while secondly the definition of the factoring contract contained in Article 1 does not indicate whether the contract is one for consideration and that in consequence the factor has a right to be paid by the supplier. The price may be agreed by the parties and in the absence of any contractual stipulation, the draft should determine it, having regard inter alia to international usages in this connection.



Article 2

AUSTRIA

This provision extends the scope of application of the uniform rules to factoring contracts relating to "international" receivables only in part. However, this provision may lead to problems in defining the scope of application. In this connection the question arises what is to apply if, for instance, it is agreed under a factoring contract to assign all receivables arising from the sale of specific goods and such receivables initially are only national receivables but if later on also an international debt arises under the same factoring contract. Was it then correct, that originally the uniform rules were not applied to such a factoring contract? To remedy this uncertainty, i.e. which law is to be applied to the contract and the individual assignment in such case, a solution ought to be found where it is clear a priori in every single case which rules have to be applied to the factoring contract and the individual assignment. The scope of application of the uniform rules would have to be clearly defined.

If the rules were limited and applied to factoring contracts only insofar as they relate to international receivables, problems in the practical implementation would arise from the fact that a factoring contract, and hence the effect of the assignment, may be subject to various laws depending on the nature of the assigned receivables (national or international). Given the various levels and the complexity of a legal construction like the factoring transaction, the single legal relations cannot be regulated individually. Any interference with one legal relationship (e.g. between debtor and factor) also has a bearing on the other one (e.g. between supplier and factor).

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 na-

tional law which has adopted the uniform rules.

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

#### MEXICO

We are in agreement with the text of paragraph 1. We do not believe that Contracting States must necessarily be involved.

As regards paragraph 2, it is not clear in sub-paragraph (a) whether the expression "sale of goods to trade" excludes consumer sales; it would be preferable in this connection to employ the term used in Article 2(a) of the Vienna Convention of 1980. Nor is the expression "professional customers (debtors)" clear: what is meant by "professional"? Must they be regular or permanent customers of the factor? This ambiguity should be cleared up and, in respect of the customers or debtors, it should be clarified as is done in paragraph 27 of the Explanatory Report of the Unidroit Secretariat that they are debtors "under the underlying contract of sale". In consequence definitions of the debtor and of the factoring contract should, as mentioned above, be added to Article 1.

We are in agreement with sub-paragraph (b) of Article 2, paragraph 2. Notice of assignment to the debtor is essential for the latter to be bound to the factor (as Article 6 later shows).

#### 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 have 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

supplier 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 apply 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.

##### MEXICO

This article should provide - as it is stated in paragraph 33 of the Explanatory Report - that the formal requirements for the assignment are governed by the internal law applicable to the assignment. On the other hand we do not think it necessary to complete this provision by the indication at the end of paragraph 32 of the Explanatory Report to the effect that the rule laid down in Article 3(b) does not apply to domestic factoring operations as this is clear from the wording of Article 2.

#### Article 4

##### AUSTRIA

While this provision does serve the promotion of factoring, it also restricts the private autonomy of the debtor. According to the principle of private autonomy, the contracting parties are free to choose how to shape the right concerning receivables existing between them and also to define it in such a way that it is not transferable. But if an assignment made in spite of such a contractual prohibition of assignments were effective, such assignment would change the mentioned right, defined as a not transferable right, into a transferable right: as a result, this would mean a restriction of the private autonomy of the debtor.

Balancing the opposing legal policy objectives one against the other, i.e. the promotion of international factoring on the one hand and the protection of the private autonomy of the parties on the other, preference must be given to private autonomy as a fundamental principle notably of the law of contracts, especially since there is also in respect of the protection of business transactions no reason for restricting private autonomy in this field. Also practice shows that the debtor may have an interest in the absolute effect of an agreed prohibition of assignments, which is definitely worthy of protection.

#### CZECHOSLAVAKIA

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.

#### MEXICO

Article 2030 of our Civil Code excludes the possibility of assignments of debts "in the event of the parties agreeing otherwise"; the article adds however that "the debtor cannot, as against a third

party, claim that the debt may not be assigned by virtue of an agreement to that effect, when that agreement has not been expressly stipulated in the document creating the receivables." The solution contained in Article 4 on the other hand permits an assignment even when the contract concluded with the debtor prohibits such an assignment. Such a solution might be justified in so far as the factoring contract is a means of facilitating and developing international trade; however we do not believe that it is justifiable to ignore an express agreement contained in the underlying contract between the parties. We would therefore propose the amendment of Article 4 and the adoption of the opposite solution which would give effect to a provision in the contract prohibiting the assignment of debts.

#### 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

#### AUSTRIA

According to this provision it is also possible to transfer real security rights (e.g. liens) merely by agreement and without any mode, i.e. an outwardly recognizable mode of transfer. This solution could be of disadvantage to the debtor; at least it creates insecurity.

#### 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 intended 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.

#### MEXICO

The article is acceptable.

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.

MEXICO

The article should specify that notice to the debtor must be given by the supplier or by the factor.

We are in agreement with paragraph 1(a) and (b) as also with the commentary in paragraphs 38 and 39 of the Explanatory Report.

Paragraph 2 is also acceptable. When this provision is seen in relation to Article 3(a) and (b) concerning "future debts", an agreement which makes provision for the assignment of such debts to the factor is valid and is effective in the relations between the factor and the supplier but, in respect of the debtor, it is required that notice be given either at the time of the conclusion of the sales contract or thereafter. This provision (Article 6, paragraph 2) says nothing regarding the effects of lack of notice to the debtor by the party who is under an obligation to give it, in the relations between the supplier and the factor: one could perhaps state that the lack of notice opens a right to damages and that the other contracting party may terminate the factoring contract.

Article 7

AUSTRIA

The payment by the debtor to the (apparent) factor on the basis of an assignment which is invalid or has even never been agreed upon should only release the debtor from liability if the semblance of authority is the result of the conduct of the supplier. This should be made clear in (a).

CZECHOSLAVAKIA

Some doubts arise from the provisions regulating the questions which cannot be agreed effectually 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.

MEXICO

In the same way as payment by the debtor to the factor is effective even though the receivables have not been validly assigned (sub-paragraph (a)), it should be accepted - and a provision included to that effect - that payment by a debtor in good faith who knew or ought to have known of the existence of the assignment to the factor will likewise be effective even though notice of the assignment had not been given in accordance with the requirements laid down by Article 6, paragraph 1(a) and paragraph 2. The good faith of the debtor should protect him despite such omissions; and although he would not be under an obligation to make payment he would be entitled to do so in such cases without the risk of having to pay twice over.

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.

Article 8

MEXICO

The first words of Article 8, paragraph 1, "Except as provided in Article 4", are ambiguous. Their purpose is clear, namely to provide that the debtor cannot set up against the factor the defence that there is an agreement between the debtor and the supplier prohibiting the assignment. However on a literal interpretation, even though it may seem absurd, Article 8 could be taken to mean that in the situation referred to in Article 4 the debtor may set up no defence at all. This is a simple drafting matter and Article 8 might perhaps be drafted as follows:

" In a claim by a factor against the debtor for payment of a receivable arising under a contract of sale, the debtor, except as provided in Article 4, may set up against the factor ..... etc".

The drafting of paragraph 2 of Article 8 could likewise be improved by placing the words "against the supplier in whose favour the receivable arose" after the words "in respect of claims existing".

#### Article 9

##### AUSTRIA

Neither the wording of this provision nor the explanations (para. 46) refer to the extent to which claims on account of unjust enrichment generally come within the scope of this provision. An explicit regulation would be desirable because it would be grossly unfair to the debtor if he were stripped by this provision also of the opportunity to raise against the factor claims arising from the reversed transaction of the contract with the supplier: if, for instance, the debtor, recedes from a contract because of late performance by the supplier he would have to have the possibility to recover money already paid to the factor as a reverse transaction claim. Now, however, it may happen that the one who has enriched himself is the factor and not the supplier. In such a case it would be impossible for the debtor to enforce his reverse transaction claim (claim on account of unjust enrichment). The supplier has not enriched himself and the factor enjoys protection under Article 9. It is equally unfair to exclude recovery claims against the factor, if, when being assigned the receivable, he was cognizant of the supplier's obligation for subsequent performance, which was not met afterwards, and the supplier went bankrupt prior to his performance or if it is impossible to enforce the reverse transaction claims against him otherwise.

##### CZECHOSLAVAKIA

See comments on Article 7.

##### MEXICO

This article is acceptable.

##### 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 he could have availed himself under the contract if such 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.

Article 10

MEXICO

The indications at the end of paragraph 48 of the Explanatory Report that the provisions of Article 10, paragraph 1 might conflict with those of the draft European Directive on Products Liability should be borne in mind although it would be excessive and unjust if the factoring contract were to entail products liability for the factor as such. As regards Article 10, paragraph 2, the factor's liability is justified when he acts as seller of the goods. Moreover this provision is in conformity with the principles governing products liability laid down in Article 34 of the Mexican Ley de Proteccion al Consumidor.

Article 11

MEXICO

This article is acceptable.

Proposed additional articles

CZECHOSLAVAKIA

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