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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT

CONVENTION ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING

Comments by the Governments of Austria, the Federal Republic
of Germany and Portugal on the text of the preliminary draft
Convention on international factoring and on the proposed
final clauses

Rome, March 1987

1. - Following the second session of the Unidroit committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring held in Rome from 21 to 23 April 1986, a number of comments have been received by the Unidroit Secretariat on the text of the preliminary draft Convention as it emerged from that session and on the proposed final clauses. These comments have been submitted by the Governments of Austria, the Federal Republic of Germany and Portugal⁽¹⁾. For ease of presentation, these comments are grouped together below under the provisions of the preliminary draft Convention (Annex to Study LVIII-Doc. 25) and of the draft final clauses (Study LVIII-Doc. 26) to which they relate.

DRAFT CONVENTION

Article 3

Portugal

Although we find sub-paragraph (a) to be necessary, it does not in technical terms seem to be correct.

As it stands, it cannot concern the question of the validity of a contractual provision, because:

- the validity of a contractual provision is to be assessed when the contract is signed and cannot depend on whether or not the receivables can be identified, in the future, as falling within the contract;
- technically, a contractual provision should not be valid for certain receivables only and not for others.

(1) Although intended for consideration at the second session of the committee, the Portuguese comments were only received by the Secretariat after the session. They have however been included in this document since they would seem to be as applicable to the revised text of the draft Convention as to that to which they were originally directed.

Article 4

Austria

The article should be deleted.

Federal Republic of Germany

The Unidroit Secretariat has in document 26 prepared a discussion paper on the Final Clauses, together with an analysis of the combined effect of Articles 4 and X. While no comments are called for on the proposed Final Clauses, our position regarding the analysis of the combined effect of Articles 4 and X is the following:

in the analysis, the problems which may result from the combined effect of Articles 4 and X are correctly illustrated. The proposed Article 4, paragraph 2 with its sub-paragraphs (a) and (b) seems to be acceptable from a theoretical standpoint. The following objections to the proposal however remain:

the provisions of sub-paragraphs (a) and (b), each of which contains an exception to an exception, appear to be extremely complicated. Furthermore, a declaration of the kind which each State may make in accordance with Article X would not have an effect corresponding to the content of the declaration on account of the exception to the exception contained in Article 4, paragraph 2(a).

Lastly, the exception to the exception provided for in sub-paragraph 2(a) deals with a case which is rather rare in practice. It is therefore suggested that the part of sub-paragraph (a) and of sub-paragraph (b) beginning with the word "except" should be deleted.

Article 5

Portugal

The first sentence limits the effects of this article to the relations between the parties involved in the contract ("as between the parties thereto").

Such effects are however only useful in regard to third parties, starting with the debtor.

The reservation of title to the goods in favour of the factor is of interest to the extent that the factor may set up that title against the debtor and his creditors. The same is true in respect of any eventual security interest.

In addition, if the transfer foreseen in Article 5 is valid only between the parties to the factoring contract, then we do not understand how the factor may be considered to be the owner of the goods for the purpose of disposing of them (Article 8).

Article 6

Austria

The debtor should be under a duty to pay, even if this duty derives only from national law and cannot be based on the Convention because the notice of the assignment does not meet the requirements of paragraph 1, sub-paragraphs (a) to (c). For the same reasons, the debtor should be discharged not only if he has paid in good faith and in accordance with paragraph 1, but also if he has paid in good faith and in accordance with national law.

Article 8

Austria

This article was the subject of much dispute during the last meeting of the committee and was therefore placed between brackets. A thorough analysis of the text reveals that the principle underlying Article 8 cannot be accepted. Taking into account all the disadvantages deriving from the fact that the debtor has, without his consent, become bound in a legal relationship to a third party (the factor), this provision would lead to a legal situation which cannot be considered to represent an appropriate balance between the interests of the debtor and those of the factor. The legal position of the factor, seen as a whole, would be unjustifiably improved.

For this reason Article 8 should be deleted.

Article 10

Portugal

Assuming that the rights which the factor acquires under the factoring contract against the debtor may be reassigned either to factoring companies or to other entities (and it may be useful to state this in the Convention), the problem remains of knowing whether the assignment of rights from one factor to another is to be conceived in legal terms as a simple assignment (applying also to other entities) or as a "re-factoring" or second factoring.

In the first hypothesis we might consider the advantage of maintaining a single operation of assignment either to a factoring company or to another entity.

Against this, and in favour of the second hypothesis, we might consider that the first factoring contract involves a transmission to the factor, even though the national and international recognition of the factoring contract only serves for the protection of the interests of all the parties when the assignor is a factoring company.

Considering that the Convention protects the interests of the debtor, which are as important in the first case as in the second or third, it seems that the second hypothesis is preferable ("re-factoring" or second factoring).

We think therefore that the Convention should apply to the second factoring operation with the necessary adaptations which the situation may require.

Article 12

Austria

In practice it will be difficult to ascertain general principles of the Convention. The words "in conformity with the general principles on which it is based and" should be deleted.

DRAFT FINAL CLAUSES

Article 1

Austria

Alternative I is to be preferred.