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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

Secretariat proposals relating to 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

Rome, March 1986

Title

The Secretariat wonders whether the title of the Convention under preparation might not follow the model of the more general formulation adopted in a certain number of instruments which, however, govern more limited matters than the title might suggest : for example, the Geneva Convention on agency in the international sale of goods whose scope is in particular restricted by Article 1 to "relations between the principal or the agent on the one hand, and the third party on the other". It may also be noted that the Convention on international leasing, likewise in the course of elaboration in Unidroit, has a more general title even though here again the subject matter regulated by the draft is not dealt with in an exhaustive manner.

It is therefore proposed that unless one were to specify in more detail in the title of the Convention which aspects are contemplated, then the title be worded as follows:

"Preliminary draft Convention on international factoring".

Article 1

Paragraph 1 of this article sets out the characteristics of the contract which permit its qualification as a "factoring contract". Sub-paragraph (a) describes the duties of the supplier and sub-paragraph (c) those of the factor, while sub-paragraph (b) lays down a general condition which, according to Article 6, paragraph 1 (a), may be met by either the supplier or the factor.

It is proposed that in the interests of a more systematic form of presentation, the order of sub-paragraphs (b) and (c) be inverted.

Article 2

- Given on the one hand the difference in meaning which is a consequence of the language employed in the English and French versions of the introductory wording of this article ("in relation to"/"à"), and on the other the reference to the "factoring contract" which does not mention the debtor (see in particular the observations of the Finnish Government), the Secretariat proposes amending the wording of the provision in one of the following ways:

Alternative 1

"This Convention applies to a factoring operation so far as the factoring contract relates to receivables ..."

Alternative 2

"This Convention applies whenever the receivables assigned pursuant to a factoring contract arise from a contract of sale of goods ...".

- As has been pointed out in the commentary, the provision concerning cases where a party has more than one place of business was inadvertently omitted during the second reading of the text on the occasion of the first session of the committee of governmental experts.

It is proposed therefore to reintroduce, as a second paragraph of Article 2, such a provision which could be modelled on Article 10 (a) of the Vienna Sales Convention (likewise to be found in the Hague Convention on the law applicable to contracts for the international sale of goods and in the preliminary draft Convention on international leasing); the provision might be worded as follows:

"For the purpose of this Convention, if a party to the factoring contract or the contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract in question."

- It should however be recalled that a slightly different, and simpler, formulation was preferred in the corresponding provision (Article 8 (a)) of the Geneva Agency Convention, and that moreover the latter instrument was dealing with a tripartite relationship. The provision (adapted with a view to its inclusion as a second paragraph of Article 2) might read as follows:

"For the purpose of this Convention, if a party to the factoring contract or the contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship with the contract in question, having regard to the circumstances known to or contemplated by the parties at the time of contracting".

Article 3

Sub-paragraph (a) is concerned with the validity of a clause providing for a global assignment of receivables, and in particular future receivables. It may however be wondered whether, given the formulation of this provision ("at the time when they come into existence"), the condition that the receivables can be identified as falling within the contract refers only to future receivables. If the condition applies to both existing and future re-

ceivables, then the wording should perhaps be reconsidered.

Article 5

- With a view to making clear, as regards the French version of the draft, the intention of its authors to restrict the effects of this provision to the parties to the factoring contract, the introductory language might be amended as follows:

"Dans les seuls rapports entre les parties au contrat d'affacturage, le contrat peut valablement prévoir ..."

- It may be a matter for further consideration as to whether it would be desirable to provide some clarification regarding the supplier's rights deriving from the sale of goods, that is to say whether the sale is that which gave rise to the receivable assigned pursuant to the factoring contract.

- Finally, is Article 5 concerned only with the transfer of rights arising from future sales? If so, then this should be clearly indicated, as also might be the time at which the transfer takes place.

Articles 6 and 7

- The committee of governmental experts replaced in the introductory language of Article 6, paragraph 1 the words "the assignment shall be effective against the debtor" by the phrase "the debtor is under a duty to pay the factor" so as to indicate clearly the resulting obligation for the factor to give notice in conformity with the provisions of sub-paragraphs (a) to (c). In the light however of the apparent contradiction between paragraphs 1 and 2 (see in particular the observations of the Finnish Government on this point), and having regard to the fact that the obligation results quite clearly from paragraph 1 (b) and from paragraph 2, a return to the former language is suggested.

- A restructuring of sub-paragraphs (a) to (c) is proposed which would permit a regrouping of the provisions relating to receivables and the separation of that concerning the factor.

- Lastly, it is proposed that Article 6 should deal only with the conditions which must be met for notice to be effective against the debtor, leaving to Article 7 the effects of notice, namely the discharging of the debtor's liability by payment (subject to the conditions laid down), and the validity of defences relating to the receivable or not connected with it.

The upshot of these proposals would be the following:

"Article 6

The assignment shall be effective against the debtor if notice of the assignment:

- (a) - unchanged -;
- (b) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given and which reasonably identifies the receivables assigned, and
- (c) identifies the factor to whom or for whose account the debtor is required to make payment.

Article 7

Following the giving of notice pursuant to Article 6:

1. Payment to the factor by the debtor shall be effective to discharge his liability pro tanto (remainder of Article 6, paragraph 2 unchanged).
2. - paragraph 1 of Article 7 unchanged -.
3. - paragraph 2 of Article 7 unchanged -."

Article C (contained in the draft final provisions : Study LVIII - Doc.21)

As stated in the commentary on this article, its provisions are based in particular on Article 23 of the Geneva Agency Convention. It will however be noted that unlike the corresponding article in that Convention, the scope of which is limited to agreements containing "provisions of substantive law", Article C makes no such restriction.

One might however wonder whether the reason for the adoption of the solution to be found in the Geneva Agency Convention - the risk of a conflict between that Convention and the 1978 Hague Convention on the law applicable to agency, each instrument giving precedence to the other - might not be of relevance for the 1980 Convention on the law applicable to contractual obligations. Article 12 of that Convention is concerned with the law applicable to voluntary assignments while Article 21, which governs the relations with other Conventions, provides that "This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party".

Might it not be argued that in these circumstances the provision in the 1980 European Convention relating to the law applicable to assignments concerns "matters governed by" the Factoring Convention and, if so, that it would be preferable to add a reference to "substantive law" in Article C?.

Article 9

The idea underlying Article 9 as adopted by the study group and provisionally retained at the first session of the committee of governmental experts was that of applying the provisions of the Convention to assignments subsequent to the first assignment. To the extent that it is not clear from the commentaries on the discussions of those committees that this article was the subject of detailed examination, what precisely was its intended scope is open to question.

The replies by Governments and the interested organisations to the questions contained in the commentary prepared by the Secretariat on the first session of the committee of governmental experts show that it was generally speaking the view that the Convention should only apply to subsequent assignments when it would already have been applicable to the first assignment; in other words when the first assignment was made pursuant to the factoring contract as defined in Article 1 and in conformity with Article 2. As to a possible further restriction of the application of the Convention to subsequent assignments the replies seem to exclude the possibility of setting out the characteristics of the subsequent contract of assignment itself.

On the other hand, according to some replies one condition limiting the scope of such a provision could relate to the character of the subsequent assignee, namely that he must be a factor. It may be noted that were such a condition to be introduced, it would no doubt call for a definition of "factor" in his capacity of subsequent assignee; indeed, as has been stressed in the United Kingdom observations, the term "factor" is already indirectly defined in the context of the original assignment, by reference to the conditions set out in Article 1, paragraph 1 which are not however relevant in the case of a subsequent assignment (see the preceding paragraph). On the other hand, and for the same reasons, if the committee were to decide that the Convention should apply to subsequent assignments irrespective of the character of the assignee, it would be desirable to describe him in a different manner from that chosen to designate the assignee in the first assignment (the factor), in connection with subsequent assignments. It is with this latter approach in mind that the new formulation of Article 9 has been conceived and it should be noted that, as regards the English text of the proposals, only one innovation in terminology has been introduced, namely the reference to the "subsequent assignee", so as to distinguish him from the first assignee pursuant

to the factoring contract, namely the factor himself.

Finally, opinions were divided as to whether it should be necessary for the application of the Convention to a subsequent assignment that the assignee should also have his place of business in a Contracting State. At this point one may recall the point made by the Finnish authorities in their observations that the objective connecting factor is supplemented by that resulting from the applicable law in accordance with conflict rules, in conformity with sub-paragraphs (a) and (b) of Article 2 of the draft, namely that the Convention would be applicable (to the subsequent assignment) when the rules of private international law lead to the application to the subsequent assignment of the law of a Contracting State. The new formulations suggested contain therefore a provision in square brackets, which refers to those two connecting factors.

The proposals for a redraft of Article 9 which are set out below have been prepared in the light of the intentions of the drafters of the provision in its original form whenever such intentions were clear, and also of the observations of Governments and the interested organisations. Several points, some of which have already been mentioned in the preceding paragraphs, relating to substantive choices, have yet to be resolved. Furthermore the Secretariat has sought to include in a single provision the mechanism for dealing with subsequent assignments without making any amendments to the text of the articles which precede Article 9 and which were provisionally adopted at the first session of the committee of governmental experts. The two alternatives proposed should in consequence be understood as drafting suggestions intended to provide a basis for discussion.

"Alternative I

When a receivable is assigned by a supplier to a factor pursuant to a factoring contract governed by this Convention:

- (a) subject to paragraph (b) of this article, the validity and effects of any subsequent assignment of the receivable shall be determined by the rules set out in Articles 3 to 8 of this Convention;
- (b) the written notice required by Article 6, paragraph 1 of the Convention for any subsequent assignment of the receivable may be given to the debtor by the factor or by the subsequent assignee.

provided that the subsequent assignee has his place of business in a Contracting State or that the rules of private international law lead to the application to the subsequent contract of assignment of the law of a Contracting State/.

Alternative II

When a receivable is assigned by a supplier to a factor pursuant to a factoring contract governed by this Convention:

- (a) the validity of any subsequent assignment of the receivable shall be determined by the provisions of Articles 3 to 5, as if the subsequent contract of assignment were the factoring contract, and as if the parties to the subsequent contract of assignment were the parties to the factoring contract;
- (b) the effects of any subsequent assignment of the receivable shall be determined by the provisions of Articles 6 to 8, as if the assignee in the subsequent assignment were the factor party to the factoring contract.

provided that the subsequent assignee has his place of business in a Contracting State, or that the rules of private international law lead to the application to the subsequent contract of assignment of the law of a Contracting State/."

It will be seen that the broad language of Alternative I attempts to bring subsequent assignments within the scope of the Convention by transposing the principles set out in the text of Articles 3 to 8. Such a form of drafting certainly permits the avoidance of the difficulties raised by the former Article 9, but leaves wide scope for its interpretation in respect of its application and may give rise to uncertainty. On the other hand Alternative II constitutes a more systematic approach establishing a mechanism for substitution which is more flexible than that contained in the former version of Article 9 although it may naturally be open to criticism.

In conclusion, a few words may be added regarding the problem of the exercise by the debtor against the subsequent assignee of rights of set-off concerning existing rights against the supplier, as well as such rights which he may have against the first assignee (see question 5 in paragraph 58 of the commentary and Article 7, paragraph 2). The replies of Governments on this point were divided. It will be seen that the proposed alternatives for the redraft of Article 9 tend to limit the exercise by the debtor of his rights of set-off against the subsequent assignee to those rights arising from his relations with the supplier. Such an approach may be justified in particular by the fact that Article 7 is silent as to the exercise by the debtor against the factor of a right of set-off in respect of rights or claims existing against the latter, and this question, which would normally be answered in the affirmative, is, however left to national law. Moreover the other solution, which would

be more favourable to the debtor, could be taken as implying that such a right is implicitly recognised by the Convention. In any event the question will call for further consideration.