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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 Denmark and Japan on
the text of the preliminary draft Convention on
international factoring

Rome, April 1987

GENERAL OBSERVATIONS

Japan

This draft Convention does not deal with the questions of effectiveness of the transfer against third parties. However, in order to facilitate international factoring, it seems important and advisable to establish uniform rules not only on the questions of relations inter partes but also on the questions of priority of assignments.

Article 1

Japan

According to sub-paragraph (b), the factor is required to provide at least two of four services, namely finance, maintenance of accounts, collection of receivables and protection against the risk of non-payment by debtors. However, it is not clear why the factor is required to provide at least two services, not at least one service. It seems to suffice for the factor to provide at least one of the above-mentioned services.

Article 2

Japan

It is proposed that the words "different States" in the introductory language of paragraph 1 be substituted by the words "different Contracting States."

Sub-paragraph (b), which provides an alternative ground for the application of the draft Convention based on the rules of international private law, may damage speedy transactions. It will not be possible for an ordinary businessman to determine in the course of disposition of an enormous volume of transactions whether or not conflicts rules lead to the application of the law of a Contracting State to both the contract of sale of goods and the factoring contract. It is therefore proposed that sub-paragraph (b) be omitted.

Article 4

Denmark

We favour the Swedish proposal to delete Article 4 since the provision implies excessive restriction of freedom of agreement.

Japan

As far as paragraph 1 is concerned, pros and cons are expressed, as paragraph 2 of Article 466 of the Civil Code provides that a claim shall not be effectively assigned in cases where the parties have declared a contrary intention; however, such declaration of intention cannot be set up against a bona fide third party.

It may be pointed out that not only the interests of the factor or the promotion of international factoring but also the interests of the debtor and respect of party autonomy should equally be taken into consideration.

The alternative redraft for paragraph 2 is hard to understand, although it might contain the right conclusions. It might be preferable for the exception to be redrafted in a simple and concise form.

Article 6

Japan

It is suggested that the words "with the supplier's authority" be deleted, as the meaning and implications are quite vague, and further, if questions regarding the form of the authority are governed by the applicable law, uncertainty would be created and the burden of determining whether or not the factor has the authority to give notice of the assignment would be imposed on the debtor.

Paragraph 2 states that the debtor shall be effectively discharged of his liability when two conditions, namely the condition that the requirements set out in paragraph 1 have been satisfied and the condition that payment has been made in good faith, have been met. However, the relationship between the two conditions is not clear, as the latter condition seems to be implicitly included in the former condition.

Article 7

Japan

The meaning and implications of the word "available" are quite vague and it seems inappropriate that the meaning and implications are left to national law. Considering the importance of this provision, clarification may be required on this point. According to Japanese law regarding the right of set-off, it is not necessary that the debtor's claim must be due for payment at the time when the debtor received notice of the assignment.

Article 9

Denmark

We consider it inadvisable to include Article 9 in the Convention as this provision regards third party liability as opposed to the rest of the draft Convention which exclusively regulates relations inter partes.

Article 10

Japan

Paragraph 1 is a very problematic provision, as its precise meaning and implications are totally vague. Replies to questions contained in the Annex to Study LVIII - Doc. 22 are quite different in substance depending on the Governments. It is therefore necessary to unify the interpretation on the matters pointed out in the above-mentioned questions, especially on the problems arising from the application of Article 1 and Article 7 to subsequent assignments.