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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS FOR THE PREPARATION OF A DRAFT

CONVENTION ON CERTAIN ASPECTS OF INTERNATIONAL FACTORING

Comments by the Governments of South Africa and Sweden on
the text of the preliminary draft Convention on
international factoring

Rome, March 1987

The present document contains the observations of Governments on the text of the preliminary draft Convention on international factoring as it emerged from the second session of the Unidroit committee of governmental experts, additional to those already set out in Study LVIII - Doc. 27.

GENERAL OBSERVATIONS

South Africa

The South African Government welcomes the initiative and effort of Unidroit to unify certain aspects of the law applicable to international factoring. The draft Convention goes a long way in unifying the applicable law. It is, however, regretted that the proposed Convention is not wider in its application. In view of the diverging approaches in different legal systems to questions such as priorities, it is, however, appreciated that the time is probably not ripe to attempt to deal with aspects of international factoring that go beyond the relations of the parties inter se. Future developments in this respect in the different legal systems may in future make attempt at unification more feasible.

Sweden

The general opinion among interested parties in Sweden is somewhat mixed. The practical value of the Convention is questioned, since the Convention only deals with certain problems in international factoring. The general attitude to the project, not least among the finance companies, is nevertheless positive.

Article 1

South Africa

The stated object of Article 1 was to formulate as wide a definition as possible so as not to hinder the expansion of activities which are already regarded as factoring in certain countries. In terms of Article 1 a "factoring contract" is inter alia "a contract pursuant to which the supplier may or will assign to the factor, by way of sale or security, receivables arising from contracts of sale..." In South African law and some other legal systems (e.g. German law) the cession pursuant to a factoring contract is not always strictly speaking a cession by way of

sale or security. In instances where the factoring contract is a contract of loan the cession pursuant to such a factoring contract can be in securitatem debiti (by way of security) or it can be a cession for the purpose of fulfilling (discharging) the contract of loan. If the cession is in securitatem debiti the factor will only be entitled to take recourse to the ceded book debts if the client fails to repay the loan. If the cession is for the purpose of discharging the loan (a cession "a erfüllungshalber") the book debts act as a source from which the loan is to be repaid. In factoring with recourse the factor will be obliged to attempt to collect the book debts before he can have recourse to the client. It is not always certain whether such a cession for the purpose of discharging the loan can technically be called a cession by way of security. In view of the fact that many cessions pursuant to factoring contracts take this form, it is submitted in the interests of certainty that the words "by way of sale or security" should be omitted from Article 1 (a).

One of the essential characteristics of factoring is its continuing nature. If this continuing nature is not recognized it is difficult to distinguish factoring from certain forms of invoice discounting. In terms of Article 1 the proposed Convention will be applicable in instances where book debts are ceded to secure a single advance by a financier. As such a result was clearly not intended it is submitted that the words "on a continuing basis" should be included after the word "assign" in Article 1 (a). If problems are foreseen in interpreting these words, a third paragraph of Article 1 could make provision for a liberal interpretation of the words.

Article 3

South Africa

Article 3 (a) is in accordance with South African law. The desirability of clarifying the moment at which the transfer becomes operative can, however, be questioned.

Article 4

South Africa

Article 4 tends to tilt the balance in favour of the factor whilst an approach whereby rights subject to pacto de non cedendo are

inalienable, tilts the balance in favour of the debtor. In the light of the fact that neither of these approaches succeeds in balancing the interests of the parties satisfactorily more serious attempts should be made to find a workable intermediate solution.

Sweden

Even if much can be said in favour of this article, it does constitute a major derogation from the principle of party autonomy. It should therefore be deleted.

Article 9

Sweden

This article should be deleted. Adding paragraph 3 to this article is not enough in those cases when it is national law which imposes liability on the owner. This Convention which in principle deals only with the relationship between the supplier, the debtor and the factor should not contain provisions regulating the factor's liability towards third parties.