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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

Draft final provisions for the preliminary draft Convention

on certain aspects of international factoring

(prepared by the Unidroit Secretariat)

Rome, January 1986

## I. INTRODUCTION

1. In accordance with a request made by the Committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring at its first session held in Rome from 22 to 25 April 1985 (UNIDROIT 1985, Study LVIII - Doc. 19, para. 4), the Unidroit Secretariat has prepared a set of draft final clauses to accompany the draft articles of the Convention as revised by the committee at the afore-mentioned session.

2. The draft final provisions set out below are to a large extent based on the corresponding provisions of the 1983 Convention on Agency in the International Sale of Goods (hereafter referred to as the "Geneva Agency Convention"), the most recent international convention to be adopted at a Diplomatic Conference under the auspices of Unidroit. It should however be added that the close relationship between that convention and the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as the "Vienna Sales Convention") resulted in certain solutions being adopted at Geneva with a view to ensuring exact correspondence between the two conventions (see Article B, below), which might not necessarily be appropriate for other conventions concluded on the basis of Unidroit drafts.

3. Since it is traditionally the case that the final provisions of Unidroit conventions are not the subject of lengthy discussion by the committees of governmental experts responsible for the preparation of those conventions, the Secretariat has limited itself at this stage to summary comments on the draft Articles A to K. This being said, any observations by governmental experts on the draft final provisions prepared by the Secretariat would be most welcome.

II. SECRETARIAT PROPOSALS FOR THE FINAL PROVISIONS OF THE PRELIMINARY  
DRAFT CONVENTION ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING

Article A

1. This Convention is open for signature at the concluding meeting of the Diplomatic Conference  
and will remain open for signature by all States at            until
2. This Convention is subject to ratification, acceptance or approval by States which have signed it.
3. This Convention is open for accession by all States which are not Signatory States as from the date it is open for signature.
4. Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary.

Commentary

The provisions of this article are based on those of Article 22 of the Geneva Agency Convention which were themselves based on precedents to be found in United Nations conventions, such as the Vienna Sales Convention.

Article B

1. This Convention enters into force on the first day of the month following the expiration of six months after the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.
2. For each State that ratifies, accepts, approves, or accedes to this Convention after the deposit of the fifth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of six months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Commentary

Following Article 99 of the Vienna Sales Convention, Article 33 of the Geneva Agency Convention requires the deposit of ten instruments of ratification, acceptance, approval or accession for its entry into force and furthermore stipulates that such entry into force shall take effect twelve months after the date of deposit of the tenth such instrument.

Article B as drafted by the Secretariat involves a return to previous Unidroit practice as exemplified by the 1973 Convention providing a Uniform Law on the Form of an International Will, Article XI of which provides for the entry into force of that Convention six months after the date of deposit of the fifth instrument of ratification or accession.

#### Article C

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the supplier, the factor and the debtor have their places of business in States parties to such agreement.

#### Commentary

Based on Article 90 of the Vienna Sales Convention and Article 23 of the Geneva Agency Convention, this provision displaces, in certain cases, the application of the prospective Convention in favour of existing or future international agreements containing provisions concerning matters governed by it, for example agreements concluded by States on a regional basis. It would also cover any future Convention intended to supersede that now under preparation unless it were to be decided to include in the present final clauses provisions establishing a revision procedure.

One effect of Article C is to a certain extent to weaken the universal character of the future Convention and it could create an element of uncertainty for the parties. For this reason, Article C would only apply when all three parties have their places of business in States parties to another agreement concerning matters governed by the Convention itself.

#### Article D

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.
2. These declarations are to be notified to the depositary and to state expressly the territorial units to which the Convention extends.
3. If, by virtue of a declaration under this Article, this

Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

4. If a Contracting State makes no declaration under paragraph 1 of this Article, the Convention is to extend to all territorial units of that State.

#### Commentary

In recent years a number of formulae have been employed in international private law conventions to meet the difficulties sometimes experienced by States with federal systems of government involving a constitutionally guaranteed division of powers among the constituent units of the federation.

The text of Article D follows that of Article 24 of the Geneva Agency Convention and moreover corresponds closely also to the most recent expression of the will of States in this connection, namely Article 26 of the 1985 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods.

#### Article E

1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the supplier, the factor and the debtor have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the supplier, the factor and the debtor have their places of business in those States.

3. If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State,

the declaration made will, as from that date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Commentary

With minor adaptations, this article is based on Article 26 of the Geneva Agency Convention which was itself heavily influenced by the drafting of Article 94 of the Vienna Sales Convention. As with Article C above, this possibility for Contracting States to restrict the application of the future Convention, which amounts in effect to a reservation clause, could create uncertainty for the parties as to which law would be applicable in a given case, and for this reason it is proposed that paragraphs 1 and 2 of Article E should only operate when all three parties, supplier, factor and debtor, have their places of business in States concerned by the declaration or declarations.

Article F

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph (b).

Commentary

Both the Vienna Sales Convention (Article 1, paragraph 1 (b)) and the Geneva Agency Convention (Article 2, paragraph 1 (b)) made provision for the application of the Convention not only when the specific objective connecting factors have been satisfied but also when the rules of private international law lead to the application of the law of a Contracting State. These models have been followed in Article 2, paragraph (b) of the present draft Convention which provides for its application "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".

At both the Vienna and Geneva Conferences however a number of States, especially Socialist States which have enacted special legislation regulating foreign trade relations, called for the possibility to take a reservation in respect of the application of the two Conventions in accordance with the rules of private international law in cases where they would not otherwise be appli-

cable. The text of Article F is based on that of the reservation clause contained in Article 95 of the Vienna Sales Convention and Article 28 of the Geneva Agency Convention.

#### Article G

1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.
2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.
3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article E take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.
4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.
5. A withdrawal of a declaration made under Article E renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

#### Commentary

Precedents for the provisions of Article G are to be found in many international conventions, the text of the article itself following word for word Article 31 of the Geneva Agency Convention.

## Article H

No reservations are permitted except those expressly authorized in this Convention.

### Commentary

The wording of Article H follows that of Article 32 of the Geneva Agency Convention and its intent is to prevent States making reservations other than those presently contemplated by Articles D, E and F or any other reservations which may be permitted.

## Article I

### Variant I

This Convention applies when the factoring contract pursuant to which the receivables are assigned is concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, sub-paragraph (a), or the Contracting State referred to in sub-paragraph (b) of that Article.

### Variant II

This Convention applies when the receivables assigned by the supplier under a factoring contract arise from a contract of sale of goods concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, sub-paragraph (a), or the Contracting State referred to in sub-paragraph (b) of that Article.

### Variant III

This Convention applies when the receivables assigned under a factoring contract come into existence on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, sub-paragraph (a), or the Contracting State referred to in sub-paragraph (b) of that Article.



Commentary

One of the most difficult problems to be solved in the context of private law conventions involving tripartite relations is that of determining which transactions will be subject to the provisions of the Convention once the requirements for its entry into force have been met. The position is complicated in this instance by the fact that Article 2 provides that the Convention will, subject to the introductory wording of the article, apply (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 the contract of sale of goods of the law of a Contracting State.

Assuming however that the requirements of either sub-paragraph (a) or sub-paragraph (b) of Article 2 have been satisfied, it is still necessary to determine at which point the "trigger" mechanism operates in respect of a given transaction. Is it for example sufficient if the receivables assigned under an existing factoring contract come into existence on or after the date of the entry into force of the Convention in respect of the State or States concerned, or should the sales contract under which the receivables arise have been concluded on or after the date of such entry into force, or again ought it to be necessary for the factoring contract itself to be concluded on or after that date? One could also imagine a combination of the solution contained in Variant I with that in Variant II or III although this would evidently reduce somewhat the number of cases in which the Convention would be applicable.

The Secretariat has not sought to provide a reply to this question at the present time but has submitted texts embodying the three solutions outlined above which the committee may wish to consider at its second session.

Article J

1. This Convention may be denounced by any Contracting State at any time after the date on which it enters into force for that State.
2. Denunciation is effected by the deposit of an instrument to that effect with the depositary.
3. A denunciation takes effect on the first day of the month following the expiration of twelve months after the deposit of the instrument of denunciation with the depositary. Where a

longer period for the denunciation to take effect is specified in the instrument of denunciation it takes effect upon the expiration of such longer period after its deposit with the depositary.

Commentary

The provisions of Article J are based on Article 16 of the 1984 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage of 1969.

Article K

1. This Convention shall be deposited with the Government of .....
2. The Government of ..... shall:
  - (a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of:
    - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
    - (ii) each declaration made under Articles D, E, F;
    - (iii) the withdrawal of any declaration made under Article G, paragraph 4;
    - (iv) the date of entry into force of this Convention;
    - (v) the deposit of an instrument of denunciation of this Convention together with the date of its deposit and the date on which it takes effect,
  - (b) transmit certified true copies of this Convention to all Signatory States, to all States acceding to the Convention and to the President of the International Institute for Unification of Private Law (Unidroit).

Commentary

The functions of depositary of Unidroit conventions are traditionally exercised by the Government of the State on whose territory the Diplomatic

Conference for the adoption of the convention in question is held. Unlike earlier Unidroit conventions, the Geneva Agency Convention followed the Vienna Sales Convention in that it contained no specific article setting out the functions of the depositary. The Secretariat believes however that such an article would be useful and has taken as a model for Article K the corresponding provisions of Article 17 of the 1984 Protocol to amend the International Convention on Civil Liability for Oil Pollution Damage of 1969.

Authentic text and witness clause

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at            this        day of            one thousand nine hundred  
and                            in a single original, of which the English and  
French texts are equally authentic.

Commentary

The general language of the provision follows many precedents, in particular that of the Geneva Agency Convention. The reference to English and French as the authentic texts of the future Convention reflects the fact that the working languages of Unidroit are English and French.