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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 A DRAFT
CONVENTION ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING

(First session, 22 to 25 April 1985)

Summary report

prepared by the Unidroit Secretariat

Rome, May 1985

1. The first session of the Unidroit Committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring was held in Rome at the seat of the Institute from 22 to 25 April 1985. The session was attended by representatives of 20 member States of the Institute, one non-member State, one inter-governmental organisation and four non-governmental international organisations (see Annex I hereto).

2. The Committee was seized of the text of the preliminary draft uniform rules on certain aspects of international factoring approved on 21 April 1982 by the Study Group for the preparation of uniform rules on the factoring contract and adopted by the Governing Council of Unidroit on 5 May 1983 during its 62nd session, together with the Explanatory Report prepared by the Secretariat (Study LVIII - Doc. 16), as well as the observations of Governments on the preliminary draft (Study LVIII - Doc. 18).

3. After electing as its Chairman Mr Royston M. GOODE (United Kingdom), the Committee adopted the agenda (reproduced in Annex II). It then proceeded to the first reading of the preliminary draft rules on certain aspects of international factoring. A drafting committee, composed of the Chairman of the Committee of governmental experts and of the French and Swedish representatives, adapted the text to take account of the amendments made to it by the Committee during the first reading and the revised version was considered in the course of a second reading which the Committee completed during the session. The new text of the preliminary draft Convention on certain aspects of international factoring, prepared by the Secretariat on the basis of the decisions taken by the Committee of governmental experts on the occasion of the second reading of the preliminary draft rules, is contained in Annex III to this report.

4. The purpose of this document is to do no more than to give some indications regarding the presentation of the text. Pursuant to the decision taken by the Committee at the outset of its work to cast the uniform rules in the form of a Convention, a Preamble has been prefaced to the preliminary draft; moreover the Committee has added two new articles, one allowing for the possibility of certain articles of the Convention being of non-mandatory application and the other, by now customary in international trade law Conventions, regarding interpretation. Article 1 has been reformulated and now includes the content of the former paragraph 2 of Article 2. Article 4 has been placed between square brackets since the Committee was unable to reach a consensus on the matter, agreeing therefore to defer until its next session any decision as to whether or not the article should be maintained.

Article 6 has been redrafted by the Secretariat in the light of the comments made by the Committee and in particular of the suggestion that the content of the former Articles 6 and 7 be combined in a single article. Lastly, the Committee's decision to delete the former Article 9 led to the renumbering of Articles 8 to 11 while the Secretariat was also requested to prepare draft final clauses to accompany the revised draft articles.

5. At the end of its first session the Committee of governmental experts agreed the procedure and timetable for its future work: it requested the Secretariat to prepare a revised commentary which would draw attention to the main problems raised during the Committee's first session and which would, together with the new preliminary draft Convention, be sent to Governments at the beginning of the summer with a request for observations; a summary of those observations, which should reach the Institute no later than 31 December 1985, would be prepared and circulated by the Secretariat as soon as possible so that the President of Unidroit might then convene the second session of the Committee, which would probably be the last one given the progress which had already been made. As had been the case with the first session, the second could immediately precede or follow the next session of the Committee of governmental experts for the preparation of a Convention on international financial leasing, and take place towards the end of the first quarter of 1986.

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ANNEX II

AGENDA

1. Election of the Chairman.
2. Adoption of the draft agenda.
3. Consideration of the preliminary draft uniform rules on certain aspects of international factoring (Study LVIII - Docs. 16 and 18)
4. Future work.
5. Other business.

Preliminary draft Convention on certain aspects of
international factoring

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

CONSCIOUS of the importance of providing a legal framework that will facilitate international factoring, while maintaining a fair balance of interests between the different parties involved in factoring transactions,

AWARE of the need to make international factoring more available to developing countries,

RECOGNIZING therefore that the adoption of uniform rules which govern certain aspects of international factoring and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE DECIDED to conclude a Convention for this purpose and have thereto agreed as follows:

Article 1

1. For the purpose of the present Convention, "factoring contract" means a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

- (a) the supplier is to assign to the factor, by way of sale or security, receivables arising from contracts of sale of goods made between the supplier and his customers (debtors) in the course of business;
- (b) notice of the assignment of the receivables is to be given to debtors; and
- (c) the factor is to provide at least two of the following services, namely finance, maintenance of accounts, collection of receivables and protection against credit risks.

2. In this Convention references to "sale of goods" shall, where appropriate, include the supply of services.

Article 2

This Convention applies in relation to a factoring contract so far as it relates to receivables arising from a contract of sale of goods between a supplier and a debtor whose places of business are in different States:

- (a) when the supplier, the debtor and the factor have their places of business in Contracting States; or
- (b) when the rules of private international law lead to the application to the factoring contract and to the contract of sale of goods of the law of a Contracting State.

Article 3

As between the parties to the factoring contract:

- (a) a contractual provision for the assignment of existing or future receivables shall be valid, even though the contract does not specify them individually, if at the time when they come into existence they can be identified as falling within the contract;
- (b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act of transfer.

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 assignment./

Article 5

A factoring contract may validly provide as between the parties thereto for the transfer, with or without a new act of transfer, of all or any of the supplier's rights deriving from the sale of goods, including the benefit of any provision in the contract of sale of goods reserving to the supplier title to the goods or creating any security interest.

Article 6

1. The debtor is under a duty to pay the factor if notice of the assignment :

- (a) is given to the debtor in writing by the supplier or by the factor with the supplier's authority;
- (b) reasonably identifies the receivables which have been assigned and the factor to whom or for whose account the debtor is required to make payment; and
- (c) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given.

2. Payment to the factor by the debtor in accordance with paragraph 1 of this article shall be effective to discharge his liability pro tanto provided that he makes the payment in good faith and without knowledge of any other person's claim to payment of the receivable.

Article 7

1. Subject to Article 4, in a claim by the factor against the debtor for payment of a receivable arising under a contract of sale of goods the debtor may set up against the factor all defences of which the debtor could have availed himself under that contract if such claim had been made by the supplier.

2. The debtor may also exercise against the factor any right of set-off in respect of claims existing against the supplier in whose favour the receivable arose, and available to the debtor at the time the debtor received notice of the assignment.

Article 8

1. The factor shall not, by reason only of his acquisition of ownership of the goods in the circumstances contemplated by Article 5, incur liability to a third party for loss, injury or damage caused by the goods.

2. Nothing in this article shall affect the liability of the factor where he sells or otherwise disposes of the goods.

3. Nothing in this article shall affect the liability of the factor under any other international agreement which has already been or may be entered into.

Article 9

This Convention shall also apply to subsequent assignments of the receivables by the factor to another factor as if the first factor were the supplier and the other factor were the initial factor, whether the places of business of the factors are situated in the same State or in different States. (1)

Article 10

Except as otherwise provided by this Convention (2), the parties may, in their relations with each other, exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Article 11

1. In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based and in conformity with the law applicable by virtue of the rules of private international law.

(1) The Secretariat will attempt to produce a redraft of Article 9 which will be communicated to Governments together with the commentary on the revised text of the draft Convention as a whole.

(2) It was agreed to leave to a later stage any decision as to which provisions of the Convention are to be regarded as mandatory.