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Unidroit

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

Discussion paper regarding the final provisions to be incorporated

in the future Convention on international factoring, including an
analysis of the combined effect of Article 4 and Article X

(prepared by the Secretariat)

Rome, November 1986

I. INTRODUCTION

1. In accordance with a request made by the committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring at its first session held in Rome from 22 to 25 April 1985 (Study LVIII - Doc. 19, paragraph 4), the Unidroit Secretariat prepared a set of draft final clauses to accompany the draft articles of the Convention as revised by the committee at the afore-mentioned session which were contained in Study LVIII - Doc. 21. These provisions were to a large extent based on the corresponding provisions of the 1983 Convention on Agency in the International Sale of Goods (hereafter referred to as the "Geneva Agency Convention"), the most recent international convention to be adopted at a diplomatic Conference under the auspices of Unidroit. It should however be added that the close relationship between that convention and the 1980 United Nations Convention on Contracts for the International Sale of Goods (hereafter referred to as the "Vienna Sales Convention") resulted in certain solutions being adopted at Geneva with a view to ensuring exact correspondence between the two conventions (see Article B, below), which might not necessarily be appropriate for other conventions concluded on the basis of Unidroit drafts.

2. Since it is traditionally the case that the final provisions of Unidroit conventions are not the subject of lengthy discussion by the committees of governmental experts responsible for the preparation of those conventions, the Secretariat limited itself in Doc. 21 to summary comments on the draft Articles A to K, on which it has however proved necessary to expand, in respect in particular of Article C, in the light of certain observations made during the second session of the committee held in Rome from 21 to 23 April 1986 (Study LVIII - Doc. 24, paragraph 4). The texts and commentary are contained in Part II of this document.

3. In compliance with a request made by the committee at that second session (Study LVIII - Doc. 25, paragraph 41), the Secretariat has included in Part III of this document an analysis of the combined effect of Article 4 and Article X in relation to the problem of the effect to be granted to a clause in the sales contract purporting to prohibit the assignment of a receivable arising thereunder.

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

Article A

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

Commentary

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

Article B

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

Commentary

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

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

Article C

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

Commentary

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

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

Criticism was levelled at this provision during the second session of the committee of governmental experts by one observer who considered that it could have the effect of interfering with the autonomous scope of application of other international instruments, for example civil liability conventions. He therefore suggested that either the whole of the proviso "provided that ... such agreement" be deleted, or alternatively that the place of business of the factor alone should be relevant. If the main concern underlying those proposals is the saving of international civil liability conventions, then it should be borne in mind that Article 9, paragraph 3 already achieves that aim in respect of the factor's liability in relation to third parties for loss, injury or damage caused by goods in respect of which he has acquired rights in the circumstances contemplated by Article 5. If on the other hand, the objection relates to other possible

international conventions dealing with the assignability of receivables and the effect of such assignments, then to the extent that factoring transactions are concerned with a tripartite relationship, the proviso proposed by the Secretariat would seem to be justifiable in the interest of the security of the parties.

With a view to facilitating discussion which may take place on Article C at a later stage, the Secretariat would recall that the corresponding provision of the Geneva Agency Convention provides that "This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions of substantive law concerning the matters governed by this Convention ...". The words "of substantive law" were added to avoid what some delegations saw as a possible conflict between the Geneva Agency Convention, which normally applies whenever the agent has his place of business in a Contracting State, and the Hague Convention on the law applicable to agency of 14 March 1978, Article 11 (b) of which provides that it is the internal law of the State in which the agent has acted which shall apply if the third party has his business establishment or, if he has none, his habitual residence in that State. A judge in a State which was Party to both Conventions might therefore find himself in a situation where he would be called upon to apply the Geneva Agency Convention under Article 2 (1)(a) of that instrument and a different set of rules in accordance with Article 11 (b) of the Hague Convention.⁽¹⁾ Although some delegations considered that in such a case the judge should give precedence to the substantive rules contained in the uniform law Convention, which was precisely intended to eliminate recourse to conflicts of law rules, others were less sure and it was to resolve the dilemma in favour of the application of the Geneva Agency Convention that the words "of substantive law" were added in Article 23 thereof.

In this connection, the Secretariat has noted that Article 12 of the Convention on the law applicable to contractual obligations, opened to signature in Rome on 19 June 1980, lays down the following rules governing the law applicable to voluntary assignment:

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- (1) It should be noted that Article 22 of the Hague Convention provides that "The Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party". Had the words "of substantive law" not been added in Article 23 of the Geneva Agency Convention then the situation would, according to some at least, have been that each instrument yielded precedence to the other.

"1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and the assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

In fact, the requirement in Article 2, paragraph 1 of the draft Convention on international factoring that, for the Convention to apply, all three parties, supplier, debtor and factor must have their places of business in Contracting States or alternatively that both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State is so restrictive that cases would seem to be rare where either paragraph 1 or paragraph 2 of Article 12 of the Rome Convention would lead to the application of the law of a State which is not a Party to the prospective Convention on international factoring while at the same time that Convention would itself be applicable. Since the parties to the factoring contract would be unlikely to choose a law other than that of their own country to govern their mutual relations, (2) the problem might well be limited to cases where the law which governs the assignability of the right to payment is that of a State which is not a Party to the Convention on international factoring.

The committee may in these circumstances wish to consider whether it is necessary or desirable to amend Article C in such a way as to reflect the solution contained in Article 23 of the Geneva Agency Convention. (3)

Article D

1. If a Contracting State has two or more territorial units in which different systems of law are applicable in relation

(2) The position might be complicated if the factoring contract were to be concluded directly between the supplier and the import factor.

(3) The same difficulty might, in theory at least, arise as Article 21 of the Rome Convention provides that "This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party".

to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

2. These declarations are to be notified to the depositary and to state expressly the territorial units to which the Convention extends.

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

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

Commentary

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

The text of Article D follows that of Article 24 of the Geneva Agency Convention and moreover corresponds closely also to the most recent expression of the will of States in this connection, namely Article 26 of the 1985 Hague Convention on the law applicable to contracts for the international sale of goods.

Article E

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

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

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

Commentary

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

Article F

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

Commentary

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

Convention which provides for its application "when the rules of private international law lead to the application to the factoring contract and to the contract of sale of goods of the law of a Contracting State".

At both the Vienna and Geneva Conferences however a number of States, especially Socialist States which have enacted special legislation regulating foreign trade relations, called for the possibility to take a reservation in respect of the application of the two Conventions in accordance with the rules of private international law in cases where they would not otherwise be applicable. The text of Article F is based on that of the reservation clause contained in Article 95 of the Vienna Sales Convention and Article 28 of the Geneva Agency Convention.

Article G

1. Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article E take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

4. Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. A withdrawal of a declaration made under Article E renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

Commentary

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

Article H

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

Commentary

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

Article I

Variant I

This Convention applies when the factoring contract pursuant to which the receivables are assigned is concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, paragraph 1 (a), or the Contracting State or States referred to in paragraph 1 (b) of that Article.

Variant II

This Convention applies when the receivables assigned by the supplier under a factoring contract arise from a contract of sale of goods concluded on or after the date on which the Convention enters into force in respect of all the Contracting States referred to in Article 2, paragraph 1 (a), or the Contracting State or States referred to in paragraph 1 (b) of that Article.

Variant III

This Convention applies when the receivables assigned under a factoring contract come into existence on or after the date on which the Convention

enters into force in respect of all the Contracting States referred to in Article 2, paragraph 1 (a), or the Contracting State or States referred to in paragraph 1 (b) of that Article.

Commentary

One of the most difficult problems to be solved in the context of private law conventions involving tripartite relations is that of determining which transactions will be subject to the provisions of the Convention once the requirements for its entry into force have been met. The position is complicated in this instance by the fact that Article 2 provides that the Convention will, subject to the introductory wording of the article, apply (a) when the supplier, the debtor and the factor have their places of business in Contracting States or (b) when the rules of private international law lead to the application to the factoring contract and the contract of sale of goods of the law of a Contracting State.

Assuming however that the requirements laid down by Article 2, paragraph 1 (a) or (b) have been satisfied, it would still be necessary to determine at which point the "trigger" mechanism operates in respect of a given transaction. Is it for example sufficient if the receivables assigned under an existing factoring contract come into existence on or after the date of the entry into force of the Convention in respect of the State or States concerned, or should the sales contract under which the receivables arise have been concluded on or after the date of such entry into force, or again ought it to be necessary for the factoring contract itself to be concluded on or after that date? One could also imagine a combination of the solution contained in Variant I with that in Variant II or III although this would evidently reduce somewhat the number of cases to which the Convention would be applicable.

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

At the second session of the committee, one representative expressed a preference for Variant III, while in written observations received by the Secretariat subsequent to that session the Austrian authorities have proposed the retention of Variant I.

Article J

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

Commentary

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

Article K

1. This Convention shall be deposited with the Government of

2. The Government of shall:

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

(b) transmit certified true copies of this Convention to all Signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit).

Commentary

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

Authentic text and witness clause

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

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

Commentary

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

III ANALYSIS OF THE COMBINED EFFECT OF ARTICLE 4 AND ARTICLE X

1. From the outset of the Institute's work on the draft Convention, differences of opinion emerged as to how far effect should be given to a clause in the sales contract prohibiting the assignment of a receivable arising thereunder. Ultimately, the study group decided in favour of retaining

an article (Article 4) providing 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 an assignment.

2. The question is one to which the committee of governmental experts gave lengthy consideration at both its first and second sessions (see Study LVIII - Doc. 25, paragraphs 38 et seq. for a summary of the discussion) in the course of which many arguments were developed both in favour of retaining and of deleting the provision, in which latter case the effectiveness of such a prohibition would in principle fall to be decided by the national law governing the assignability of the right to payment.

3. At the first session attempts were made to find solutions which might provide a basis for compromise: the first consisted in stating that the assignment of a receivable by the supplier to the factor could be effective notwithstanding any agreement between the supplier and the debtor prohibiting such an assignment, unless the debtor within (X) number of days after notice of assignment sent written notice to the factor invoking such agreement; the committee agreed that this solution, if adopted, would have to be completed by a provision indicating the method of calculating the time limit. The second formula proposed was to provide that a stipulation in the contract of sale prohibiting the assignment of a receivable shall be effective against the factor only if specifically accepted in writing by the supplier. The general view was that this solution would be difficult to operate in practice. Another possibility, not far removed from the last proposal, was to indicate that the assignment of a receivable by the supplier to the factor may be effective notwithstanding any agreement prohibiting the assignment contained in a standard form contract. A number of representatives objected however that the distinction between standard form and negotiated contracts did not exist in the law of their countries and that the formula would give rise to difficulties. Finally, the possibility was canvassed of combining the first and second solutions mentioned above. At the end of a wide-ranging debate, the committee came to the conclusion that none of the compromise proposals constituted a satisfactory solution. Independently of 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 since any intermediate solution of a mandatory character would represent a step backwards in relation to the law of their countries on the matter.

4. Any decision regarding the ultimate fate of Article 4 was therefore postponed to the committee's second session when once again a marked division of opinion became apparent and, with a view to finding a generally acceptable solution which could be proposed in the draft text to be submitted for adoption at a diplomatic Conference, the Secretariat suggested that assistance might be derived from the way in which the conflict of views regarding the need for written form had been resolved in the context of the Vienna Sales Convention. The approach adopted there had been: (i) to lay down the general rule that written form is not required (Article 11); (ii) to state in Article 12 that any provision of Article 11 and certain other articles of the Convention allowing a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than writing does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96 of the Convention and, (iii) in Article 96 to provide that a Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with Article 12 that any provision of Article 11 etc. that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in that State.

5. Articles 4 and X of the draft Convention on international factoring as at present drafted seek to maintain a strict parallelism with this system. Thus Article 4, paragraph 1 establishes the substantive rule of law that 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. Paragraph 2 of Article 4, by analogy with Article 12 of the Vienna Sales Convention, then provides that paragraph 1 will not apply when the debtor has his place of business in a Contracting State which has made a declaration under Article X of the Convention while Article X (corresponding to Article 96 of the Vienna Sales Convention) allows a Contracting State to make a declaration at any time in accordance with Article 4, paragraph 2 that the provisions of Article 4, paragraph 1 shall not apply when the debtor has his place of business in that State.

6. What it is important in the first place to realise is that the combined effect of Articles 12 and 96 of the Vienna Sales Convention, and of Article 4, paragraph 2 and Article X of the draft Convention on international factoring, is not to introduce the converse rule to that laid down in Article 11 and in Article 4, paragraph 1 respectively of those instruments, but rather totally to remove the subject-matter of those provisions from the Convention so that a judge will find his solution to the problem of written form or to that of the effectiveness of the prohibition on assignment in accordance with the rules of the applicable law.

7. On further reflection however, the Secretariat has come to the conclusion that the present language of Article 4, paragraph 2 is perhaps not fully satisfactory in two respects. Its hesitations may in the first place be illustrated by the following example (situation I): the supplier and the factor have their places of business in State A which, although its internal law gives effect to a prohibition on assignment, has nevertheless ratified the Convention without availing itself of the reservation contained in Article X, while the debtor's place of business is located in State B which has made a declaration under that article. A judge in State A seized of such a case would in the first place decide that Article 4, paragraph 1 does not apply because the condition set out in paragraph 2 of that article that the debtor has his place of business in a Contracting State which has made the declaration under Article X has been satisfied. If the judge finds the law of State B to be that which governs the assignment and he applies that law the prohibition will be upheld. Suppose, however, that he finds his own national law to be applicable: since, a priori Article 4, paragraph 1 does not apply, he would, it is submitted, apply his own national law governing domestic transactions which would likewise give effect to the prohibition. This result appears somewhat strange as it may be supposed that by ratifying the Convention without making the declaration provided for in Article X, the legislator in State A has intended as far as possible to give effect to the rule contained in Article 4, paragraph 1, albeit that rule is in diametric opposition to his internal law. If this reading of the situation is correct, then it would seem that a judge in State A ought to be enabled to apply the provisions of Article 4, paragraph 1 in all cases where his own law determines whether or not the right to payment is acceptable. This result could, it is suggested, be achieved by amending Article 4, paragraph 2 to read as follows:

"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, except in cases where the assignability of a right to payment is governed by the law of a Contracting State which has not made such a declaration."

8. Such drafting would render Article 4, paragraph 1 applicable in the case cited above but it would not meet a further objection that might be levelled at the present text of paragraph 2 and which may be illustrated by the following case (situation II): the supplier and the factor have their places of business in State C which has made a declaration under Article X whereas the debtor has his place of business in State D which is not a Party to the Convention on international factoring; suppose moreover that both the factoring contract and the sales contract, which includes a prohibition on assignment of the right to payment, are governed by the law of State C with the consequence that the Convention will be applicable under the terms of Article 2, paragraph 1 (b). Since, in these circumstances, the debtor does not have his place of

business in a Contracting State which has made a declaration under Article X, the provisions of Article 4, paragraph 1 will apply even though the law of State C, and possibly also that of State D, would give effect to the prohibition on assignment.

9. Such a result seems, at first sight at least, to be curious and how far it might be acceptable is bound up intimately with the reasons for the objections of a number of States to the content of Article 4, paragraph 1. If, on the one hand, the principal concern of the legislators in such States is the protection of debtors in those States then the position of debtors in non-Contracting States might be of less importance to them, and moreover in situation II the application of Article 4, paragraph 1 would indeed operate to the advantage of a factor in the Contracting State. If, however, the purpose of paragraph 2 of that article is seen essentially as safeguarding as far as possible the contractual freedom of the parties to the sales contract, then the present wording of the provision could result in solutions in individual cases which might be unacceptable. If this were to be the case, then it would be necessary further to amend Article 4, paragraph 2 to meet the difficulty, for example by adding language such as that which is contained in the proposed new sub-paragraph (b). The text of paragraph 2 as a whole could read as follows:

"2. The provisions of the preceding paragraph shall not apply when:

- (a) the debtor has his place of business in a Contracting State which has made a declaration under Article X of this Convention, except in cases where the assignability of a right to payment is governed by the law of a Contracting State which has not made such a declaration, or
- (b) the assignability of a right to payment is governed by the law of a Contracting State which has made a declaration under Article X of this Convention, except in cases where the debtor has his place of business in a Contracting State which has not made such a declaration."

10. The effect of sub-paragraph (b) is in effect to introduce for the first time in the draft Convention a reference to the law governing the assignability of the right to payment as the principal criterion for determining the applicability of Article 4, paragraph 1 since in sub-paragraph (a) it operates only as a proviso limiting the scope of the exception which is based on the readily identifiable criterion of the debtor's place of business. The proviso in sub-paragraph (b) has been included on the assumption that the original draft of Article 4, paragraph 2 which allowed for the application of paragraph 1 whenever the debtor has his place of business in a State which has not made a declaration under Article X reflected the intention of the members

of the committee. If that proviso were to be deleted then it is submitted that the application in any individual case of the rule contained in Article 4, paragraph 1 would depend almost exclusively upon whether the law governing the assignability of the right of payment is that of a Contracting State which has made a declaration under Article X, a solution which would cause few drafting problems but which would create great uncertainty for businessmen who would, before knowing whether or not Article 4, paragraph 1 would apply in any given case, need advice as to the law governing the assignability of the receivable.

11. The Secretariat is fully conscious of the fact that the alternative redraft for Article 4, paragraph 2 suggested above contains what are in effect exceptions to an exception, which is not a particularly felicitous form of drafting, albeit not unknown in international private law conventions. Against this must however be set the fact that the second alternative in particular has the merit of providing solutions to the two main problems identified in connection with the text of Article 4, paragraph 2 as it stood at the end of the committee's second session.

12. In conclusion, it should be recalled that many other possible solutions were considered, all of which were however rejected either because they would have solved the problem identified in situation I or in situation II, but not in both, or because they would have involved still more complicated drafting which would have introduced an unwarranted degree of uncertainty for those practitioners whose activities would be affected by the future Convention.