

UNIDROIT 1986  
Study LVIII - Doc. 25  
(Original: French)

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

Commentary prepared by the Secretariat on the text of the preliminary  
draft Convention on international factoring drawn up by the committee  
of governmental experts at its second session held in Rome from

21 to 23 April 1986

Rome, October 1986



BACKGROUND TO THE PRELIMINARY DRAFT CONVENTION

1. At its 53<sup>rd</sup> session, held in Rome from 4 to 7 February 1974, the Governing Council of Unidroit decided on the basis of a memorandum submitted by the Secretariat to include in the Work Programme for the triennial period 1975 to 1977 the subject of the assignment of debts in general and more particularly that of the factoring contract. It also requested the Secretariat to present a preliminary study on that contract which would permit the Council to take a decision on the order of priority to be accorded to the topic with a view to the elaboration of uniform rules.(1)

2. The Governing Council was seized of the preliminary report prepared by the Secretariat(2) at its 55<sup>th</sup> session, held in Rome on 16 and 17 September 1976, on which occasion it authorised a wider distribution of the report and accompanying questionnaire, especially to practitioners(3) so that a decision might be taken at its 56<sup>th</sup> session as to whether steps should be taken towards the convening of a study group or a committee of governmental experts to work out uniform rules on the factoring contract. At that session, held in Rome on 19 and 20 May 1977, it decided to set up a restricted group of members of the Governing Council, perhaps assisted by one or more experts on factoring, to examine an analysis of the replies(4) to the questionnaire.(5) The restricted group concluded, inter alia, that it would be desirable to elaborate uniform rules on factoring given its significance as a new method of financing international trade capable of responding to needs which other financing techniques do not meet to the same extent, and also agreed that the uniform rules should, initially at least, be limited to international factoring although it was suggested that rules on international factoring would not fail to influence the various domestic laws.(6)

3. The detailed conclusions of the group were brought to the attention of the Governing Council at its 57<sup>th</sup> session, held in Rome from 5 to 7 April 1978,(7) and in accordance with the powers conferred upon him by the Council the President of the Institute constituted a study group for the preparation of uniform rules on the factoring contract. The study group held three sessions in Rome, the first on 5 and 6 February 1979, the second from 27 to 29 April 1981 and the third from 19 to 21 April 1982.(8) At the conclusion of that session the study group adopted the preliminary draft uniform rules on certain aspects of international factoring.

- 
- (1) Minutes of the 53<sup>rd</sup> session of the Governing Council, p. 20.
  - (2) Study LVIII - Doc. 1.
  - (3) Minutes of the 55<sup>th</sup> session of the Governing Council, p. 44.
  - (4) Study LVIII - Doc. 3.
  - (5) Minutes of the 56<sup>th</sup> session of the Governing Council, p. 33.
  - (6) See Study LVIII - Doc. 4 for the report on the session.
  - (7) Minutes of the 57<sup>th</sup> session of the Governing Council, pp. 20-23.
  - (8) The reports on the three sessions are contained in Study LVIII - Doc. 7, Study LVIII - Doc. 10 and Study LVIII - Doc. 13 respectively.



4. At its 62<sup>nd</sup> session, held in Rome from 4 to 7 May 1983,(9) the Governing Council approved the draft rules and decided to communicate the text of the preliminary draft, together with an explanatory report prepared by the Secretariat,(10) to the Governments of the member States, with a request for observations so as to permit the Council to take a decision as to whether a committee of governmental experts should be convened to continue work on the subject. In the light of the observations received from seven Governments the Governing Council decided at its 63<sup>rd</sup> session, held from 2 to 4 May 1984, to set up a committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring.(11)

5. The first session of the committee was held in Rome at the seat of the Institute from 22 to 25 April 1985. It was attended by representatives of 20 member States of the Institute, one non-member State, one intergovernmental organisation and four non-governmental international organisations. After electing as its Chairman Mr Royston M. GOODE (United Kingdom), the committee proceeded to the first reading of the preliminary draft rules on certain aspects of international factoring. A drafting committee, composed of the Chairman of the committee of governmental experts and of the French and Swedish representatives, adapted the text to take account of the amendments made to it by the committee during the first reading and the revised version was considered in the course of a second reading which the committee completed during the session.(12)

6. At the request of the committee, the Secretariat drew up a commentary(13) on the text of the preliminary draft Convention as it stood following the first session, as well as a set of draft final clauses(14) which were circulated to Governments and to the interested associations with a view to obtaining their observations. A summary(15) of the observations received was prepared and these documents, as well as a number of Secretariat proposals,(16) were laid before the committee at its second session which was held in Rome at the seat of the Institute from 21 to 23 April 1986. Twenty-one member States of Unidroit, two

- 
- (9) Minutes of the 62<sup>nd</sup> session of the Governing Council, p. 12.  
(10) See Study LVIII - Doc. 16 for the text of the preliminary draft rules adopted by the study group and the explanatory report.  
(11) Minutes of the 63<sup>rd</sup> session of the Governing Council, p. 39.  
(12) See Study LVIII - Doc. 19 for the list of participants and the text of the preliminary draft Convention prepared by the Unidroit Secretariat on the basis of the decisions taken by the committee of governmental experts at its first session.  
(13) Study LVIII - Doc. 20.  
(14) Study LVIII - Doc. 21.  
(15) Study LVIII - Doc. 22.  
(16) Study LVIII - Doc. 23.



non-member States, one intergovernmental organisation, one non-governmental international organisation, three international and two national professional associations were represented at the session(17) which was again chaired by Mr Goode.

7. The committee considered the text of the preliminary draft Convention on certain aspects of international factoring which it had worked out at its first session, in the light in particular of the documents submitted by the Secretariat. A drafting committee composed of the Chairman of the committee and of the representatives of France, Italy and the United States of America prepared a revised version of the draft Convention which was examined by the committee at its last meeting held on the morning of 23 April. The committee proceeded on that occasion to a brief exchange of views on the draft final clauses and more particularly on two draft articles whose content might touch on matters of substance going beyond the purely procedural questions regarding the implementation of the Convention. Given however the insufficient time available, the committee agreed to come back to the final clauses at a later stage, in the light of any observations which might be made by Governments and the interested organisations. The ANNEX to this commentary 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.

8. At the conclusion of the committee's second session, a general sentiment emerged that although important progress had been made in the elaboration of the preliminary draft Convention, certain provisions were still controversial and that it would be desirable to achieve a wider consensus within the committee of governmental experts so as to permit as clear and coherent a draft as possible to be submitted to the diplomatic Conference which will be convened for its adoption. Particular stress was laid on the main aim of the work in hand, namely the facilitation of factoring for the purpose of developing commercial exchanges, and on the international character of the transactions in question which called for original solutions to be contemplated with a view to the unification of the rules applicable in this context. Consequently, the committee decided to hold a third and last session which would immediately precede or follow the third session of the committee of governmental experts for the preparation of a draft Convention on international leasing and which would probably take place in spring 1987.

---

(17) See Study LVIII - Doc. 24 for the list of participants.



## II

### GENERAL CONSIDERATIONS

9. Although it has a long history in the United States of America, factoring as it is understood today is a comparatively recent phenomenon outside North America and especially in those countries which do not have a Common Law tradition. In these circumstances a few introductory remarks explaining the nature of factoring operations and their spectacular growth over the last thirty years or so would seem to be in order.(18)

10. Factoring is without doubt today one of the most effective ways for a small or medium size business selling raw materials or consumer goods or providing services to finance the trade credit it grants to its customers. True, it may rely on its own resources or on credit **provided** by the bank or on that available from its own suppliers but inflation coupled with high interest rates and the current low supply of risk capital have led many businessmen to seek alternative forms of financing such as factoring, with the many services which it offers.

11. The concept of factoring is, as has been pointed out, simple in that it is a continuing arrangement whereby a finance company, the factor, purchases or takes a security over the trade debts of a merchant, manufacturer or provider of services, the supplier, and in most cases undertakes to recover the debts from the latter's customers. Usually notice of the transfer of the debts (receivables) which is in most countries accomplished by their assignment, will be given to the customers of the supplier on the invoice together with instructions to pay the factor. Again it is frequent for the factor to make no provision for recourse against the supplier in the event of the insolvency of the customer, subject to his approval of the latter's credit standing, and it is also usual for the factor to relieve the supplier of the burden of keeping the accounts. In addition to the supplier's paying the factor for these services a fee which ranges from a fraction of 1% to some 2% of the face value of the invoice representing each debt, the supplier may also pay the factor a discounting charge, in return for which he obtains a substantial part of the receivables arising from each debt as soon as the goods have been sold and delivered, the remainder (usually some 20%) being retained by the factor until the customer pays or until a date calculated by reference to the average period of credit taken by the supplier's customers. The factor may set off the amount retained by him against his rights in regard to disputes or claims raised by customers.

---

(18) Paragraphs 10 to 13 owe much to a paper by Mr Frederick R. Salinger, Director of Anglo-Factoring Services, Ltd., which appears as Chapter 26 in the 1981 edition of Sheldon and Fidler's "Practice and Law of Banking".



12. As a rule, the factoring contract concluded between the supplier and the factor, whereby the supplier undertakes to assign or actually assigns his trade debts to the factor, will be of a duration of at least one year. The factor will decide whether he will purchase the debts of a given customer as well as determining any credit limit he may establish in respect of such a customer. As stated above, the supplier's invoice will in the case of notification factoring give notice to the customer of the assignment to the factor with instructions to pay him. Copies of the invoice will be sent to the factor who will credit the supplier with the value of the invoices (less his charges) and debit the accounts of the customers, the supplier being free to draw on the credit in his account subject to the arrangements with the factor.

13. Finally, in this brief exposé of the rudiments of factoring, it should be recalled that while the factor will normally accept responsibility for payment of debts arising from the insolvency of a customer, always provided that the supplier has not exceeded his credit limit or that the supplier is not in breach of his undertaking that the receivables accepted by him are free from rights of set-off by his customers, the factor will not accept responsibility for any breach of contract by the supplier against his customer, for example by non-performance, defective or late performance, or for the accuracy of any invoices and credit notes which have been issued.

14. If the mechanics of factoring operations are relatively straightforward, the converse is true in many countries of the law applicable to them. As is the case with leasing, in respect of which a draft Convention is also under preparation within Unidroit, it has often been necessary to adapt the development of factoring to conform to a preexisting legal framework which was not designed to accommodate it. The attendant difficulties in the various legal systems are still further exacerbated in international factoring, not only by the wide variations in national law but also by the frequent uncertainty as to which law will apply.

15. It is in these circumstances that at its first session the committee of governmental experts fully endorsed the opinion of the study group that it would be desirable to work out uniform rules on factoring. It also agreed with the proposal of the study group to restrict the scope of application of the rules to international factoring, that is to say to cases where the contract for the sale of goods or the supply of services under which the receivables to be factored arise, is concluded between parties with places of business in different States. It considered in effect that such a limitation would be conducive to the acceptance of the uniform rules by a greater number of States for while it might be desirable in theory to contemplate the preparation of uniform rules on factoring at national as well as international level, there could well be a strong reluctance on the part of many States to accept changes to well-established principles of law which are of much more general application than simply to factoring operations.



16. As a result of the decision to limit the scope of application to international factoring, the committee decided to cast the uniform rules in the form of a convention. It was emphasized that this would not exclude its influence as a model law and that those States which so wished might take the principles contained in the international rules as a basis for the regulation of domestic transactions. This choice has entailed the inclusion of a preamble, as well as of draft final clauses prepared by the Secretariat; on the other hand, the territorial scope of application has been amended and the two criteria determining the applicability of the draft Convention now refer to Contracting States.

17. A further observation should be made concerning the general purpose of the Convention under preparation, namely that the rules seek to interfere as little as possible with the contractual relations of suppliers and factors and of factors inter se. Generally speaking it was acknowledged that the regulation of these relations is best left to the parties, between whom many practices and customs have grown up, a large number of which have been embodied in general conditions to be found in the agreements concluded between suppliers and factors and in the arrangements concluded between factors themselves. Moreover the rules do not attempt to regulate the validity of the factoring contract itself, which should be determined by the applicable law, that is to say usually by the law of the State where the supplier and the factor (in international transactions normally the export factor) have their places of business. What is on the other hand contemplated is the specific question of the assignment of receivables in the context of factoring transactions with a view to encouraging the development of factoring as an instrument for the promotion of international trade, while having due regard to the interests of the parties. The scope of application is regulated in the first two articles of the draft Convention: first the substantive scope with the definition of the factoring contract in Article 1 and the limitation to international factoring whose characteristics are set out in the introductory language of Article 2, and then the territorial scope determined in the two sub-paragraphs of paragraph 1 of that article.

18. The first point dealt with in the draft Convention relates to the validity of assignments of receivables between the supplier and the factor. Article 3 removes certain obstacles to the validity of assignments of future receivables and dispenses with the need for a new act of transfer in respect of such receivables after they have come into existence, as distinct from provisions in the factoring contract assigning them. Article 4 lays down the principle that the right to payment of the receivable may be assigned notwithstanding any agreement between the supplier and the debtor prohibiting such assignment: given however the controversial character of this provision, it is accompanied by a reservation clause although its maintenance is still open to question. Article 5 makes provision for the validity of the transfer of the supplier's rights deriving from the sale of goods, including the benefit of any reservation of title clause, whether that transfer be made with or without a new act of transfer.



19. Another issue concerns certain effects of the assignment, in particular as regards the relations between the factor and the debtor. Article 6 affirms the debtor's duty to make payment when notice of the assignment has been given to him in accordance with the formalities prescribed by the provision and also regulates the effects of payment. Article 7 determines the extent to which the debtor may set up against the factor defences which he had against the supplier while Article 8 deals with the special case where the debtor has made payment to the factor although the supplier has not properly performed his obligations under the sale contract. Article 9 is also concerned with the effects of the assignment but only in relation to the factor and governs the special situation where the factor acquires ownership of goods as a result of the transfer of a reservation of title clause: in such cases, and on condition that he does not dispose of the goods or that he is not liable under an international agreement, it is provided that he will not incur liability to a third party for damage caused by the goods.

20. Finally, Article 10 extends the application of the rules to any assignment effected subsequent to one made under a factoring contract, provided that the original assignment was governed by the Convention, while the concluding articles of the draft, Articles 11 and 12, relate respectively to the possibility for the parties to set aside the provisions of the Convention and to rules of interpretation.

21. In conclusion it should be recalled that the study group had discussed at length the question of whether the rules should also include provisions dealing with cases of conflicting claims of the factor and third parties over receivables. In this connection it had found that there were wide differences in approach from one country to another, some systems granting priority to the first assignee of a receivable, others to the first assignment to be notified to, or accepted by, the debtor, or alternatively to the first of which the debtor receives notice, and yet others to the first to be filed in a public register. In addition, the possibility of laying down an acceptable uniform rule of a substantive character in this connection seemed to be even less likely given the variety of situations in which priority questions could arise and therefore the only prospect of success seemed to lie in solving the problem on the basis of a conflicts of law rule. Here again however insuperable problems were encountered in the elaboration of a uniform rule, given the difficulties in determining the connecting factor as the priority question might, according to the circumstances, be characterized as one relating to the law of contract, tort law, the law of property, quasi-contract, equitable rights, restitution etc. In these circumstances the study group had come to the conclusion that it would have to leave the whole problem of priorities between the factor and third parties to be decided in accordance with whatever might be the applicable national law. This approach was also endorsed by the committee of governmental experts, although some of its members, and in particular the representatives



of the professional factoring organisations, expressed regret that the rules in the Convention did not deal with a question which raised the most difficult problems in the international context.

### III

#### COMMENTARY ON THE PROVISIONS OF THE PRELIMINARY DRAFT CONVENTION ON INTERNATIONAL FACTORING

22. The title of the prospective Convention as provisionally adopted by the committee of experts at the end of its first session, namely "Preliminary draft Convention on certain aspects of international factoring", was that agreed by the study group, subject to the replacement of the words "uniform rules" by "Convention" in conformity with the decision taken by the committee regarding the final form which the draft text should assume and to a terminological change in the French text.<sup>(19)</sup> At its second session the committee was seized of a proposal to delete the words "certain aspects of", the intention being to indicate in more general terms the subject matter of the preliminary draft Convention, following the model of a number of instruments which are more restricted in scope than their titles would suggest. This proposal was accepted by the committee and the text under preparation is now entitled "Preliminary draft Convention on international factoring".

23. At its first session, the committee deemed it appropriate to include a draft preamble, the text of which remained unaltered at the second session. The first two paragraphs are based on the preamble to the preliminary draft Convention on international leasing, the declared objectives being to establish a legal framework which will facilitate international factoring while maintaining a balance between the interests of the parties and to render international fac-

---

(19) The word "factoring" has been replaced by "affacturage", a term now well established in the French language. However, since the technique of financing in the process of regulation is better known under the name of "factoring", this word is included in parenthesis after the term "affacturage" in the preamble. On the other hand, the word "factor" which appears in Article 1 has no strict equivalent in French and after due consideration the French delegation proposed that it be translated by the words "l'entreprise d'affacturage" which, for reasons of convenience, is designated by the term "cessionnaire" in the articles of the draft Convention.



toring more accessible to developing countries. The third paragraph reproduces almost word for word the corresponding provision of the preamble to the 1980 United Nations Convention on contracts for the international sale of goods (hereafter referred to as the "Vienna Sales Convention") which was also included in the 1983 Convention on agency in the international sale of goods and which refers to the development of international trade while taking account of the different social, economic and legal systems. The committee agreed to maintain in this provision a reference to the application of the uniform rules to "certain aspects" of international factoring so as to indicate the limited scope of this attempt at unification.

#### Article 1

24. As has already been indicated above in the general considerations, one of the primary concerns of the study group and subsequently the committee of governmental experts was to permit the free growth of factoring as a technique for financing international trade. Given the variety of forms which factoring has assumed in practice and the legal frameworks within which it has been accommodated or to which it has been adapted in different countries, as wide a definition as possible has been sought in the Convention so as not to hinder the expansion of activities which already are, or may be, regarded as factoring in certain countries. Thus the possibility of limiting the application of the rules to recourse factoring or of fixing a maximum time-limit for the credit granted to the buyer under the sales contract to which the receivables relate was ultimately rejected. So as to avoid an excessive extension of the Convention's scope of application the authors of the draft have however decided to restrict the subject matter of their work to factoring transactions in which notice of the assignment is given to the debtor. The definition in Article 1 seeks therefore to identify what may be considered to be the lowest common denominator in factoring contracts and after indicating the parties to the factoring contract, namely the supplier on the one hand and the factor on the other, paragraph 1 sets out the respective duties of the parties in their contractual relations and lays down the condition that the assignment of the receivables must be notified to the debtor (at its second session the committee agreed to reverse the order of the provisions contained in sub-paragraphs (b) and (c)).

25. Sub-paragraph (a) defines the supplier's obligation to the factor, namely the assignment of receivables. In practice, factoring contracts contain an undertaking by the supplier to assign the receivables, although they may also constitute the act by which the receivables are directly transferred. One governmental representative proposed at the committee's second session that it be clearly indicated that both possibilities are covered by the provision and it was agreed to replace the words "the supplier is to assign" by "the supplier may or will assign ...". Sub-paragraph (a) provides that the assignment may be effected in two ways, either by sale or security, that is to say that there must be either an outright sale or a loan of money on the security of the receivables. It



also lays down two conditions concerning the receivables themselves. In the first place, the receivables must arise from contracts for the sale of goods or for the supply of services since, in accordance with paragraph 2 of Article 1, references to a "sale of goods" include, for the purposes of the Convention, the supply of services. Furthermore, the contracts which give rise to the receivables must be concluded between the supplier and his customers in the course of business, the authors of the draft in effect being of the belief that this was a distinctive feature of factoring when compared with other forms of financing based on the assignment of receivables and that given the special regime which governs consumer transactions in the legislation of a number of countries such transactions should be excluded. One governmental representative however raised the question at the second session of the committee of whether receivables arising under sales contracts concluded with consumers might not be assigned in accordance with the rules of the Convention to the extent that those contracts satisfied the requirements of national law but the proposal received no support. The committee also reconsidered the question of whether the formulation of this provision, and in particular the words "in the course of their business" indicated in a sufficiently clear manner that not only is the status of the parties relevant but that moreover they must have concluded the contract of sale in the context of their professional activity. For his part one participant suggested that this provision be modelled on Article 2 of the Vienna Sales Convention and more particularly on sub-paragraph (a) thereof which excludes the application of that Convention to consumer sales. The committee agreed however to maintain the wording adopted at its first session, subject to the addition in the English text of the word "their" before "business" and to the placing of the phrase "à titre professionnel" at the end of sub-paragraph (a) of the French text. In connection with the contract of sale, it should be observed that Article 1, paragraph 1(a) of the draft Convention imposes no conditions as to form and the committee decided that the question of whether the rules of the Convention would apply to receivables arising out of contracts of sale concluded orally should be governed by the law applicable to the contract. Finally as regards sub-paragraph (a), a remark should be made concerning the terminology employed in the English text: the term "customers" to denote the debtor in the underlying contract of sale was chosen so as to avoid any doubts arising in the minds of United States lawyers for whom the word "debtor" normally signifies the supplier as the debtor of the factor under his contract with the latter, the supplier's customer most often being referred to as an "accounts debtor".

26. Sub-paragraph (a) having set out the supplier's duty to the factor, sub-paragraph (b) of Article 1, paragraph 1 deals with the obligations of the factor. In practice, factors provide a series of widely differing services; it seemed however that only four of the services to be found most frequently in factoring transactions needed to be mentioned, namely finance, maintenance of accounts, collection of receivables and protection against the risk of non-



payment by debtors (this formulation replacing the former wording "protection against credit risks" so as to avoid any possible ambiguity as to the person at the origin of the risk covered). For the contract between the supplier and the factor to be considered to be a factoring contract for the purposes of the future Convention, at least two of these services must be provided: in fact since none of them taken individually is characteristic of factoring transactions, each may be absent from a factoring contract. Thus certain bulk factoring operations under which the factor is required to give notice to the debtor of the assignment to him of receivables by the supplier but is responsible only for financing are excluded from the scope of the uniform rules. It should moreover be stressed that the committee had at its first session made it clear that the requirement contained in sub-paragraph (b) was additional to the conditions set out in sub-paragraphs (a) and (c) with the consequence that if the two services provided were the collection of receivables and the maintenance of accounts, the transaction would indeed be considered to constitute factoring for the purposes of the Convention provided that the receivables were to be transferred by way of sale or security and that notice of the assignment was to be given to the debtor.

27. The effect of sub-paragraph (c) of Article 1, paragraph 1 is to exclude from the field of application of the future Convention non-notification factoring, a technique often preferred by suppliers who do not wish their customers to know that they have assigned the receivables. This important restriction which derogates from the declared principle of embracing the most diverse forms of factoring has, from the very outset of the work on this subject within Unidroit, been retained as a criterion for the definition of the factoring contract for the purposes of the Convention. In reply to one delegation which sought the deletion of this condition, the committee reaffirmed at its second session the arguments which had led to its introduction, namely that non-notification factoring is a form of invoice discounting and that its inclusion would result in the Convention applying to a considerable number of transactions, in particular international banking operations where the receivable is used as security, whereas those transactions might assume forms of factoring unknown to some legal systems, and that in any event the problems raised by assignments were totally different in respect of the rights of debtors according to whether the assignment was or was not notified to them. This provision, which in Article 1 lays down an indispensable element of the factoring contract for the purposes of the draft Convention, is completed in Article 6 which determines the method of giving notice and, together with Article 7, its effects.

28. Finally in connection with Article 1, it should be recalled that the text adopted by the study group provided that the assignment by the supplier to the factor should be "on a continuing basis". Those words were deleted by the committee of experts at its first session as it was of the opinion that the



continuing relationship was implied by the services provided by the factor as well as by the formulation of sub-paragraph (a) which refers to "contracts ... made". Furthermore, the committee was concerned to allow a maximum of flexibility so as not to exclude transactions which a strict interpretation of the words "on a continuing basis" would have left outside the scope of application of the draft Convention.

## Article 2

29. Paragraph 1, whose structure is based on that of Article 1, paragraph 1 of the Vienna Sales Convention, contains two kinds of provisions. The first determine the substantive scope of application which Article 1 has limited to factoring contracts: the introductory wording of Article 2 in effect restricts the scope of application of the future Convention to the factoring of international receivables. This approach was decided on by the committee as it facilitates the application of the rules in the draft to domestic transactions for those States which might wish to apply the provisions of the Convention to such transactions. Paragraph 1 includes on the other hand provisions which determine the territorial scope of application of the future Convention by indicating the connecting factors for its application.

30. The introductory language of paragraph 1 provides that the 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. Whereas Article 1 gives a definition of "factoring" for the purposes of the Convention, Article 2 defines "international" factoring. Since one of the principal aims of the prospective Convention is the facilitation of factoring as a technique of financing international trade, it is easy to understand that it is the commercial relationship giving rise to the factoring contract which determines the international character of the transaction governed by the Convention. A criterion to which recourse is usually had for the purpose of characterizing as international a legal relationship in modern international trade law conventions is that of the places of business of the parties to the relationship in question and it is this which has been adopted, following the model of Article 1 of the Vienna Sales Convention, with a view to determining the international character of a contract for the sale of goods (or where appropriate the supply of services), and in consequence of the factoring contract, independently of the place of business of the factor: in practice the latter will, when he is the export factor, most frequently be in the same country as the supplier and in that of the debtor when he is the import factor. It should be noted that the present wording of the introductory part of Article 2, paragraph 1 was adopted by the committee at its second session in substitution for the former text which provided that "This Convention applies in relation to a factoring contract



so far as it relates to receivables arising from a contract of sale of goods ...". This language was considered to be inappropriate since it did not take account of the debtor, some of whose rights and duties are affected by the draft Convention. It is now moreover clear that the future Convention will apply only to receivables arising from international transactions which are assigned by the supplier to the factor in the context of a factoring contract and not to receivables deriving from domestic transactions which might be assigned under the same contract.

31. The determination of the connecting factors for the purpose of the application of the Convention is a consequence of the form chosen for the rules under preparation and gave rise to lengthy discussion in particular at the last session of the committee. The complicated nature of this question results in part from the fact that it is intended to deal only with international transactions but above all from the special character of the situation under consideration which involves two contractual relationships. In fact, as stated in the preceding paragraph, the "foreign" aspect of the factoring contract, which is itself most often purely national in character, is to be found in the contract of sale. Furthermore, the draft Convention contains provisions governing certain effects of the sales contract on the factor and others which relate to the effects of the assignment on the debtor. Moreover, the committee was concerned that while the Convention should have as extensive a scope of application as possible so as to cover a wide range of transactions, this should not cause any prejudice to the legitimate interests of the parties involved. These various considerations finally led to the committee adopting the solution contained in the two sub-paragraphs of paragraph 1 of Article 2. Sub-paragraph (a) retains the objective criteria of the places of business of the parties so as to confer on the Convention an autonomous scope of application, which is evidently desirable for an instrument unifying rules of substantive law. The committee emphasized that an objective connecting factor would ensure greater security and speed in commercial transactions, two prerequisites for international factoring. Sub-paragraph (a) therefore provides that the Convention will apply to the assignment of international receivables when the supplier, the debtor and the factor have their places of business in Contracting States, this solution seeming to be the one which best guaranteed the protection of the interests of each of the parties concerned in factoring transactions and in particular of the debtor who, although not a party to the factoring contract, might find his position altered by the assignment and who must in consequence know which law will be applicable. Sub-paragraph (b) on the other hand provides an alternative ground for the application of the Convention based on conflicts rules: thus even when the conditions laid down in sub-paragraph (a) are not met, the Convention will still apply if the contract of sale of goods and the factoring contract are governed by the law of a Contracting State, the considerations which guided the choice of the two contracts being the same as those which had led the committee



at its first session to retain the place of business of the debtor as one of the relevant factors referred to in sub-paragraph (a). Some criticisms which had been levelled against the introduction of such a rule in the factoring contract by a number of delegations at the first session of the committee were reiterated at its second session by representatives of the professional organisations who stressed that the provision would cause difficulties in the practical application of the Convention as the parties would, notwithstanding the large number of transactions and the speed with which they must be handled, have to undertake complicated and costly enquiries to ascertain whether the conditions laid down in Article 2(1)(b) had been satisfied. The committee nevertheless agreed for the time being to retain this alternative connecting factor for the application of the draft Convention, subject to the substitution of the language of the provision which had been taken over from that in the corresponding provision of the Vienna Sales Convention by that mentioned above which was considered to be more concise and clear.

32. Paragraph 2 of Article 2, which contains a provision intended to determine the place of business to be taken into consideration for the purposes of the Convention whenever a party has more than one place of business, was reintroduced by the committee at its second session. Since, as in other modern international trade law conventions, it is the place of business of the parties which has been chosen as the criterion to determine the international character of the contract of sale of goods and therefore of the factoring contract (introduction to Article 2, paragraph 1) and the conditions for the application of the Convention set out in paragraph 1(a), it was essential to include a provision indicating the relevant place of business when one or more of the parties has more than one place of business. The committee stated its preference for the formulation of the corresponding provision of the Vienna Sales Convention (Article 10(a)) as against that in the Geneva Agency Convention (Article 8(a)) which is more condensed, so as to avoid any risk of divergent solutions concerning the places of business of the parties to the contract of sale of goods in the context of the prospective Convention on factoring and in the Vienna Sales Convention. The necessary amendments have therefore been made to the language of the corresponding provisions of the Vienna Convention to take account of the two contractual relationships central to factoring transactions and Article 2, paragraph 2 now reads as follows: "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." In reply to an observation by one representative that the place of business which has the closest relationship to the contract may vary according to the contract in question, it was suggested that "the contract" should be understood as that corresponding to the legal relationship contemplated.



Article 3

33. It will be seen from the commentary on Article 1 that this provision contains a number of elements permitting a characterization of a "factoring contract", one of which is that the supplier undertakes to assign or directly assigns receivables to the factor: that this is so is apparent from the drafting amendment to Article 1, paragraph 1(a) introduced by the committee at its second session (see above, paragraph 25). For its part, Article 3 supplies the legal basis permitting the factoring contract effectively to assign the supplier's receivables to the factor, certain legal systems in effect not recognizing the global assignment of receivables, in particular future receivables. Thus, after affirming the validity between the parties to the factoring contract of a clause in that contract under which existing or future receivables are to be assigned (subject to sufficient identification of them), it indicates the time at which the transfer of the future receivables takes place. The text of this article as adopted by the committee of governmental experts at its second session shows few changes from that drawn up by the study group, certain modifications, mainly of a drafting character, having however been introduced to bring out more clearly the principles underlying the provisions.

34. The introductory wording limits the scope of the rules which follow to relations between the parties to the factoring contract, this formulation being preferred to an express designation of those parties so as to avoid any ambiguity as regards the scope of the article in certain legal systems where the term "supplier" might be understood as possibly including a trustee in bankruptcy carrying on the supplier's business. In conformity with the decisions taken by the study group and endorsed by the committee of governmental experts at the beginning of its work, the article does not purport to deal with the question of how far the assignment may be set up against third parties (in particular the debtor, the supplier's trustee in bankruptcy or any of his other creditors) and is therefore concerned exclusively with relations inter partes. It should however be recalled that one governmental delegation drew attention in its observations on the text of the preliminary draft Convention established by the committee at its first session to the fact that the article did not settle the problem which could arise if the debtor were to contest the validity of an assignment of future receivables, and suggested that this question should not be left to be decided by the applicable national law. With a view to meeting this objection it was proposed at the second session of the committee that Article 3 be recast in the negative so that sub-paragraph (a) would read as follows: "a contractual provision for the assignment of existing or future receivables is not invalid merely because ...", so as to make it quite clear that it was not intended to lay down a general rule governing validity. Since this proposal was not seconded, the provision remained unchanged.



35. Sub-paragraph (a) seeks to overcome the difficulties existing in some legal systems regarding the possibility of assigning future receivables since an agreement to assign such receivables, let alone their effective assignment, might not be valid on account of the absence of any indication of their subject matter by a sufficient identification of the receivables. As it stands, the sub-paragraph states that a contractual provision for the assignment of existing or future receivables is valid, even though the contract does not specify them individually, provided that at the time of the conclusion of the contract or when they come into existence they can be identified as falling within the contract. As regards the time at which a receivable is to be so identified, the committee agreed to introduce the words "at the time of conclusion of the contract" in regard to existing receivables, while the words "when they come into existence" refer to future receivables. So as to leave the provision as flexible as possible with a view to facilitating international factoring transactions, the committee preferred not to lay down criteria governing the question of whether the required condition has been satisfied which is in consequence left to the appreciation of the judge in each individual case. It was however suggested by way of example that considerations which might be relevant in deciding whether receivables can, in accordance with Article 3(a), be identified as falling within the factoring contract, are the line of goods or services whose sale is included in the contract, the countries of the customers or, possibly, a list of regular customers the supplier and the factor have agreed upon. It is however clear that under no circumstances does the provision permit the assignment of receivables which are uncertain.

36. It should be noted with regard to sub-paragraph (b) that it constitutes a considerable advance over certain national laws in the direction of encouraging factoring by establishing the rule that 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. While this provision reflects the law of a certain number of States, even though in some of them it is not uncommon for a new assignment to be made purely for evidentiary purposes so as to avoid the need for the whole factoring contract to be exhibited in court, in other legal systems an act of assignment relating to specifically designated receivables distinct from the factoring contract itself is necessary for an effective assignment of the receivables to the factor. It was for those legal systems which do not recognize the global assignment of future receivables that the committee considered that it would be desirable to clarify the moment at which the transfer becomes operative so as to permit the determination, always independently of the question of priorities, of the time as from which the factor will become entitled to certain rights. It should moreover be recalled that in accordance with the general scope of application of the future Convention the rule laid down in Article 3 does not affect the rules of national law relating to assignments of receivables arising out of domestic operations. Finally, it should be



borne in mind that Article 3 is not concerned with the formal requirements for an assignment in the sense of what is necessary to make a valid assignment under national law. These questions will continue to be regulated by the law applicable to the assignment between the supplier and the export factor, or between the export and the import factor in the event of a second assignment.

#### Article 4

37. The text of Article 4 as submitted in the preliminary draft to the committee of governmental experts had been the subject of lengthy discussion in the study group where some opposition had been encountered in its regard although the group nevertheless adopted it, recognizing that it was one of the most important and novel provisions of the draft. This article provided that the assignment of a receivable by the supplier to the factor shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment.

38. For its part, the committee of governmental experts was at its first session divided on the question of whether the provision should be retained. A slender majority of representatives who were certainly prepared to recognize the value of a provision of this kind in a Convention aiming at the development of international factoring transactions emphasized however that it constituted a derogation from the principle of party autonomy and that it was in consequence unacceptable even if its application were limited to international transactions; they further pointed out that it would tilt the balance in favour of the factor while there might be good reasons for the debtor to prohibit assignment. On the other hand, the provision was supported by a certain number of delegates who, it should be noted, represented either countries which already had such a provision in their law (in particular the United States of America) or which would apply the contrary rule to domestic transactions by giving effect to the prohibition on assignment, but who could accept the provisions of Article 4 in respect of international relations. They observed that the article was of the utmost importance for the promotion of international factoring and that it would ensure the security of transactions as the factor would not have to devote a large amount of time to consulting the sales contracts; they laid stress on the value of the rule in facilitating the provision of credit to suppliers, insisting also that at present some large companies often take advantage of their position to impose their standard contracts containing such a prohibition on small suppliers who, by reason of their limited financial capacity, are precisely those who have the greatest need of the services offered by factoring companies. They furthermore recognized that this provision was in the interest of the factor but they believed that the assignment of debts was different from the assignment of receivables and that no prejudice would be caused to the debtor as the latter was in any event protected by Article 7 since he could set up against the factor any defences deriving



from the contract of sale and exercise any right of set-off in relation to rights existing at the time he received notice of the assignment. In conclusion, they recalled that the rule would in no way prevent the customer recovering against the supplier for any damage he might sustain as a consequence of the supplier's breach of the contractual prohibition, whether it be contained in an individual contract of sale or a term of a master contract regulating future transactions between them.

39. The existence of these opposing views led the experts to contemplate the possibility of intermediate solutions which might permit a compromise to be reached.(20) Following lengthy discussion however, the committee came to the conclusion that none of those solutions was satisfactory. Apart from the various objections which could be levelled at each of them, the representatives whose legal systems contained a solution of the kind to be found in Article 4 indicated that all things considered they would prefer the future Convention to contain no rule at all on the question and to leave it to national law to determine the effect to be given to a stipulation in a contract of sale prohibiting assignment as any intermediate solution of a mandatory character would represent a step backwards in relation to the law of their countries on the matter. The committee decided that two possibilities remained open: either to retain Article 4 in its original form or to delete it, and it is for this reason that it decided at the end of its first session to retain it in square brackets in the text of the draft Convention.

40. At the second session of the committee, a number of representatives reiterated their support for, or opposition to, the provision contained in Article 4, and given the fact that no rule seeking to lay down an intermediate solution was acceptable, the committee considered the possibility already mentioned at its first session of introducing a clause permitting a reservation in respect of the provision. It was widely agreed that a reservation would limit the scope of the future Convention since it would in effect recognize the failure of the attempt at unification concerning the effects, as regards the factor, of a prohibition on assignment agreed between the supplier and the debtor, although some representatives suggested that it would be desirable to attempt at this stage of the work to reach a generally acceptable solution which could be proposed in the draft text to be submitted for adoption at a diplomatic Conference.

41. In consequence, it was suggested that regard be had to Article 12 of the Vienna Sales Convention which provides that "Any provision of Article 11(21)

---

(20) For these compromise solutions, see Study LVIII - Doc. 20, paragraph 35.

(21) These provisions concern the form of the sales contract. The reservation was introduced at the request of the Socialist States whose legislation requires contracts of sale to be concluded or evidenced in writing.



... does not apply where a party has his place of business in a Contracting State which has made a declaration under Article 96 of this Convention". In the context of the draft Convention on international factoring, only the debtor's place of business is relevant since he is the party whom it is sought to protect in those States whose law gives effect, as against the factor, to a prohibition on assignment agreed with the supplier. Although the committee recognized that this provision could provide a valuable basis for discussion, some objections to it were however raised. In the first place, one representative pointed out that since a majority of the States represented seemed to be opposed to the principle contained in Article 4, it was the converse rule which should be laid down therein, and a reservation clause formulated to meet the needs of the States which intended to give effect to the assignment notwithstanding the prohibition agreed between the supplier and the debtor. It was moreover observed that the reservation to Article 4, as at present drafted, ought to ensure that due regard be had to the intention of the debtor by laying down a rule of substantive law rather than by leaving a legal gap which would call for the application of the rules of private international law of the forum and which could lead to the same result as that achieved by the application of the provisions of Article 4. Another representative stated that in his opinion the criterion to be retained in the reservation clause should be the law applicable to the contract between the supplier and the debtor, and that whenever the sales contract is governed by the law of a State which has taken the reservation then effect should be given to the prohibition on assignment. Doubts were however expressed as to whether the law applicable to the contract of sale would always be the law determining the assignability of the receivables and it was in any event suggested that there was a risk that the party with the stronger bargaining position would choose as the law of the contract that which would best suit him as the law to govern the assignment. The committee finally came to the conclusion that it would only be in a position to take a definite decision on the wording of the reservation, supposing that the principle were to be accepted, in the light of a paper which the Secretariat was asked to prepare for the next session indicating the effects of such a reservation clause, and it agreed provisionally to introduce into the text of the draft Convention the reservation based on the corresponding provision of the Vienna Sales Convention, which is now to be found in Article 4, paragraph 2 and in Article X of the text adopted by the committee at the close of its second session. Given however the hesitations expressed regarding this formulation and its implications, the whole of Article 4, as well as Article X, has been placed in square brackets.

42. During the discussion on the reservation clause, an observer from a professional organisation insisted on the necessity for factors to be certain of the conditions governing the validity of the assignment between the parties to the factoring contract. He wondered whether, apart from the case of some countries such as, for example, the Federal Republic of Germany where factors must



take special precautions, the assignment should in any event be considered to be ineffective on account of a prohibition agreed between the parties to the contract of sale when the factor had in good faith paid the supplier. One governmental representative who also supported the principle contained in Article 4, drew attention to the fact that there seemed to be two aspects to the provision: the first was that of whether the receivable had been effectively transferred to the factor, even in contravention of a prohibition or assignment agreed by the supplier and the debtor, with the consequence that if the debtor paid the supplier, the latter would in his turn hand over the sum to the factor; the second on the other hand concerned the problem of the right of the debtor to ignore notice of the assignment and to pay the supplier while continuing to exercise rights of set-off arising after the giving of notice. In his opinion, the first aspect was that with which it was intended to deal and the solution contemplated corresponded no doubt to the law of many countries, although the position was totally different with regard to the effects of the assignment on the debtor and on any third party which posed much more delicate problems. It was suggested that this ambiguity could be removed by providing expressly that it was intended to deal only with relations between the parties to the factoring contract. The representative of the United States of America stated for his part that the rule contained in the Uniform Commercial Code, namely that now to be found in Article 4, limited the validity of an assignment effected contrary to a prohibition therein to the assignment of the right to payment, it being open to the debtor validly to contest the transfer of other rights. He further observed that in his opinion an analogy could be drawn between the problem which arose in the context of factoring and the solution provided in the Uniform Customs and Practices for Documentary Credits under the heading "Assignment of proceeds", according to which "The fact that a credit is not stated to be transferable shall not affect the beneficiary's right to assign any proceeds to which he may be entitled"; once therefore the debtor has made payment of the receivable, thus waiving his right not to pay it, the prohibition should be without effect, although only in respect of the right to payment, with the consequence that the factor would be protected against any persons not party to the agreement prohibiting the assignment. In spite of the doubts expressed by one representative as to the practical importance of this distinction which did not exist under his country's law, it seemed that a reference of the kind contained in Article 55 of the Uniform Customs and Practices for Documentary Credits would restrict the scope of the principle contained in Article 4 and would be likely to make it more widely acceptable. The provision in question which appears as paragraph 1 of Article 4 now reads as follows: "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".



Article 5

43. Article 5 performs a similar function to Article 3 in that it recognizes the validity and effectiveness of a clause in a factoring contract providing for the transfer to the factor not only of the receivables but also of the rights of the supplier arising from the sale of goods: what is intended here is to ensure that the rights deriving from future sales, which are therefore not yet in existence, may, contrary to the solution pertaining in some legal systems, be transferred although it is to be understood that the provisions of Article 5 also concern the transfer of existing rights.

44. The introductory wording of Article 5 states that the provision deals only with the relations between the parties to the factoring contract so as to make it quite clear that, as with Article 3, questions associated with the effectiveness of the transfer against third parties are not dealt with. It should be noted that at the second session of the committee the possibility was considered of extending the scope of this article in the light of the regret expressed by one professional association in its observations at the failure to address the problem of priorities. Reference was in particular made to the fact that the solution contained in Article 5 of the preliminary draft Convention on international leasing which provides that the lessor's real rights in the equipment shall be valid against certain third parties (exhaustively listed, to the exclusion of privileged creditors) on condition that publicity requirements laid down by the law of the State of the principal place of business of the lessor have been satisfied. While certain delegates stated that they were favourable to the inclusion, subject to the necessary adaptation, of a similar rule in Article 5 of the preliminary draft Convention on international factoring, other representatives expressed the most serious reservations at this new orientation which would have important implications in the field of bankruptcy law and would at least call for further detailed consideration before they could take a stand on it. One delegate emphasized that the situation contemplated was totally different from that dealt with in the contract of leasing since the assignee of the receivable was the holder of a right in personam against the debtor whereas the lessor's right over the equipment was a right in rem and that it would be contrary to established legal principle to give priority to the factor over other creditors of the supplier. In the absence of any substantial support for the suggestion the committee decided to retain the text adopted at the outcome of its first session.

45. In addition to stating the principle of the validity of the transfer of rights, Article 5 indicates the method of transfer: this may be effected directly, that is to say without a new act of transfer, which corresponds to the form already indicated in the rules on assignment of receivables, although the parties may agree that the transfer will take place once a new act for the purpose has been concluded. Article 5 therefore provides an option on this



point, as it might not be in the interest of the parties to stipulate an automatic transfer of rights. In this connection it should be recalled that the freedom accorded to the parties to choose the method for transferring the rights relates only to their internal relations, whatever may be the rules of the applicable national law. The position is however completely different if the parties seek to invoke the transfer against third parties, a question not governed by the draft Convention, in which case they must satisfy the conditions as to form or publicity of the applicable law.

46. It should finally be mentioned that the committee of experts considered at its first session the question of what was meant by the term "rights": in the version adopted by the study group, Article 5 included the benefit of provisions in a contract of sale reserving title to the goods to the supplier. It goes without saying that this rule, which has been maintained in the present draft, in no way seeks to confer validity upon any provision for the reservation of title in the contract between the supplier and his customer, nor to regulate questions associated with the recognition or enforcement of such clauses. A further indication had however been added to cover those situations where the supplier's security assumes a different character, and especially in North America that of a security interest. Thus, under the terms of Article 5, the benefit of any provision in the contract of sale of goods conferring a security interest on the supplier may be transferred. The committee furthermore agreed that the rights should also include those concerning the contract of sale itself, such as the right to terminate the contract and to retake possession of the goods and that the rights in question are not simply those created under the contract of sale but all those deriving from the sale of goods, including therefore rights conferred on the seller by the applicable law even though not stipulated in the contract.

#### Article 6

47. Article 6 as adopted by the committee at its first session was the consequence of the amalgamation and amendment(22) of the former Articles 6 and 7 of the text approved by the study group. At its second session the committee limited itself to a simple rearrangement of the wording of paragraphs 1 and 2 so as to ensure a greater coherency of the provisions.

48. Paragraph 1 affirms the debtor's duty to pay the factor which arises from the debtor's being given notice of the assignment in accordance with the

---

(22) For the amendments made at the first session and the reasons underlying them, see the commentary on Article 6 in Study LVIII - Doc. 20, especially paragraphs 42 and 46.



conditions set out in sub-paragraphs (a) to (c). The drafting amendment introduced by the committee lies in the transfer to the introductory language of the paragraph of the provision previously contained in paragraph 2 subjecting the debtor's duty to pay to the condition that he does not have knowledge of any other person's superior right to payment. The question may however be raised of whether this new wording does not have the effect of placing a heavier burden on the debtor than did the former text ("provided that he makes the payment ... without knowledge of any other persons's claim to payment of the receivable"), since although the debtor is not required to undertake research into the possibility of the existence of creditors other than the factor, on the other hand when the debtor knows that another person claims to have a right in the receivable he may perhaps under the new formulation have to make enquiries into the merits of the claim and, if it does indeed exist, into whether it constitutes a superior right to payment. Consequently, and even when the notice given to the debtor satisfies the provisions of sub-paragraphs (a) to (c), if another person does have a right to payment of the receivable superior to that of the factor and if the debtor has knowledge of the existence of that right, he is under no duty to pay the factor and, if he does make payment, then in accordance with paragraph 2 his liability will not be discharged and he may be required to make payment a second time. It should moreover be noted that one representative drew attention to the case where the debtor accepts the assignment and expressed the opinion that such acceptance could, under the prospective Convention, produce the same effects as notice, namely the creation of a duty for the debtor to pay the factor. The committee considered the question of whether a provision to this effect should be added at the beginning of Article 6 and although some representatives favoured the inclusion of such a reference, others were of the view that it was unnecessary in Article 6 as it was their understanding that, once the debtor had accepted the assignment, notice was no longer necessary or could be deemed to have been given, the matter being a purely procedural one. On the other hand, acceptance might affect the debtor's rights vis-à-vis the factor and this question was therefore examined in greater depth in connection with Article 7 concerning the defences which the debtor may set up against the factor.

49. Paragraph 1, sub-paragraph (a) lays down the first condition which the notice must satisfy, namely that it is to be in writing. While it is true that in a number of legal systems oral notice may be sufficient, it seemed preferable in the interests of the certainty of the transactions governed by the future Convention to require written notice. It should however be pointed out that oral notice, even though not sufficient under the terms of the draft Convention to place an obligation on the debtor to pay the factor, might nevertheless have the effect of imputing bad faith to the debtor if he paid the supplier, with the consequence that he would be required to pay twice over. The second condition relates to the question of who must give notice; this may in



the first place be the supplier since he is the original creditor and the contracting partner of the debtor. The factor however has a legitimate interest in the debtor's receiving notice of the assignment as it is to him that payment must be made and in those legal systems where the creditor's rank is determined by the order in which notice is given he will usually be more diligent than the supplier. In consequence the committee decided that the factor may give notice of the assignment, on condition however that he acts with the supplier's authority, this language being intended simply to indicate that the debtor must have reasonable grounds for believing in the existence of the factor's authority, where appropriate by seeking information from the supplier, questions regarding the form of the authority and the possibility for notice to be given by other persons acting in the name of the supplier or of the factor being governed by the applicable law.

50. Sub-paragraph (b) provides that, in addition to the conditions set out in sub-paragraph (a), the notice must reasonably identify the receivables which have been assigned and the factor to whom or for whose account the debtor is required to make payment. This provision seeks to ensure that the debtor is informed of the precise content of the assignment (it will be seen that sub-paragraph (c) adds a further condition concerning the receivables of whose assignment notice is given) and of the person to whom he is to make payment: this may be the factor himself, in which case the committee agreed that the assignee's status as a factor need not necessarily be apparent from the notice, or a bank authorised to receive payment on behalf of the factor.

51. Finally, sub-paragraph (b) subjects the effectiveness of notice to the requirement that it relate to receivables arising under a contract of sale of goods made at or before the time when notice is given. Consequently, whereas a clause of this kind in the factoring contract is sufficient to bring about an effective transfer of future receivables from the supplier to the factor under Article 3 of the preliminary draft Convention, notice of the assignment of a receivable arising under a future contract of sale will impose no duty to pay upon the debtor.

52. Paragraph 2 of Article 6 describes the effect of payment by the debtor to the factor when the conditions set out in paragraph 1 have been met, namely that the debtor is pro tanto discharged of his liability. Following the amendment of this provision, the only restriction on this principle is that the debtor must have made payment in good faith, a requirement to be found in the general law of obligations and which it was considered important to affirm in paragraph 2, although the committee was of the opinion that this condition was implicit in paragraph 1 of Article 6 concerning the debtor's duty to pay the factor.



Article 7

53. Article 7 completes paragraph 2 of Article 6 in the sense that it sets out the rights of the debtor following the giving of notice in accordance with paragraph 1 of Article 6. It is concerned on the one hand with the extent to which the debtor may set up against the factor defences relating to the receivable and, on the other, with defences not connected with it arising from his relations with the supplier. Paragraph 1 embodies the rule common to virtually all legal systems that an assignment cannot place the debtor in a worse position vis-à-vis the assignee than that in which he would have been as regards the assignor. It provides therefore that the debtor may, if a claim is brought against him by a factor for payment of a receivable arising under a contract of sale, set up all defences against the factor of which the debtor could have availed himself under the contract if such claim had been made by the supplier. It is only the prohibition of the assignment stipulated in the contract of sale between the supplier and the debtor which may be not be set up against the factor, subject however to Article 4 ultimately being retained by the committee of experts, and it is for this reason that the introductory words of the provision "subject to Article 4" at present remain in square brackets.

54. Paragraph 2 of Article 7 deals with the related but distinct question of the debtor's exercise against the factor of rights of set-off he may have against the supplier. Such rights may be exercised against the factor subject to certain conditions, the first of which is that they are not merely contingent. In other words they must exist and be available to the debtor at the time he receives notice of the assignment, for otherwise it would be possible for the supplier and the debtor subsequently to erode the position of the factor by the conclusion of new contracts giving rise to a set-off of which the factor was unaware. In their written observations submitted to the second session of the committee, two delegations however raised the question of whether the formula "claims ... available to the debtor" should be understood as laying down a condition that such claims must be due for payment for him to be able to exercise his right of set-off. Whereas one of them suggested that this was perhaps a question which should be left to national law, one member of the committee stated that in his opinion the intention of Article 7, paragraph 2 was not to restrict the exercise of the debtor's right of set-off to claims due for payment but only to existing claims. Finally, the set-off pleaded by the debtor against the factor must have arisen in respect of claims against the supplier in whose favour the receivable arose so as to avoid the possibility of a debtor asserting a right of set-off in respect of claims against a different supplier regarding receivables assigned to the same factor.

55. The representative who had in the course of the discussion on Article 6 drawn attention to the case where the debtor accepts the assignment, sug-



gested that this question was of particular importance in connection with its effects on the rights of set-off which the debtor may exercise against the factor as under the law of some countries, including his own, unconditional acceptance of the assignment by the debtor implies tacit renunciation of any set-off against the factor. The problem arose of whether, under the present drafting of Articles 6 and 7 of the draft Convention, failure to mention the special case of acceptance of the assignment by the debtor would lead a judge to apply national law, or whether the judge would understand the rule set out in Article 7, paragraph 2 as being one of general application and apply it irrespective of whether or not the debtor had accepted the assignment. If the latter were the case, factors would find themselves in a worse position than they would be if the regime provided for in certain legal systems were to apply. The same representative insisted that given the uncertainty as to how judges would react, it would be wiser to include a rule on the effects of acceptance in the prospective Convention. One proposal put forward would have made provision for a rule of substantive law according to which the debtor would be unable to invoke rights of set-off against the factor once he had unconditionally accepted the assignment. Those representatives whose law contained no such rule expressed hesitations regarding such a solution while at the same time however stating that they would be prepared to accept a provision referring to the applicable law, so as to maintain the more extensive rights which it might confer on the factor. Since this proposal enjoyed wide support, the committee agreed to include a second sentence in Article 7, paragraph 2 worded as follows: "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

56. The text of the preliminary draft articles worked out by the study group contained a provision (former Article 9) to the effect that without prejudice to the debtor's rights under Article 8 (now renumbered Article 7) non-performance or defective or late performance of the contract of sale by the supplier should not entitle the debtor to recover money paid by him to the factor. This provision dealt therefore with the situation where the debtor is seeking to recover from the factor a sum of money paid to him and the supplier has not performed his obligation as provided for in the contract of sale: under the rule previously laid down the debtor had accordingly to content himself with a recourse action against the supplier unless he later found himself in a position to exercise his rights of set-off against the factor in accordance with what is now Article 7, paragraph 2.

57. At the first session of the committee of governmental experts the representatives of a number of States expressed strong reservations concerning this rule which, in their opinion, would place the debtor at a disadvantage



by depriving him of any recourse, for example in the case where the supplier became bankrupt before performing his obligations and where the factor to whom payment had been made knew of the defect in performance. It was moreover observed that it seemed somewhat unjust and indeed illogical not to permit the debtor to recover money paid to the factor before receiving or examining the goods, when he would have been entitled to invoke the provisions of Article 7, paragraph 1 in cases where payment should have been made after performance by the supplier. In the light of these objections the committee had agreed to delete the whole of the former Article 9 of the draft Convention and to leave the question to be determined by the applicable national law.

58. At the second session of the committee however a proposal was made to reintroduce the article. The representatives of the professional factoring associations in particular emphasized that while the debtor ought not to find himself in a worse position as a result of the assignment, neither ought it to be improved: in consequence there was no reason, in the event for instance of the supplier's bankruptcy, for the debtor to recover a sum from the factor when he would have been unable to do so had no factoring contract been concluded. Moreover, the factor is in no way enriched by the payment made by the debtor since even if he has not provided the service of financing to the supplier by making an advance payment, he pays the latter the equivalent of the purchase price of the receivable once he has been paid by the debtor. Moreover, when the factor does no more than maintain the accounts and collect the receivables he makes no enquiries into the solvency of the supplier and receives no remuneration for covering the risk in this connection. Finally, some representatives stressed that the factor was intervening at a subsidiary level, his role being essentially a financial one and that there was no reason why he should guarantee the performance of the supplier's obligations to the debtor. It should however be noted that one member of the committee suggested that the position might be somewhat different if the factor had acquired ownership of the goods as a result of the transfer of the benefit of a reservation of title clause. In any event, the principle contained in the former Article 9 was justified and should be reintroduced into the text of the preliminary draft.

59. The representatives opposed to the rule reiterated the arguments against it which they had already developed. In addition, one member of the committee stated that under the normal rules of law the factor is put in the shoes of the assignor, thus taking over his obligations, and he drew attention to the current evolution of the law which tends to link the credit to the obligation in respect of which it had been sought: in consequence the debtor ought in his opinion to be able to recover the sum paid to the factor in cases where the supplier fails to perform his obligations in conformity with the terms of the contract of sale. For their part the representatives of Austria and of the Federal Republic of Germany indicated the effects which the rule contained



in Article 9 of the text adopted by the study group would have in their legal systems: in the absence of any factoring contract the debtor would, if he had made payment to a supplier who had not properly performed his obligations, be entitled to two actions against him, one for damages and the other for recovery of the price. The fact that the debtor had paid the factor subsequent to the assignment would deprive him of the possibility of bringing an action for recovery against the supplier because it was not the latter to whom he had made payment. The debtor's position would therefore be worsened by the assignment.

60. With a view to reaching a generally acceptable solution preserving the interests and rights of factors and debtors alike, the committee agreed to reintroduce the former rule in its original form, subject however to two exceptions. The first meets the objection raised by the representatives of Austria and the Federal Republic of Germany by restricting the application of the principle to cases where the debtor is entitled to an action against the supplier for recovery of the price. The second concerns those situations where there has been an unjust enrichment of the factor, since the latter has not paid the supplier the purchase price of the receivable (which he ought to have done had he undertaken to provide finance) when he is not obliged under the factoring contract to make such payment following payment to him by the debtor of the price of that receivable. This case is now dealt with in paragraph 2, thereby completing paragraph 1 which itself contains the principle and the first exception. Given however the continuing hesitations entertained by a number of representatives concerning the provisions of Article 8, even in their amended form, the article at present appears in square brackets.(23)

#### Article 9

61. The question dealt with in Article 9 (Article 8 of the text provisionally adopted by the committee at its first session) relates to the effects, in regard to third party liability for damage caused by the goods, of the transfer of ownership in them to the factor when the factoring contract has so provided (such a clause in the factoring contract being effective in accordance with Article 5). As to the usefulness of regulating this question in the prospective Convention, the representatives of the factoring associations had indicated that to their knowledge goods affected by factoring transactions have never caused damage but that the problem could arise with the diversification of the products concerned. The period during which the factor may be owner of the goods as a result of the transfer to him of the benefits of a reserva-

---

(23) The discussions of the committee at its second session leave some doubt as to the exact meaning of the words "or incurred a liability to pay".



tion of title clause is, admittedly, in general shorter than that in the case of leasing, but this consideration did not deprive the rule of its importance. Finally, they had pointed out that in the absence of the protection afforded to factors by the principle contained in this provision, the latter would be obliged to take out insurance, the increased costs of which would in turn fall on suppliers.

62. A majority at the first session of the committee of governmental experts was of the opinion that the factor's rôle was a strictly economic one: while he might become owner of the goods by reason of the benefit of the reservation of title clause being transferred to him at the same time as the receivable, he would not on the other hand have the animus possedendi as ownership served only as security for the receivable. The corollary of this reasoning is the principle contained in paragraph 1 which provides that: "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". If, on the other hand, the factor were not to be simply the economic owner of the goods but also to exercise the attributes of ownership by selling or otherwise disposing of the goods to any person and not only to a person having no connection with the factoring transaction, then the principle that he be relieved of liability should be displaced and this exception stated in paragraph 2.

63. The other approach suggested had been to make the factor responsible for all the consequences of ownership resulting from his acquisition of the goods and the representatives endorsing this view were reluctant to introduce into the field of factoring transactions a liability regime which would derogate from the principles of various national laws and international instruments which impose a presumption of liability on the owner. It was to meet this concern that the committee agreed to add a paragraph 3 which affirms the preeminence of the provisions of any international agreement already concluded or to be concluded imposing a liability regime based on ownership of the goods. At the second session of the committee one representative restated his opposition to the article as a whole on the ground that when it is national law which imposes liability on the owner the effect of the defence for which provision is made in paragraph 1 would be to create a legal gap as to the person liable to third party victims; given the rare number of cases where all the necessary conditions would be met he expressed the opinion that factors should assume the risks connected with the ownership of goods. In the light however of the absence of support for this proposal the committee retained unaltered the text of the corresponding article adopted at its first session.



Article 10

64. The text of Article 9 (now renumbered Article 10) which had been provisionally retained by the committee of governmental experts at the end of its first session, reflected the wording of the corresponding provision of the version adopted by the study group. The committee had in effect endorsed the principle contained in that provision according to which, in the event of the original assignment by the supplier to the factor being followed by one or more assignments between export and import factors (the normal situation in international factoring transactions), the subsequent assignments would be governed by the rules applicable to the first assignment, the position of the factor/assignor and the factor/assignee being assimilated, mutatis mutandis, to that of the supplier and the factor in the factoring contract. The committee had however observed that the provision, as formulated, raised difficulties of application in respect of certain articles: in effect, although the assignment was in such cases made between two factors, the underlying relationship created by the contract of sale between the supplier and his customer was relevant to a certain number of provisions of the draft Convention. In consequence it requested the Secretariat to overcome this obstacle, which seemed to be essentially of a drafting nature, and to prepare a revised version of the provision for consideration at its second session. In conformity with the wish of the committee, the Secretariat submitted two proposals<sup>(24)</sup> drafted by it in the light of the intentions of the authors of the original provision when this was clear, and of the commentaries by Governments and the interested organisations in response to a brief questionnaire which had sought to clarify the intended scope of the rule governing subsequent assignments.

65. At the committee's second session, a number of representatives expressed their views as to the approaches followed in the two alternative redrafts of the article put forward by the Secretariat. Alternative I, which proposed a simple transposition of the principles contained in the articles of the draft Convention to subsequent assignments, together with the necessary adaptations as regards the person giving notice of the assignment to the debtor, seemed preferable to Alternative II, the mechanism of which was clearer to some but which was based on a fiction. However, the arguments raised on this occasion permitted a clarification of the purpose of the provision. In the first place, the committee considered that it would be useful to include in the draft Convention a rule relating to subsequent assignments since silence on this matter might suggest that such assignments were not governed by the Convention. One representative stated that it would perhaps be sufficient to

---

(24) For the text of the proposals and the accompanying commentary see Study LVIII - Doc. 23, pp. 5 to 8.



provide that whenever there is an assignment of a receivable which has already been assigned under the terms of the Convention, the subsequent assignee will take over all the rights and duties of the assignor. The committee agreed that what was intended was in fact to place the subsequent factor in the same position as the factor who had concluded the factoring contract, in particular with regard to the debtor, without however laying down a rule concerning the validity of the contract for the subsequent assignment - which would be determined by the applicable national law - and without dealing with the relations between factors which are generally governed by codes of practice. The committee decided therefore to opt in favour, subject to drafting amendments, of the proposed Alternative I which in its opinion met its concerns.

66. Article 10 as approved by the committee at its second session contains provisions concerning scope of application as well as substantive rules of law. The first question is that of the criteria which should determine whether a subsequent assignment would be governed by the prospective Convention and the committee finally decided that the only relevant consideration should be that of whether the Convention was already applicable to the first assignment, irrespective of the character of the contract for the subsequent assignment or the status of the parties to that contract. The committee wondered however whether it was desirable to adopt a connecting factor based on the place of business of the subsequent factor or on the application to the contract for the subsequent assignment of the law of a Contracting State in conformity with the conflicts rules of the forum. Some representatives were of the opinion that even though the position of the debtor vis-à-vis the subsequent factor would scarcely be different from that in relation to the original factor, it would on the other hand perhaps be justifiable to limit the benefit of the provisions of, for example, Article 9 or, if it were to be retained, Article 8, only to those factors with places of business in Contracting States. Other members of the committee stated that in their opinion such a requirement was unnecessary, principally for the reason that in the context of international factoring transactions the subsequent factor is, as a general rule, the import factor who has his place of business in the same State as that of the debtor: if, then, the Convention were to apply to the first assignment in accordance with Article 2, paragraph 1(a), that State would be a Party to the Convention. In consequence, the necessary and sufficient condition stipulated in the introductory wording of Article 10 for the rules contained in the Convention to apply to any subsequent assignment of a receivable is that the receivable "is assigned by a supplier to a factor pursuant to a factoring contract (these terms being defined in Article 1) governed by this Convention" (in conformity with Article 2 and provided that its application has not been excluded by the parties under Article 11).

67. Paragraph 1(a) of Article 10 provides that in the cases referred to



in the introductory wording, the rules set out in Articles 3 to 9 of the Convention shall apply to any subsequent assignment of the receivable by the factor or by a subsequent assignee. The term "subsequent assignment" is to be understood as referring to the transfer of a receivable by the person to whom it has been assigned and not of course to a second fraudulent assignment by the same assignor. Moreover, if a chain of transactions takes place following the first assignment all such assignments will be governed by the Convention provided that that assignment was itself governed by the rules of the Convention. As to the language employed in the French text of the provision, it should be observed that the words "cessionnaire successif" denote any person to whom the receivable is assigned by virtue of a subsequent assignment; whereas the term "cessionnaire" continues to be defined indirectly in Article 1 by reference to the factoring contract. The committee was of the opinion that the flexible formulation of the rule contained in sub-paragraph (a) would permit those called upon to interpret it to transpose the principles governing assignments pursuant to a factoring contract to any later assignment of the receivable. In the event therefore of a subsequent assignment, the assignor may validly effect a global assignment of future receivables (subject to the conditions established by Article 3) and in his turn transfer any rights deriving from the sale of goods (Article 5), together with the correlative benefit of any exoneration from liability for damage caused by the goods (Article 9 and the attendant exceptions). While the debtor's duty to pay the new holder of the receivable is subject to the rules laid down in Article 6, it seemed useful to state in sub-paragraph (b) of Article 10 that the latter may himself give notice of the assignment so as to avoid the risk of non-recognition of the successive factor's exercise of this important right which secures his position against the debtor. On the other hand it was thought to be reasonable that in these circumstances the giving of notice should be dependent on the authority conferred by the supplier himself. As to the defences which may be set up by the debtor against a subsequent assignee, the principles set out in Article 7 will apply. The committee considered that only rights of set-off arising from relations with the supplier and acquired at the time of notice of the first assignment could be exercised against the subsequent assignee, the question of the exercise of such rights which might exist against the first or any intermediate factor being left to be regulated by the applicable national law. Finally, although Article 8, paragraph 1 ought to apply to the subsequent assignee without any difficulty, paragraph 2 should probably be read in the light of the reasons which led to its introduction, namely the exception for the case where the holder of the receivable has been unjustly enriched either because he has not paid the assignor or because he has not undertaken to make such payment.

68. At the second session of the committee one delegation stated that the law of its country did not permit a receivable which had already been assigned to be assigned a second time and that factoring contracts contained a clause



whereby the factor undertook not to reassign the receivable: in the context of international transactions therefore the supplier directly assigned the receivables to an import factor in the same State as that in which the debtor had his place of business. A member of that delegation requested the introduction of a rule excluding the application of the provisions of Article 10 in such cases, having regard in particular to the fact that under Article 11 the application of the Convention may not be partially excluded by the parties. Some participants expressed doubts as to the need for the inclusion of such a provision, recalling above all that Article 10 did not govern the validity of the contract for the subsequent assignment, which fell to be determined by national law, and that in any case the debtor would not, by virtue of Article 6, paragraph 1(a), be under a duty to pay the second factor because the latter had no authority from the supplier to give notice of the assignment. Finally, one member of the committee drew attention to the inconsistency between the rule contained in Article 4, should the principle underlying it be confirmed, and that proposed in this connection since effect was not given, with respect to the factor, to a prohibition on assignment agreed between the parties to the contract of sale, whereas the converse solution would be adopted in relation to a prohibition on assignment contained in the factoring contract. The committee nevertheless agreed to introduce a new paragraph 2 to Article 10 which provides that "The preceding paragraph shall not apply to an assignment which is prohibited by the terms of the factoring contract" while placing it in square brackets so as to indicate that it will be reconsidered at its next session.

#### Article 11

69. The principle underlying the provisions of Article 11 was introduced by the committee of governmental experts at its first session in Article 10 which stated that except as otherwise provided in the Convention, the parties might, in their relations with each other, exclude the application of the Convention or derogate from or vary the effect of any of its provisions. Any decision as to the mandatory character of certain provisions of the prospective Convention was deferred, in particular because of the uncertainty as to whether the rule contained in Article 4 would be retained. At the committee's second session one representative drew attention to the fact that with the exception of Articles 3 and 5, whose provisions were essentially of a non-mandatory character in that they left an option open to the parties to the factoring contract and did not impose obligations upon them, all the other articles concerned the effects of the assignment on the debtor, and that the possibility for the parties to exclude the application of the Convention only in their relations with each other scarcely reflected the realities of the transaction. The committee agreed therefore that the decision to be taken regarding the character of the provisions of the Convention should of necessity be the same for all parties involved in the transaction.



70. While some members of the committee were of the opinion that the whole of the Convention could be of mandatory application, principally for the reason that it would be unlikely that the factor would wish to exclude rules which were designed to facilitate international factoring and that this aim would be frustrated if the parties to the contract of sale were to be free to choose another law to govern the assignment, others declared themselves to be firmly attached to the principle of party autonomy, all the more so as the work in progress fell within the domain of international trade law: reference was in particular made to the risk that the choice of a mandatory system could be detrimental to the prospective Convention whereas many States would on the other hand be prepared to accept an instrument from whose provisions the parties could derogate. There was therefore a general feeling within the committee that the parties to the factoring contract might have a legitimate interest to choose a law other than the Convention to govern their contractual relations and that this freedom should be accorded to them, the debtor not being a party to the agreement on this matter between the supplier assigning the receivable and the factor. This is the rule contained in paragraph 1 of Article 11 which provides that "the factoring contract may exclude the application of this Convention".

71. Consideration was however also given to the situation where it is the supplier and the debtor who provide in the contract of sale that the prospective Convention shall not apply in the event of the assignment of receivables, some representatives being of the opinion that it was not desirable to allow the parties to a contract which was not governed by the Convention to determine the law applicable to the contract for the assignment of the receivables. Attention was moreover drawn to the fact that the possibility for the parties to the contract of sale to exclude the application of the Convention on international factoring would considerably reduce the interest of the rule contained in Article 4, always assuming that the provision were to be retained. It seemed however to the committee that the essential difficulty was a practical one since, as the representatives of the professional organisations recalled, the volume of factoring transactions is such that it would be impossible for a factor to scrutinize every contract of sale so as to ascertain whether the parties thereto had excluded the application of the Convention to receivables assigned to him. With a view to solving this problem, a proposal was made that the parties to the contract of sale should give separate notice to the factor of their agreement to exclude the application of the Convention and so as to protect the factor who, it was stressed, must act on the assumption that the Convention governed the assignment, the committee considered that only receivables arising after the factor receives notice of the exclusion should be governed by another law. In consequence, paragraph 2 of Article 11 is worded as follows: "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". (25)

72. Finally, the committee considered the question of whether it would be desirable to provide for a limitation on the principle of party autonomy recognized in paragraphs 1 and 2 of Article 11 by affirming the mandatory character of some of the provisions of the Convention or whether, on the other hand, the parties should be permitted partially to exclude the rules of the Convention or to derogate from some of them. One representative observed that special agreements are sometimes concluded between the debtor and the factor concerning the rights dealt with in Article 7, and he suggested that it should be possible for the parties to derogate from the provisions of that article. The general view was however that the rules of the future instrument should be seen as a whole which could not be split up or modified without disturbing the balance which it was sought to achieve between the rights and obligations of the parties involved in factoring transactions. The committee agreed therefore clearly to state this intention in a provision to be found in paragraph 3 of Article 11 according to which, where the application of the Convention is excluded in accordance with the preceding paragraphs of the article, such exclusion may be made only as regards the Convention as a whole.

#### Article 12

73. Article 12 concerns the rules of interpretation to be applied to the prospective Convention. This article is based on the corresponding provision of the Vienna Sales Convention, namely Article 7, which has been incorporated in several international trade law conventions. Paragraph 1 lays stress on the promotion of uniformity in the application of the Convention, having regard to its international character, so as to avoid the attempt at harmonisation at legislative level being defeated by different or piecemeal approaches at the stage of implementation by judges or arbitrators: the paragraph also refers to the observance of good faith in international trade. Furthermore, another criterion

- 
- (25) While it is easy to understand the reason which led the committee to make this restriction on the receivables covered by the exclusion, one may on the other hand raise the question of whether the provision as worded meets the committee's intention: in fact in most bilateral contracts obligations arise at the time of the formation of the contract, so that even if the parties to the contract of sale were to give notice of the exclusion of the application of the Convention to the receivable at the exact time of the conclusion of their contract, the assignment of the receivables would remain subject to the rules of the Convention.



was, at the suggestion of one representative, added to those designed to aid in the interpretation of the Convention, namely its object and purpose as set forth in the preamble, and this with a view to ensuring that the Convention will be applied in accordance with the intention of its authors and with the declared objectives of States when they become parties to it. Given however the absence of precedents for the addition of this formula, whose introduction has also been proposed in the corresponding provision of the preliminary draft Convention on international leasing, the committee preferred for the time being to retain it in square brackets. Finally, paragraph 2 supplements the first part of paragraph 1 in that it is directed not to the interpretation of the provisions of the Convention but to the principles to be applied to matters governed by the Convention which are not settled by it: for such cases mention is made of the general principles on which the Convention itself is based and, moreover, of the law applicable by virtue of the rules of private international law.



ANNEX

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<sub>2</sub>/ 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./