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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

(Second session, 21 to 23 April 1986)

Summary Report

prepared by the Unidroit Secretariat

Rome, May 1986

1. The second session of the Unidroit committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring was held at the seat of the Institute in Rome from 21 to 23 April 1986. Twenty-one member States of Unidroit, two non-member States, one inter-governmental organisation, one international non-governmental organisation, three international professional associations and two national professional associations were represented at the session (see ANNEX I hereto). Mr Royston M. Goode (United Kingdom) chaired the session.

2. After approving the agenda (reproduced in ANNEX II hereto), the committee considered the text of the preliminary draft Convention on certain aspects of international factoring which it had drawn up at its first session held in Rome from 22 to 25 April 1985 (Study LVIII - Doc. 19), in the light in particular of the commentary (Study LVIII - Doc. 20) and of the draft final provisions (Study LVIII - Doc. 21) prepared by the Secretariat, of the observations of Governments and international associations (Study LVIII - Doc. 22) and of Secretariat proposals concerning the text of the preliminary draft Convention (Study LVIII - Doc. 23). A drafting committee composed of the Chairman of the committee of governmental experts and of the representatives of France, Italy and the United States of America prepared a revised version of the draft Convention which was then considered by the committee at its final meeting on the morning of 23 April. ANNEX III to this report contains the new text of the preliminary draft Convention on international factoring as provisionally adopted by the committee of governmental experts at the close of its second session.

3. This report will provide only some brief indications as to the changes made to the text of the preliminary draft Convention which had been drawn up following the first session of the committee. Apart from some purely drafting amendments, including the deletion of the words "certain aspects of" in the title of the draft Convention, the modifications relate to Articles 2, 4, 7, 10 (former Article 9) and 11 (former Article 10); moreover two new articles, namely Article 8 and Article X, have been introduced.

As regards Article 2, a new paragraph has been added which parallels corresponding provisions in a number of other international instruments and which determines the place of business to be taken into consideration for the purposes of the Convention when one of the parties to the contract of sale of goods or to the factoring contract has more than one place of business.

Article 4 has been amended with a view to reaching a more generally acceptable solution : on the one hand the previous scope of the substantive law provision has been restricted in that it is only the right to payment that may be assigned notwithstanding an agreement between the supplier and the deb-

tor prohibiting such assignment, while on the other a second paragraph displaces the application of that rule when the debtor has his place of business in a Contracting State which has made the declaration for which provision is made in Article X of the preliminary draft Convention. Given however the hesitations of certain delegations regarding the principle of the rule contained in Article 4, paragraph 1, both articles have been retained in square brackets.

A new sentence has been added to Article 7, paragraph 2, which limits the cases in which the debtor may exercise rights of set-off by giving effect to the applicable law when this provides that acceptance by the debtor of the assignment amounts to a waiving of his rights of set-off.

The present Article 8 is based on the provisions to be found in Article 9 of the text of the preliminary draft approved by the study group which had been deleted by the committee of governmental experts at its first session. The article has been reintroduced, principally at the request of the professional associations, although given the hesitations of certain governmental delegations it has been placed in square brackets. The rule that the debtor may not recover sums paid to the factor on the ground of non-performance or defective or late performance of the contract of sale by the supplier has been attenuated by two exceptions, namely that where the debtor has no claim against the supplier for recovery of the purchase price and that where the factor has neither paid nor incurred an obligation to pay the purchase price to the supplier.

Article 10 (formerly Article 9) has been reformulated so as to indicate more clearly those provisions of the future Convention which will apply to any subsequent assignment of the receivable by the factor or by a subsequent assignee. Paragraph 2 was added at the request of one delegation which stated that factoring contracts concluded by companies in its country prohibit successive assignments of the receivable. This provision is contained in square brackets pending further consideration by the committee.

Article 11 (formerly Article 10) now indicates the circumstances in which the parties to the factoring contract or to the sales contract may exclude the application of the Convention. In view of the character of the substantive rules contained in the instrument under preparation the committee deemed it necessary to provide that such exclusion may be made only in respect of the Convention as a whole.

4. After completing its consideration of the revised text prepared by the drafting committee, the committee of governmental experts proceeded to a brief exchange of views on the draft final clauses drawn up by the Secretariat

and in particular two draft articles whose provisions concern matters of substance which go beyond the purely procedural questions regarding the implementation of the Convention, namely Article C which seeks to regulate the problem of priority between the future instrument and any international agreement containing provisions concerning matters governed by it, and Article I which fixes the trigger mechanism for the application of the Convention to any particular factoring transaction.

5. At the conclusion of its second session, the committee decided on the procedure to be followed in respect of its future work : the holding of a final session seemed desirable so as to permit as widely acceptable a text as possible to be agreed. This text would then be submitted to a Diplomatic Conference for adoption which would hopefully be held in 1988. It was agreed that the Secretariat should prepare a revised commentary on the preliminary draft Convention indicating the principal problems raised at the second session of the committee, and that it should in early summer communicate that commentary to Governments and to the interested organisations with a request for comments on the text of the preliminary draft and on the draft final provisions. Those observations, which should reach the Institute no later than 31 December 1986, would then be circulated by the Secretariat and the third and final session of the committee convened by the President of Unidroit. As had been the case with the first two sessions, this meeting would be held immediately before or after the third session of the committee of governmental experts for the preparation of a draft Convention on international leasing and would probably take place in spring 1987.

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AGENDA

OF THE SECOND SESSION OF THE COMMITTEE OF GOVERNMENTAL EXPERTS FOR
THE PREPARATION OF A DRAFT CONVENTION ON CERTAIN ASPECTS OF INTER-
NATIONAL FACTORING

1. Adoption of the draft agenda
2. Consideration of the preliminary draft Convention on certain aspects of international factoring drawn up by the aforementioned committee of governmental experts at its first session held in Rome from 22 to 25 April 1985 (Study LVIII - Doc. 19), notably in the light of:
 - (a) the commentary prepared by the Secretariat on the text of the preliminary draft Convention drawn up at the first session of the committee of governmental experts (Study LVIII - Doc. 20)
 - (b) the draft final provisions drawn up by the Unidroit Secretariat (Study LVIII - Doc. 21)
 - (c) comments by Governments and organisations on the text of the preliminary draft and the commentary thereon prepared by the Secretariat (Study LVIII - Doc. 22)
 - (d) proposals submitted by the Secretariat on the text of the preliminary draft Convention (Study LVIII - Doc. 23)
3. Future work
4. Any other business

Preliminary draft Convention on 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 this Convention, "factoring contract" means a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

- (a) the supplier may or will 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 their business;
- (b) the factor is to provide at least two of the following services, namely finance, maintenance of accounts, collection of receivables and protection against the risk of non-payment by debtors; and
- (c) notice of the assignment of the receivables is to be given to debtors.

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

Article 2

1. This Convention applies whenever the receivables assigned pursuant to a factoring contract arise 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 both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.

2. For the purpose of this Convention, if a party to the contract of sale of goods or the factoring contract 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 that contract.

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 of conclusion of the contract or when they come into existence they can be identified to 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

1. The assignment by the supplier to the factor of a right to payment shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment.

2. The provisions of the preceding paragraph shall not apply when the debtor has his place of business in a Contracting State which has made a declaration under Article X of this Convention./

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 provided that the debtor does not have knowledge of any other person's superior right to payment and 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 good faith in accordance with paragraph 1 of this article shall be effective to discharge his liability pro tanto.

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. However the debtor may not exercise a right of set-off where, under the applicable law, he has waived that right by accepting the assignment.

Article 8

1. Without prejudice to the debtor's rights under Article 7, non-performance or defective or late performance of the contract of sale of goods by the supplier shall not entitle the debtor to recover money paid by the debtor to the factor if the debtor has a claim against the supplier for recovery of the price.

2. Notwithstanding the provisions of paragraph 1, the debtor shall be entitled to recover money paid to the factor to the extent that the factor has not paid or incurred a liability to pay the purchase price of the receivable to the supplier. /

Article 9

1. The factor shall not, by reason only of his acquisition of rights in 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 10

1. Where a receivable is assigned by a supplier to a factor pursuant to a factoring contract governed by this Convention:

(a) the rules set out in Articles 3 to 9 of this Convention shall, subject to paragraph (b) of this article, apply to any subsequent assignment of the receivable by the factor or by a subsequent assignee;

(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 a subsequent assignee.

2. The preceding paragraph shall not apply to an assignment which is prohibited by the terms of the factoring contract. /

Article 11

1. The factoring contract may exclude the application of this Convention.
2. The contract of sale of goods may exclude the application of this Convention only in respect of receivables arising after the factor has received notice in writing of such exclusion.
3. Where the application of this Convention is excluded in accordance with the preceding paragraphs of this article, such exclusion may be made only as regards the Convention as a whole.

Article 12

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the Preamble, 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.

Article X

A Contracting State may at any time make a declaration in accordance with Article 4, paragraph 2 of this Convention that the provisions of Article 4, paragraph 1 shall not apply when the debtor has his place of business in that State./