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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

Observations of Governments and of the interested organisations on the text of the preliminary draft Convention on certain aspects of international factoring drawn up by the committee of governmental experts at its first session and on the commentary thereon prepared by the Secretariat

Rome, March 1986

1. INTRODUCTION

Following the first session of the Unidroit committee of governmental experts for the preparation of a draft Convention of certain aspects of international factoring held in Rome from 22 to 25 April 1985, the Secretariat addressed to Governments and to the interested organisations the text of the preliminary draft drawn up by the committee, together with a commentary and a request for observations.

By 28 February 1986, replies have reached the Secretariat from the Governments of Austria, Finland, the Netherlands, Sweden and the United Kingdom, as well as from two professional organisations, the Association of British Factors and Factors Chain International. The content of any replies which may be received subsequently will be submitted to the committee at its next session which will take place in Rome from 21 to 23 or 24 April 1986.

II GENERAL OBSERVATIONS

SWEDEN

The general opinion among interested parties is somewhat mixed. The practical value of the Convention is questioned, since the Convention only deals with certain problems in international factoring. Some parties point to the fact that the existence of a Convention with such a limited scope may complicate the legal situation, since it still would be necessary to consult national legislation on questions not solved by the Convention. However, the general attitude to the project, not least among the finance companies, is nevertheless positive. The Swedish Government shares the general attitude to the project, although the remarks made regarding the scope of the Convention ought to be kept in mind in the future work.

ASSOCIATION OF BRITISH FACTORS

It is of considerable disappointment to this Association that the proposed Convention does not deal with the question of the validity of assignments as against third parties such as the trustee in bankruptcy or liquidator of the supplier nor of priority rights relating to the assignments. In this connection, it should be appreciated that to deal with the validity of the assignment as between the assignor and assignee only is not of great help in encouraging the confident use of factoring; it is normally only on the insolvency of the supplier that the parties need to have recourse to rules such as those in the draft Convention. It is, however, accepted that in the time

available and owing to the implications for other branches of the law, such as those relating to banking and insolvency, it was not possible for the study group and the committee to formulate such comprehensive rules. However, the comments which we make on the individual articles below should be read in conjunction with our view as to the detraction from the usefulness of the proposed Convention arising from the absence of such rules.

FACTORS CHAIN INTERNATIONAL

1. To our great regret the draft Convention does not include any provisions dealing with conflicting claims of the factors and third parties. To facilitate international factoring which is - as to the preamble - the aim of the convention, it is for the factoring business of utmost importance to solve the wide discrepancy from one country to another in dealing with the question of priority of assignments. We understand that it was not possible to solve this problem because it would be indeed a time consuming work to find acceptable uniform rules. But maybe Unidroit can study this item at a later time and can come forward with proposals what would be highly appreciated.

2. Since the priority problem could not be solved, it is in consequence of the utmost importance for the development of international factoring that the factoring assignment is legally valid notwithstanding a clause in the delivery agreement prohibiting such an assignment.

...

If Article 4 is deleted we think that the rest of the Convention will not be of great benefit for international factoring and the Convention will fail in its original aim.

III ARTICLE BY ARTICLE COMMENTARY ON THE PRELIMINARY DRAFT CONVENTION

Article 1

FINLAND

It seems doubtful whether sub-paragraph 1 (b) is necessary or even an appropriate element of the definition of a factoring contract. Since notice of the assignment is required in Articles 6 and 7, which contain the most important provisions determining the position of the debtor in relation to a factor to whom the receivable has been assigned, the requirement in Article 1 (1) (b) according to which the contract between the supplier and the factor

must provide for such notice of the assignment does not seem to serve any significant purpose from the debtors' point of view. On the other hand, reading the present provision together with Article 6, sub-paragraph 1 (b), it seems as if the intention might be to impose a duty upon the debtor to examine whether notice of the assignment given by the factor is compatible with the contractual arrangement between the supplier and the factor, meaning that such examination was intended as a condition for discharge when the debtor makes payment to the factor. If this is to be the case, it seems that the debtor is placed in an all too difficult position. The requirement of good faith in Article 6 (2) can hardly be extended so far as to require this kind of an examination by the debtor. Article 1 (1) (b), together with Article 6 (1) (a) might, however, contribute to such an interpretation of Article 6 (2). Since the requirement in Article 1 (1) (b) does not appear to be a necessary qualification for the application of any other substantive provisions in the draft convention, it seems superfluous as an element of the definition given in Article 1 (1). Deletion of sub-paragraph (b) should therefore be considered.

SWEDEN

The commentary (paragraph 22) states that the assignment must be effected by either an outright sale or by a secured loan. As paragraph 1, sub-paragraph (a) indicates, this is not absolutely necessary. Although there is no transfer of money from the factor to the supplier, the factor only taking over the credit risk and the maintenance of accounts, the Convention should perhaps apply. The assignment of the receivables to the factor in these cases is considered by the Swedish finance companies to be an outright sale.

The draft is not clear on the question of whether the contract of sale of goods should be in writing or not. The Swedish view is that also oral contracts should be accepted.

Article 2

FINLAND

The introductory language used in Article 2, which states that the Convention applies in relation to a factoring contract so far as it relates to receivables arising from an international sale, seems too narrow in view of the fact that several of the most important provisions in the draft convention deal with the relationship between the debtor and the factor to whom receivables have been assigned by virtue of the factoring contract. A wording which would indicate better that the convention deals with all the

main aspects of the three-party relationship arising in a factoring situation would be preferable.

The draft convention does not contain any provision specifying which of several places of business a party may have is to be considered relevant when determining the applicability of the convention. Such a provision is to be found for instance in Article 10 of the United Nations Convention on Contracts for the International Sale of Goods. A provision of this kind should be included also in the present draft Convention.

The criteria laid down in Article 2 for the applicability of the convention seem appropriate and acceptable.

ASSOCIATION OF BRITISH FACTORS

We consider that sub-paragraph (a) will normally be the determining factor as to the scope of the Convention. As was expressed during the meeting of the committee in April 1985, to determine whether the rules of international private law lead to the application of the law of a contracting state to the factoring contract and to the contract of a sale of goods, would be beyond the scope even of the knowledge of a trained lawyer in many cases. It will certainly not be possible for a layman engaged in a factoring operation to make such a determination. Accordingly, we consider that Article 2 (b) might well be omitted.

As regards the difference between the French and English versions of the draft, we consider that the words in the first line should be "in relation to" and not simply "to", because the factoring contract may well include domestic business. The use of the word "to" would apply the Convention to the whole of the contract and not just to that part of the contract which related to international business.

Article 3

FINLAND

This article is concerned with the validity of an assignment of future receivables as well as existing receivables which are not specified individually. According to its initial wording, the article only deals with the validity of such assignments as between the parties to the factoring contract. The purpose of this phrase is to indicate that the article is not intended to have any bearing upon the question of priorities between the factor and third parties, i.e. the supplier's other creditors, with regard to the receivables.

However, in the factoring context the question of the validity of an assignment of future receivables or other receivables which have not been individually specified at the time of the assignment is relevant not only between the parties to the factoring contract but also in relation to the debtor. The present text leaves unresolved the problem which may arise if the debtor raises the objection that an assignment of future receivables on which the factor is relying against the debtor is not valid. It seems obvious that this aspect of the problem should not be left to be determined according to the applicable national law, since the need for regulating the validity of an assignment of future receivables etc. in the draft convention relates both to the factoring contract and the obligation of the debtor.

Sub-paragraph (b) of this article provides that, between the parties to the factoring contract, a provision in this contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence. The implications of this provision are not quite clear. The wording is explicit enough in stating that the provision is only concerned with the inter partes aspects of the assignment of future receivables. What exactly is the meaning of sub-paragraph (b) in this relation is, however, not entirely clear. The factoring contract is a bilateral contract involving obligations for both parties. In such contracts, one party may be entitled to withhold his performance until the other party fulfils his obligations. Thus, under the general law of obligations, the assignment of receivables by the supplier to the factor may be subject to the condition that the factor performs his obligations - for instance, makes payment of the balance which he owes to the supplier with respect to the receivables in question.

Sub-paragraph (b) of Article 3 gives rise to the question of whether this provision is intended to modify the position of the supplier in this respect, or whether its only purpose is to make it clear that no formal act of transfer is necessary with respect to the individual receivables in order to constitute a valid assignment. The meaning of the phrase "operates to transfer the receivables ... when they come into existence" would thus seem to need clarification.

ASSOCIATION OF BRITISH FACTORS (Articles 3 and 5)

The reasons for limiting the scope of the rules to the validity between the parties to the contract and not third party rights nor to priority rights, in the case of insolvency of the supplier, are described in paragraphs 31 and 38 respectively of the Commentary. For these very reasons, the limitation of the rules is most disappointing: as mentioned in the introductory para-

graphs of our observations, in order confidently to provide factoring services for small businesses which, in the interests of most economies should be encouraged, it is necessary that a factor should know that his ownership of debts should be secured against third party rights and secure in the event of the insolvency of the supplier. It seems that these articles as they stand will give very little scope for improvement in this direction.

Article 4

AUSTRIA

This provision should be deleted for the reasons already expressed in the comments on the draft uniform rules, the provision restricts the facility of the debtor to determine by agreement with the creditor the contents of his obligation, namely to create a receivable against himself which is not transferable. It cannot be ignored that the debtor is not a party to the factoring contract and that such a contract does not result in an improvement of the position of the debtor. From this point of view a restriction of the debtor's facilities would be unjustified. The provision also partly sets aside the principle of the autonomy of the parties. This cannot be justified by the purpose of the Convention i.e. to facilitate international factoring.

Finally, it is a problem of a general nature whether a contractual prohibition to assign a receivable should be effective only inter partes or also against third parties. Therefore, it would be inappropriate to solve this problem in a convention which is restricted only to factoring contracts. The validity of an assignment contrary to such a clause should not depend upon the fact of whether the receivable was assigned in pursuance to a factoring contract or to another agreement. Otherwise, the effect of a prohibition clause would be unforeseeable for the debtor.

FINLAND

The provision in this article should be deleted. The debtor may have a legitimate interest in a contract clause which prohibits the supplier from assigning receivables arising from the business relationship between them. The fact that the assignment of a receivable limits the debtor's right of set-off in respect of claims which become available to the debtor after he received notice of the assignment may be one reason for including such a prohibition in the contract. The possibility that a debtor, where he is the strongest party, may impose this kind of a contract clause upon the supplier without good cause can hardly be considered a sufficient reason for rendering

such contract clauses generally ineffective.

Moreover, it seems that the analysis on which Article 4 is based may be incomplete. The underlying assumption here seems to be that a contractual provision between a debtor and a supplier prohibiting the assignment of a receivable would render such an assignment ineffective, so that a factor to whom the receivable has been assigned would not be able to rely on the assignment. However, the fact that the supplier, when assigning the receivable, acts in breach of his contract with the debtor, does not necessarily mean that the assignment becomes ineffective so that the factor cannot rely on it. Article 4 of the draft seems to be based on the assumption that the factor has a duty to examine whether the supplier is under any contractual restrictions concerning the assignment of his receivables. Such an assumption is hardly correct. It is therefore subject to doubt, whether the interests of the factor at all require a provision of this kind.

Under Finnish law, it seems that the factor may be precluded from relying on the assignment only if he was in fact aware of the fact that the assignment was in breach of the contract between the supplier and the debtor and the circumstances were such as to render it unfair to allow the factor to rely on the assignment.

NETHERLANDS

As far as Article 4 is concerned, the same view is taken as was held by some delegations during the meeting in Rome. Although admittedly a provision like Article 4 would promote international factoring, it is hard to see how one could justify an infringement of one of the fundamental principles of the law of contract, namely the free autonomy of parties. The alternatives A and B, which were proposed during the meeting, raise too many problems. The only solution seems to be to delete Article 4.

SWEDEN

Much can be said in favour of this article. It does, however, constitute a major derogation from the principle of party autonomy and should therefore be deleted.

UNITED KINGDOM

We strongly support the retention of Article 4 and great importance is attached to it by the factoring industry. There are two reasons why debtors may wish to include clauses prohibiting assignment. First, they thereby

exclude the risk of overlooking a notice of assignment and thus of having to make a second payment, to the assignee, after paying the original creditor. Secondly, the exclusion of assignment preserves the debtor's right to set off against the factor new cross claims arising against the creditor.

Moreover, in our view these points, though legitimate, are outweighed by the following serious disadvantages of allowing no-assignment clauses to be set up against the factor.

1) It is impossible for a factor to scrutinise individual contracts. The factor has to assume that the debts are transferable. To allow no-assignment clauses to be set up against the factor is thus a serious impediment to receivables financing, particularly at the international level.

2) Many debtors are in a strong position to dictate terms of trade. In particular they can force the supplier to extend credit without security. To allow such debtors also to prevent assignment will have effect that the supplier is not only unable to obtain security but is also unable to lay off his risk by factoring the debt.

Finally, the likelihood of a debtor overlooking a notice of assignment is reduced by the provisions of Article 6 (1) (c).

Article 4 caused great controversy and a series of complex alternatives was put forward. The view of the representatives from factoring organisations was that Article 4 should either be in or out but that if it was not to be adopted as it stands they would rather have it deleted altogether than accept any of the alternatives proposed.

ASSOCIATION OF BRITISH FACTORS

The arguments against the inclusion of Article 4 rest mainly on the hypothesis that its provisions will detract from the freedom of commercial concerns to contract freely with each other.

This is not so. The provisions do not prevent the inclusion of prohibitions of assignments in purchase contracts nor do they have the effect of making them invalid. In fact they leave untouched in the hands of the innocent purchaser all the remedies which he has against the seller for breach of the term in the purchase contract forbidding the assignment.

However, the object of the provisions is to relieve the factor as

a purchaser of a receivable of the possibility of an unfair financial penalty - the inability to recover the funds he has laid out in good faith. For the factor is most unlikely to know of the prohibition; it is an administrative impossibility for a factor, dealing with a stream of a multitude of comparatively small transactions, to examine all his clients' contracts of sale.

It is not putting it too high to allege that, coming on top of the limitation of the rules in Articles 3 and 5, the omission of Article 4 will have the effect of emasculating the proposed convention to such an extent that it will be of little use in promoting international trade. It seems that it will then be a case of "parturient montes, nascetur ridiculus mus".

...

Finally, we make no apology for reiterating our strong recommendation that the inclusion of Article 4 should be fully supported. As it stands now, the Convention without such an article would do little to assist the advancement of factoring and thereby international trade.

FACTORS CHAIN INTERNATIONAL

Since the priority problem could not be solved, it is in consequence of the utmost importance for the development of international factoring that the factoring assignment is legally valid notwithstanding a clause in the delivery agreement prohibiting such an assignment. To make it very clear: the factor must have the unrestricted right to collect the accounts receivable from the debtors. As said at the various Unidroit Conferences:

a) International factoring is facilitating especially the exports of small and medium sized companies including an increasing number of those situated in developing countries.

b) Prohibition of assignment is in many cases used by large companies in some, but economically important, countries.

c) Factoring is dealing with hundreds of relatively small accounts receivable. It is an administrative burden for the factor to control whether the delivery contracts include such prohibition clauses. This might certainly impede the development of international factoring.

If Article 4 is deleted, we think that the rest of the Convention will not be of great benefit for international factoring and that the Convention will fail in its original aim.

Article 5

FINLAND

According to the commentary, this article is primarily intended to ensure the validity of the transfer of rights deriving from future contracts of sale. In the draft text, however, no reference is made to future sales. Thus it seems that the essential element is missing from the article itself. The validity of a transfer of rights deriving from a contract already concluded can hardly be subject to doubt in national legal systems.

ASSOCIATION OF BRITISH FACTORS

See observations on Article 3.

Article 6

FINLAND

The wording of paragraph 1 ("the debtor is under a duty to pay the factor") was, according to the commentary, preferred by the committee of experts to the former language which provided that the assignment was effective against the debtor. The present language involves, however, the problem that according to paragraph 1 the debtor is always under a duty to pay the factor if the conditions in sub-paragraphs (a) - (c) are fulfilled, whereas paragraph 2 states that payment in accordance with paragraph 1 discharges the debtor from his liability only in case he was in good faith and without knowledge of any other person's claim to payment of the receivable. The present text thus seems to suggest that even if the debtor knew of another person's claim or otherwise falls short of the requirement of good faith, he is still under a duty to pay the factor but enjoys no discharge. This, of course, is not the intended meaning of the article. The former wording, which was rejected by the committee, was better in avoiding this problem, even if it was more obscure with regard to the basic question dealt with in paragraph 1.

The qualification in paragraph 1, sub-paragraph (a) according to which notice of the assignment, unless given by the supplier, must be given by the factor with the supplier's authority, seems somewhat dubious. The meaning and implications of this requirement are not quite clear, nor are the reasons for adopting such a qualification. It is in the factor's interest that notice of the assignment is given to the debtor, and it is therefore reasonable that such notice can be given not only by the supplier but also

by the factor. On the other hand, notice given by the factor does not in itself constitute evidence of the assignment as certain as notice given by the supplier, and therefore it cannot alone be a sufficient basis for the debtor's duty to pay the factor. The qualification adopted in the draft, requiring that notice by the factor must be given "with the supplier's authority", seems all too vague and open to varying interpretations in order to satisfy the need for a precise regulation which is obvious in the present provision. The language adopted in the draft gives rise to uncertainty and doubts, especially in view of legal systems in which notice given by the assignee is always sufficient to preclude the debtor from gaining discharge by making payment to the original creditor but which, on the other hand, require that notice given by the assignee must be accompanied by written evidence of the assignment in order to discharge the debtor in cases where payment has been made to the assignee but the assignment is later found invalid. The draft provision in Article 6 is not based on this kind of a distinction between the conditions under which discharge for the debtor no longer is possible by making payment to the supplier and the conditions under which payment to the factor discharges the debtor even if there was in fact no valid assignment entitling the factor to the payment. These two aspects seem instead to have been combined by adopting the present, rather obscure reference to the supplier's authority. According to the commentary, the intention has been to indicate that "the debtor must have reasonable grounds for believing in the existence of the factor's authority". Questions regarding the form of the authority are left to be settled by the applicable law. It would seem to be of great importance that both the draft article and the commentary be made more precise on this point. It is unfortunate if the present question is left to be settled by the applicable national law to the extent which the draft text seems to indicate.

ASSOCIATION OF BRITISH FACTORS

Again in this case, the fact that the article does not protect the factor against third party rights and claimants for priority detracts considerably from the usefulness of this article.

Article 7

FINLAND

According to paragraph 2 the debtor may exercise against the factor any rights of set-off in respect of claims against the supplier, provided however that the claim was available to the debtor at the time he received notice of the assignment. The exact meaning of this condition is not entirely

clear, since neither the text itself nor the commentary are specific about when a claim becomes available to the debtor. Considering the importance of the present provision, clarification seems to be required on this point. Presumably the language adopted in the draft text is intended to purport not only that the debtor must have become creditor with respect to the counterclaim before he received notice of the assignment but also a general requirement that the counterclaim must be due for payment at the time when notice of the assignment is given to the debtor. However, in cases where the date for the payment of the counterclaim has not been fixed in advance, for instance where the debtor has a claim for contractual damages against the supplier, it may be subject to doubt when the claim becomes available to the debtor within the context and meaning of the present provision.

SWEDEN

According to the Swedish law regarding the right of set-off, it is not always necessary that the debtor's claim should be available in the sense that the time for fulfilment has arrived. In any case, the question of the precise meaning of the word availability is perhaps one which must be left to national law.

ASSOCIATION OF BRITISH FACTORS (former Article 9)

It seems that the omission of a provision negativing the liability of the factor once the debtor has paid, is illogical. Once the debtor has paid, the transaction as regards the factor is completed and, even if he has not provided finance by way of early payment to his supplier, he will be responsible for immediate payment to the supplier. Thus, if it subsequently emerges that the debtor ought not to have paid, there will be no unjust enrichment in favour of the factor. The debtor's rights to recover from the supplier remain and it seems illogical that, in the event of the insolvency of the supplier, the factor may have the penalty of having to pay on the supplier's behalf. The illogicality arises because the mere fact of the factoring agreement, for the entry into which the debtor has given no consideration, will be of considerable benefit to the debtor.

Article 8

SWEDEN

The possibility of regulating the factor's liability towards all third parties - which the wording of the article indicates - in a Convention

which in principle only deals with the relationship between the supplier, the debtor and the factor, ought to be analysed.

UNITED KINGDOM

The article represents the best compromise result obtainable. It is designed to ensure that the factor does not, by reason only of his acquiring title to the goods under the factoring agreement, incur the liabilities of an owner, because he has not been responsible for putting the goods into circulation; neither have they ever come into his physical possession. The position is otherwise where, for example, the factor exercises the right to take over returned goods and then dispose of them. In such a case he is acting as a merchant and there is no ground for exonerating him from liability.

Article 9

(replies to questions 1 to 5 contained in paragraph 58 of the commentary)(1)

AUSTRIA

1. Yes; the Convention should only apply to subsequent assignments if it is also applicable to the first assignment. Otherwise each of the successive assignments could be subject to different laws. This would not be desirable.

2. a) No; the application of the Convention to subsequent assignments should be irrespective of whether they are assignments in the context of a factoring contract or not. This solution guarantees that the first assignment and all subsequent assignments are subject to the same law (i.e. the Convention). This promotes clarity in general and thus the interests of the debtor in particular.

b) No; an assignment which does not meet the criteria of Article 1 should not be characterised as a factoring contract. Otherwise there would be confusion in the meaning of this term.

c) As the subsequent assignment need not be connected with a factoring contract, it is not necessary for the assignee in the subsequent assignment to be a factor.

3. The subsequent assignee need not have his place of business in a Contracting State: once applicable to the assignment of a receivable the Convention should remain applicable to subsequent assignments of this receivable.

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(1) See Annex

4. Yes; in order to avoid uncertainty it should be provided that an assignee in a subsequent assignment can give notice of that assignment to the debtor when duly authorised to do so.

5. The first alternative is preferred. The debtor's rights of set-off against the second assignee must relate to claims existing against him or against the supplier.

FINLAND

1. The applicability of the draft Convention to subsequent assignments of the receivables gives rise to a number of questions which are not easily resolved. Since the subsequent assignment of the receivables by the factor is a transaction which does not necessarily involve problems that are different from those relating to any assignment of a claim, the basic question is how far it is advisable to extend the scope of the present draft Convention. The main argument which can be advanced in favour of including provisions on such subsequent assignments in a convention on international factoring is the need to ensure that the rules applicable in a factoring situation remain the same even if a successive assignment takes place. Therefore, it seems appropriate to restrict the application of the draft Convention so that a subsequent assignment is governed by the Convention only under the condition that the first assignment was governed by it.

2. a) In order not to extend the application of the factoring convention too far, i.e. to situations where it would not be expected, it seems advisable to let the draft Convention govern only those successive assignments which can be regarded as part of the normal procedure in the factoring business, such as assignments by an export factor to an import factor. If the line is drawn according to what are normal transactions in the international factoring business, it can hardly be required that all the criteria set out in paragraph 1 of Article 1 be fulfilled as far as the contract between the (first) factor and his assignee are concerned.

The services listed in sub-paragraph (c) of Article 1, paragraph 1 are, for instance, unlikely to be normal elements of a contract between an export and an import factor.

b) It is a matter of drafting technique to solve the problem mentioned in question 2 (b) in paragraph 58, while reserving the term "factoring contract" to the contract between the supplier and his factor.

3. It was suggested above that the applicability of the draft Conven-

tion to the first assignment should be a condition for its applicabilty to any subsequent assignment. As to the additional requirements, i.e. those relating to the assignee in the subsequent transaction, it would seem appropriate to consider the solution already adopted in Article 2. Such an approach would entail that the draft Convention would be applied if the subsequent assignee has his place of business in a Contracting State or if the rules of private international law lead to the application of the law of a Contracting State to the subsequent assignment.

4. Regarding Article 6, paragraph 1 (a), the reasons which speak in favour of entitling the factor to give notice of the assignment to the debtor also speak in favour of entitling a subsequent assignee to give such notice.

5. It seems obvious that the debtor's right of set-off against a subsequent assignee should not only include claims against the supplier but also possible claims against the first assignee, i.e. the factor.

NETHERLANDS

1. The Convention can apply to a successive assignment even if it did not apply to the first assignment.

2. a) Often the export factor and the import factor do not enter into a proper contract, but make use of simpler methods to assign the receivables, e.g. a form which will not meet the criteria set out in Article 1, paragraph 1. That practice does not cause any problems. Therefore there does not seem to be any reason why one should require a contract which meets all the criteria mentioned.

b) If these criteria are not satisfied, such a contract cannot be characterised as a "factoring contract", but then it does not seem necessary that it should. Surely the purpose of Article 9 is to extend the applicability of the Convention to subsequent assignments irrespective of whether those assignments constitute factoring contracts in the sense of the Convention.

c) Yes. If the assignee in the subsequent assignment need not be a factor, the Convention would also apply to the collection of the receivables by a collecting agency.

3. Yes.

4. If the assignee is a factor - as he should be in the Dutch view -, there is no need for a special provision, because Article 6 will apply. In practice it often occurs that the export factor gives notice to the debtor of the assignment to the import factor. Article 9 should provide that in

that instance there is no need for a new notification by the import factor.

5. The fact that two assignments of the receivables take place must not worsen the position of the debtor, but it must not better that position either. That means that the debtor's rights to set-off against the second assignee must relate to claims existing against the supplier and available to the debtor at the time the debtor received notice of the first assignment.

SWEDEN

The Swedish Organisation of Finance Companies is of the opinion that the questions should be solved contractually between the factoring companies.

1. Yes, but the possibility for the parties to derogate from the Convention must be taken into consideration.

2-3. Since the Convention contains provisions concerning the debtor it is advisable that the Convention be applicable although there is a change of factors. It is, however, hard to say how far this principle should be carried.

4. Such a provision does not seem necessary.

5. The best solution seems to be that there should exist a right of set-off in both situations.

UNITED KINGDOM

This article will need very careful study. It looks sensible at first sight but will need to be tested against a series of typical situations in order to see whether it works as intended. Some of the questions raised by the Secretariat show why it may not be possible to apply to the second assignment the same rules as govern the first assignment.

In answer to the questions raised:

1. Yes. If the first assignment is outside the Convention, the second must also be outside it.

2. a) If the original assignment is governed by the Convention then the subsequent assignment must also be governed by it because the second assignee is also taking over a Convention contract. Indeed, it would not be possible to incorporate all the criteria required for the original assignment, since the export factor's right to the receivables does not arise from a contract of sale made by him to his customer.

b) It is not necessary to characterise the second assignment as a "factoring contract" if the assignment states that the Convention should apply.

c) It is not even necessary for the first assignee to be a factor, nor does it seem desirable to say that he should be because "factor" is not defined except by the reference to the conditions described in Article 1 (1) which, as indicated above, are in various respects inapplicable in relation to the second assignment. It would be better to substitute "party" for "another factor" and "other factor".

3. Since the assignee takes over a Convention contract it is not necessary that he himself should have his place of business in a Contracting State. Indeed, if Article 2 is satisfied in relation to the factoring contract it should not have to be satisfied additionally in regard to the second assignment.

4. The requirement of Article 6, paragraph 1, sub-paragraphs a) - c), will have to be met if the debtor is to pay the second assignee. The debtor must be protected in this respect. It follows that it should be made clear that the second assignee can give notice of the second assignment.

ASSOCIATION OF BRITISH FACTORS

1. It is suggested that the answer to this question should be in the affirmative. If this were so, it would import into the scope of the Convention transactions not intended to be covered by it by reason of Article 1.

2. a) It is suggested that the answer to this question should be in the negative. It seems that, provided that the first assignment is covered by the criteria set out in sub-paragraphs (a), (b) and (c) of paragraph 1 of Article 1, the second assignment should fall within the scope of the Convention. It will be almost impossible to bring the second assignment within the scope because, as far as the export factor is concerned, it is not his contract of sale.

b) It is suggested that the answer to this should be in the affirmative provided that the first assignment relates to transactions covered by the said sub-paragraphs (a), (b) and (c).

c) It is suggested that the answer should be in the affirmative. If it were not so, the purpose of the mention of the word "factor" in Article 6 (b) might well be defeated.

3. For the reason given in the answer to question 1, it is suggested that the answer to this question should be in the affirmative.

4. Again, it is suggested that the answer should be in the affirmative. The second assignee will normally be closest to the debtor and speak the same language and will accordingly be in the best position to give or confirm notice.

5. In international factoring using the two factor system it would be most unusual for two notices of assignments to be given. Normally the first assignment is not notified. The two assignments take place in very short succession and if both assignments were notified, much confusion would be caused to the debtor. We therefore do not consider that this question needs to be covered.

FACTORS CHAIN INTERNATIONAL

1. The application of the Convention to the first assignment must be a condition for the possible application of the Convention to a successive assignment. The agreement between the export and import factors is a consequence of the factoring contract between the supplier and the export factor.

2. a) The subsequent contract of assignment must not necessarily satisfy all criteria in Article 1, if it is itself governed by the Convention. The second contract is for example certainly not a contract of sale of goods.

b) Both contracts are factoring contracts - certainly different types-; the first one, between supplier and export factor, is the basis for the second one, between the export factor and the import factor. Therefore, it is a condition - as said to question 1 - that the first contract meets all the criteria laid down in Article 1.

c) The assignee in the subsequent assignment must be a factor.

3. It is necessary that the import factor - the subsequent assignee - has his place of business in a Contracting State.

4. Normally the second assignee is a factor in the country of the importing debtor. In international factoring agreements he has very important obligations: to collect, to protect against credit risk etc. Therefore, he should be able to give notice of the assignment to the debtor when duly authorised to do so.

The practice of factoring companies is to notify the (ultimate) debtor only once that the accounts receivable are assigned to the import-factor (the ultimate assignee).

ANNEX

The questions contained in paragraph 58 of the commentary read as follows:

1 - Must the application of the Convention to the first assignment (between the parties to the factoring contract mentioned in Article 1) be a condition for the possible application of the Convention to a successive assignment?

2 - a) Must the subsequent contract of assignment necessarily satisfy all the criteria set out in sub-paragraphs (a), (b) and (c) of paragraph 1 of Article 1, if it is itself to be governed by the Convention?

b) If all the criteria set out in paragraphs (a), (b) and (c) need not necessarily be satisfied in the event of a subsequent assignment, can a contract for such an assignment nevertheless be characterized as a "factoring contract"?

c) Must the assignee in the subsequent assignment be a factor?

3 - Without prejudice to the answer to question 1 (which will determine whether the supplier must have his place of business in a Contracting State or whether his place of business is irrelevant), is it necessary for the application of the Convention to successive assignments that not only the debtor and the factor but also the subsequent assignee has his place of business in a Contracting State?

4 - As regards the provisions of Article 6, paragraph 1 (a), is it necessary to make provision for an assignee under a subsequent assignment to be able to give notice of that assignment to the debtor when duly authorised to do so?

5 - As regards the debtor's rights of set-off against the second assignee, must they relate to claims existing against the supplier and available to the debtor at the time the debtor received notice of the /first/ assignment, or may they also relate to claims existing against the first assignee which the debtor may invoke at the time the debtor received notice of the /second/ assignment?