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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

(third session, 22 to 24 April 1987)

SUMMARY REPORT

prepared by the Unidroit Secretariat

Rome, June 1987

1. The third and final session of the Unidroit committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring was held at the seat of the Institute in Rome from 22 to 24 April 1987. Twenty-seven member States of Unidroit, three non-member States, three intergovernmental organisations, two international non-governmental organisations, two international professional associations and three national professional associations were represented at the session (see APPENDIX I hereto). Mr Royston M. Goode (United Kingdom) chaired the session.

2. The committee had before it the following documents:

- Doc. 25 - 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
- Doc. 26 - 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)
- Doc. 27 - 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
- Doc. 28 - Comments by the Governments of South Africa and Sweden on the text of the preliminary draft Convention on international factoring
- Doc. 29 - Comments by the Governments of Denmark and Japan on the text of the preliminary draft Convention on international factoring
- Doc. 30 - Comments by the Government of the Netherlands on the text of the preliminary draft Convention on international factoring and on the proposed final clauses
- Doc. 31 - Comments by the Government of the United States of America on the text of the preliminary draft Convention on international factoring and on the proposed final clauses (only the English version of this document was available at the session).

3. After adopting its agenda (see APPENDIX II hereto), the committee proceeded to a consideration of the text of the preliminary draft Convention on international factoring drawn up by it at its second session

held in Rome from 21 to 23 April 1986 (Study LVIII - Doc. 24), and also briefly reviewed the draft final provisions prepared by the Secretariat (Study LVIII - Doc. 26). A drafting committee composed of the Chairman of the committee of governmental experts and of the representatives of France, Italy and the United States of America prepared a revised version of the draft Convention which was then considered by the full committee at its final meeting on the morning of 24 April. The text of the draft Convention adopted by the committee of governmental experts at the close of its third session is contained in APPENDIX III to this report.

4. It may be useful to note here that the committee of governmental experts sought to achieve compromise solutions capable of the widest possible acceptance with a view to the diplomatic Conference for the adoption of the draft Convention. The general feeling within the committee at the conclusion of its work was that the outcome was satisfactory and that the text which would be submitted to the Conference reflected a fairly broad consensus, in regard also to those questions which had been the subject of some controversy among governmental delegations during one phase or another of the work.

5. At the end of the third and final session of the committee of governmental experts for the preparation of a draft Convention on international financial leasing, which was held immediately after the session of the committee of governmental experts for the preparation of a draft Convention on certain aspects of international factoring, the Canadian representative announced that following discussions between the competent Canadian authorities and the Unidroit Secretariat his Government had decided to host a diplomatic Conference for the adoption of the draft Conventions on international financial leasing and international factoring. The Conference will be held in Ottawa in May 1988.

6. The purpose of this document is to do no more than indicate the changes to the text of the preliminary draft as it stood at the end of the second session of the committee. An explanatory report will be prepared by the Unidroit Secretariat and will accompany the text which will be submitted to the diplomatic Conference for adoption.

7. Only minor drafting amendments were made to the *Preamble*: the word "factoring" which was included in brackets in the second paragraph of the French version has been deleted while the last paragraph has been simplified by taking over the language to be found in other international trade law Conventions and now reads: "HAVE AGREED as follows".

8. There were no amendments to the substance of *Article 1*, paragraph 1 although some changes were made with a view principally to

clarifying the drafting. The words "by way of sale or security" in *sub-paragraph (a)* were deleted for the reason that other methods of transferring receivables may exist in certain systems; the language in question might have been understood in a restrictive sense and could have excluded the application of the Convention when, according to the terminology used in national law, an assignment is effected neither "by way of sale" nor "by way of security". In addition, the words "in the course of their business", which were intended to indicate that only transactions between businessmen were contemplated, have been replaced by language similar to that contained in Article 2 (a) of the Vienna Sales Convention which is in effect a negative definition in that it excludes contracts between a supplier and his customers "for the sale of goods bought for their personal, family or household use". This form of wording seemed to be more consistent from a drafting point of view with Conventions dealing with related matters and to indicate with greater clarity the exclusion of consumer transactions, while on the other hand the assignment of receivables arising out of contracts concluded with public bodies or enterprises of a non-profit making character would remain subject to the rules of the Convention. It must be emphasized that the committee was of the view that assignments of receivables relating to the other categories of sales excluded from the application of the Vienna Sales Convention by Article 2 (b) to (f) thereof should however fall within the application of the Convention on international factoring. Finally, it should be noted in connection with Article 1, paragraph 1 that the word "biens" in the French version has been replaced by "marchandises" so as to ensure harmonisation with the terminology employed in other recent Conventions dealing with international trade law.

9. Only drafting amendments have been made to *paragraph 1 (b)*, introduced principally at the request of the United States delegation so as to take account of a slightly different linguistic usage in that country. It should also be noted that the committee was of the opinion that the factor sometimes performs the services mentioned in his own interest rather than in that of the supplier (in particular the maintenance of accounts and the collection of receivables) and this explains the new formulation of the introductory language to the effect that "the factor is to *perform* at least two of the following *functions*". The last function which was, in the preceding version of the draft, described as "protection against the risk of non-payment by debtors" is now referred to as "protection against default in payment by debtors" so as to indicate clearly that only credit risks are accepted by the factor and not all cases of failure by the debtor to make payment, for example because he disputes his liability to pay.

10. A new element was added to *paragraph 1 (c)* as the committee was of the belief that consistency between the provisions of the Convention, in

this case between Article 1 and Article 7 (former Article 6), paragraph 1 (a), called for immediate clarification of the fact that one of the constitutive elements of the factoring contract is that notice to debtors must be given in writing.

11. Only minor amendments have been made to *paragraph 2*: one of these was simply a matter of drafting (the addition of "goods" which is to be taken as including services), whereas the other was the deletion of the words "where appropriate" which might have created the mistaken impression that the Convention was only applicable to the provision of services associated with the sale of goods.

12. A new provision, *paragraph 3*, was added which the committee considered to be necessary so as to clarify the meaning of "writing", in particular given the anxiety of the professional associations which stressed the importance of certainty as to whether a stamp on an invoice sent to the debtor should be considered to be writing in the absence of any signature. That provision now reads: "In this Convention "writing" includes any form of writing, whether or not signed"; the committee was however at its final meeting conscious of the unsatisfactory nature of this wording which failed to mention modern means of communication, and it requested the Unidroit Secretariat to prepare for the Conference another formulation which could be based on definitions contained in other international texts, some of them still at the drafting stage, or in national law, in which connection reference was made to the United States Uniform Commercial Code.

13. While *Article 2* remained unchanged, *Article 3* now contains the provisions of the former Article 11 concerning the possibility for the parties to the factoring and sales contracts to exclude the application of the Convention and the circumstances in which such exclusion is permitted. The reason for the transposition of these provisions was that they relate to the scope of application of the Convention, as has been shown by a number of recently adopted Conventions. Of the amendments to the former text the first to be noted is that both the first and second paragraphs provide that "*The parties ... may exclude the application ...*": this language follows that of other recent international instruments, in particular Article 6 of the Vienna Sales Convention. It was moreover pointed out that, as paragraph 2 was drafted, the parties to the contract of sale would have been obliged to carry out a first transaction, subject to the Convention, so as to be able to exclude its application to subsequent transactions. With a view therefore to overcoming this difficulty, the exclusion will, under the new formulation, apply only to receivables arising at or after the time when the factor has received notice in writing of such exclusion.

14. Scarcely any changes have been made to *Article 4* (former Article 3). In response to a proposal to broaden the scope of this article to include third parties, it was once again emphasized that the rule was limited to parties to the factoring contract, the effects of the assignment on the debtor being dealt with in Articles 7 to 9. As to other third parties, the prevailing intention within the committee had been that their rights were unaffected as the laying down of a priority rule had been avoided, although it was noted that in the absence of any provision to the contrary in the applicable national law, the usual result would be that the assignment could be valid against third parties. It should be recalled that one representative stressed that the purpose of this provision had been to remove the difficulty which might exist in some legal systems arising out of a failure to identify the receivables and thus invalidate the factoring contract, rather than to establish a general rule on validity independent of the other grounds of invalidity recognised by the applicable national law. In consequence, the English text was amended to read as follows: "a contractual provision for the assignment of existing or future receivables *shall not be rendered invalid by the fact that ...*"; the French text has however remained unchanged ("*une clause du contrat ... est valable, même si ...*") as in the opinion of the French speaking representatives this language hardly left room for any other interpretation than that which had originally been intended.

15. *Article 5* (former Article 4) was the subject of a debate in the course of which certain arguments raised at previous sessions in favour of or against the rule laid down therein were once again invoked. In the course of the discussion a difference of opinion emerged as to the proper interpretation of paragraph 2 for while some representatives insisted that the purpose of that provision had been to displace the rule contained in paragraph 1 so as to give free rein to the rules of private international law, others argued that its effect was on the contrary to lay down a rule of substantive law exactly opposite to the solution contained in the preceding paragraph: such an interpretation was in particular supported by the fact that the reservation ought not to lead to the application of the same rule as that which was to be displaced, all the more so as it was probable that the law applicable to the assignment would most often be that of the seller's place of business, and in consequence that of the factor, a solution which would hold out scant prospects of protection for the debtor.

16. In addition, the committee had agreed at its preceding session to limit the principle set out in paragraph 1, namely the validity of the assignment of the receivable by the supplier to the factor notwithstanding any agreement between the supplier and the debtor prohibiting such an assignment, to the right to payment of the receivable (following the model of the Uniform Customs and Practices for Documentary Credits) and,

accordingly, the idea was mooted at the third session of the committee of distinguishing the effects of the assignment between the parties to the factoring contract from those regarding the debtor. The prohibition on assignment stipulated by the debtor would in no way affect the validity of the assignment between the parties to the factoring contract, but whenever the State in which the debtor had his place of business had made a reservation, the prohibition would on the other hand deprive the assignment of any effect in his regard. Given the agreement reached within the committee on this important point, the committee as a whole seems to have accepted the principle of a reservation of a substantive character which in any event would have the merit of guaranteeing certainty. In these circumstances, and subject to the deletion of the words "of a right to payment" which were rendered superfluous by the solution retained in paragraph 2, paragraph 1 remained unchanged while paragraph 2 was reformulated as follows: "However, such an assignment shall not be effective against the debtor when he has his place of business in a Contracting State which has made a declaration under Article X of this Convention"; finally, the square brackets around the article were removed.

17. *Article 6*, formerly numbered *Article 5*, has remained unchanged. As regards *Article 7* (former *Article 6*), *paragraph 1*, one representative enquired whether the conditions set out therein were to be considered exhaustive or whether less strict requirements of national law could perhaps impose on the debtor an obligation to pay the factor. In reply, it was stressed that the intention of drawing up uniform rules of substantive law militated in favour of the first solution and, in the interest of certainty, the two conditions (absence of knowledge of a superior right to payment and notice given in accordance with sub-paragraphs (a) to (c)) are now introduced by the words "if, and only if".

18. As regards on the other hand the grounds for discharge open to the debtor under *paragraph 2*, the committee agreed that apart from payment made in accordance with paragraph 1, the debtor should be discharged from liability even if he was not obliged by the Convention to make payment because the requirements of paragraph 1 were not satisfied, whenever such payment would discharge him under the applicable law. The committee was however reluctant to refer to the applicable national law without indicating how it should be determined and in the first instance it considered designating the law which would govern the question of payment; to this end the possibility was contemplated of choosing the law of the debtor's place of business. Two objections were raised against this solution: on the one hand it was questionable from the standpoint of principle to introduce a conflicts rule into a Convention establishing uniform rules of substantive law while on the other it was difficult to take a decision on the connecting factor for the purpose of determining the law applicable to the

payment with the attendant risk of ignoring the different rules contained in other applicable international instruments or those chosen by the parties. In consequence the formula ultimately adopted is worded as follows: "Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability ...". Finally, the committee considered the significance of the requirement of good faith for the purpose of discharging the debtor of his liability. Several representatives asked whether what was envisaged was a condition different from those set out in paragraph 1 or whether "good faith" was to be understood as being bound up with the question of the knowledge which the debtor has (or ought to have had) of a superior right to payment. Given the uncertainty caused by the words, it was agreed to delete them.

19. *Paragraph 1 of Article 8* (former Article 7) remained unchanged apart from the deletion of the introductory wording ("Subject to Article 4") which the committee considered to be superfluous as the Convention must be read as a whole.

20. Only minor changes were made to the first sentence of *paragraph 2*, one of them being of a purely drafting nature affecting only the English text and caused by terminological differences in British and American usage ("The debtor may also *assert ... any other defences, including* any right of set-off"), while the other makes it clear that the notice of assignment referred to is notice "conforming to Article 7 of this Convention". On the other hand, the sentence ("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"), which had been introduced at the committee's second session, has now been deleted: in effect, after one representative had proposed extending the scope of this provision to any act constituting a waiving of the exercise of the right of set-off under the applicable law, and that this exception should apply moreover to the defences mentioned in paragraph 1, the committee was of the opinion that since set-off is an extremely complicated matter it was not possible to treat all aspects of it in a Convention on international factoring; given that the applicable law would in any case govern questions not expressly settled by the Convention in accordance with Article 12, paragraph 2, it was preferable to leave the whole question (subject to the two basic principles enunciated in Article 8) outside the scope of the prospective rules.

21. *Paragraph 1 of Article 9* (former Article 8) was modified by the introduction of language intended only to clarify the scope of the principle contained therein: one observer in effect drew attention to the fact that the debtor may have a direct action against the factor, for example when the latter has been guilty of negligent conduct, founded on non-performance, defective or late performance of the contract of sale of

goods by the supplier. Since it was once again not the intention of the committee to lay down a general rule but simply to prevent a debtor bringing an action solely on the grounds mentioned in paragraph 1, this provision now reads as follows: "non-performance or defective or late performance ... by the supplier ... shall not *alone* entitle the debtor to recover ...".

22. *Paragraph 2* has been modified and contains an exception to the general principle additional to that already included therein, each of which is contained in a separate sub-paragraph. The introductory language has been made more explicit and now reads: "The debtor who has such a claim against the supplier shall nevertheless be entitled to recover money paid to the factor ...". As regards the content of *sub-paragraph (a)*, which was already included in the earlier version of the draft, the committee decided to restrict its application to situations where the factor has not paid the supplier the purchase price of the receivable and to delete the words "or incurred a liability to pay", as it was recalled that it was of the essence of a factoring contract that the factor undertakes to pay, and that he could in any case protect his rights against the supplier in the factoring contract. The other situation now dealt with in *sub-paragraph (b)*, in which the debtor may recover a sum paid by him to the factor (subject of course to his disposing of an action for recovery of the price from the supplier), was added at the request of certain representatives who noted that if the factor pays the supplier before the latter has performed the service or delivered the goods for which payment was to be made in the knowledge that performance had not yet taken place, it is the factor and not the debtor who must assume the risk of non-performance, late or defective performance by the supplier, all the more so as factors request suppliers to provide guarantees as to performance which are stipulated in factoring contracts. In consequence, *sub-paragraph (b)*, which will apply as an alternative to *sub-paragraph (a)* reads as follows: "where, at the time the factor paid such purchase price he knew of the supplier's non-performance as regards the goods to which the debtor's payment relates".

23. Article 9 of the text, which had been adopted by the committee at its second session, was deleted at its third session. Several representatives reiterated their Governments' opposition to the provisions of this article and stress was in particular laid on the fact that this was a matter which it had not initially been intended to deal with, the intention being rather to regulate only the obligations between parties directly involved in transactions for the assignment of receivables. Moreover, it was pointed out that even in those cases where there had been a transfer of a right over the goods in accordance with the provisions of Article 6 (former Article 5), the factor would not necessarily incur liability for damage caused by the goods; this was true of the transfer of

the benefit of a reservation of title clause in civil law systems but not of the security interests known to Common Law countries for example. In consequence, the problem which it was contemplated dealing with was one of very minor importance when set against the strong objections to which it had given rise, and although the representatives of the professional associations recalled that factors would have to take out insurance to cover their liability and that the cost of such insurance would be borne by suppliers, they were able to accept the deletion of the article.

24. As regards *Article 10, paragraph 1 (a)* remained unchanged: it should however be noted that following the transposition of the article permitting the parties to exclude the application of the Convention which is now numbered Article 3, the committee did not consider the question of whether those provisions should now be included among those mentioned in Article 10, paragraph 1 (a), probably because they were not previously included. The committee amended the wording of *sub-paragraph (b)* so as to facilitate the understanding of the mechanism which it was sought to implement: it considered it advisable to come back to the solution consisting in a fiction (which had been adopted at an intermediate stage of the preparatory work on the draft) placing the subsequent assignee in the position of the first assignee, and this in respect both of the rules in Article 7 concerning the debtor's obligation to make payment (including the form and content of the notice) and the conditions for the debtor to be discharged, and of those contained in Article 8 relating to the exercise by the debtor of defences and rights of set-off. One representative wondered whether the principle contained in this provision ought not also to apply to Article 9 and given the difficulties which had been encountered when the mechanism for the substitution of the parties had been adopted with a view to making the Convention applicable to subsequent assignments, it was agreed that the Secretariat should consider in good time for the Conference the manner in which the provisions would operate in practice for each of the other articles to which they were intended to apply.

25. One new provision was introduced as *paragraph 2*, so as to meet the concern of the professional associations which pointed out that in practice the supplier most often gives notice to the debtor that he must make payment to a person who is in fact a subsequent assignee, no notice having been given of the first assignment. In consequence this paragraph provides that "Notice to the debtor of the subsequent assignment may also constitute notice of the assignment to the factor".

26. Finally, the committee decided to maintain the provision, now contained in a new *paragraph 3*, which had been introduced at the preceding session at the request of one delegation which explained that its own country's legal system did not permit subsequent assignments and that

effect should therefore be given, under the terms of the Convention on international factoring, to prohibitions on subsequent assignments contained in factoring contracts. In consequence the square brackets around the paragraph were deleted and in the introductory language the words "The preceding paragraph" have been replaced by "This Convention" as the committee was of the opinion that the application of all the provisions of the Convention should be excluded in such cases.

27. *Article 11* remained unchanged apart from the deletion of the square brackets around the words "its object and purpose as set forth in the Preamble, to".

28. Lastly in connection with the text of the draft articles, it should be mentioned that one delegation submitted a proposal for the addition of a new article laying down a priority rule intended to govern those cases where a supplier has assigned the same receivable twice over to different factors. A number of objections were raised against this proposal, in particular the difficulty of establishing a uniform criterion acceptable to all legal systems, and since it was observed that such cases would in any event be rare as most factoring contracts contain an "exclusivity" clause in favour of the factor, the committee suggested that such a proposal might be considered at the diplomatic Conference but that the proposed article should not be added to the text of the draft Convention for the time being.

29. The committee then briefly considered the proposed final provisions. *Article X* was amended in consequence of the changes made to *Article 5*; the square brackets surrounding it were deleted and the provision now reads as follows: "A Contracting State may at any time make a declaration in accordance with *Article 5*, paragraph 2 of this Convention that an assignment under *Article 5*, paragraph 1 shall not be effective against a debtor when he has his place of business in that State.

30. As regards *Article B* concerning the conditions for the entry into force of the Convention, one representative suggested reducing the number of instruments whose deposit is required to three, having regard to the highly specialised character of the prospective Convention which should enter into force once it had achieved a multilateral, albeit restricted, character.

31. Objections to *Article C* were once again raised by one observer who maintained that the Convention should not lay down conditions for the application of international agreements by which a State was bound other than that in the course of preparation, for the purpose of determining which of the two instruments should apply; he therefore repeated his

which of the two instruments should apply; he therefore repeated his proposal to delete the last part of the provision beginning with the words "provided that". One representative wondered whether this article, although admittedly commonly found in the final provisions of recent international trade law Conventions, was really necessary in this case; he suggested that the subject matter of the draft Convention was extremely limited, while for example the 1980 Rome Convention on the law applicable to contractual obligations was concerned with a whole range of contracts, and that it might perhaps be possible to accept a situation consisting in the Convention on international factoring prevailing over any other international agreement dealing with the matters governed by it. Such a solution would moreover have the advantage of avoiding the problem of different Conventions each yielding precedence to the other. Other representatives were reluctant to delete the provision, being of the opinion that it would hardly be advisable to create a situation in which some States might not become parties to the Convention for the reason that they would not wish to be bound by its application in cases where another instrument would be applicable. The committee agreed therefore to place the whole of the article in square brackets.

32. A purely drafting change was made to the final words of *Article F* which now refers to Article 2, paragraph 1 (b). As to *Article I*, a number of representatives expressed their views in relation to the variants proposed by the Secretariat, the preference of the committee going towards a combination of the solutions set out in Variants I and II, the language of which submitted to the committee at its final meeting was the following: "This Convention applies when both the factoring contract pursuant to which the receivables are assigned and the contract of sale of goods which gives rise to these receivables are 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". This language avoids the automatic application of the future Convention to existing contracts which would not have permitted the parties to exclude its application. One representative however suggested that the proposed text of Article I would oblige parties to factoring contracts to conclude new contracts whereas it would be much simpler for them to amend existing contracts so as to render the Convention applicable to their contractual relations and he therefore proposed that the drafting of the provision be amended along those lines. The committee took note of this proposal but given the drafting difficulties it presented, it was agreed to leave the matter for consideration at the diplomatic Conference.

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APPENDIX II

DRAFT AGENDA

1. Adoption of the draft agenda.
2. Consideration 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 (Annex to Study LVIII - Doc. 25), notably in the light of:
 - (a) a 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 (Study LVIII - Doc. 25);
 - (b) a 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 (Study LVIII - Doc. 26);
3. Future work.
4. Any other business.

Text of the draft Convention on International Factoring
(adopted by the committee of governmental experts for the preparation of a draft
Convention on certain aspects of international factoring at its third session held
in Rome from 22 to 24 April 1987)

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 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 receivables arising from
contracts of sale of goods made between the supplier and his customers
(debtors) other than those for the sale of goods bought for their
personal, family or household use;
- (b) the factor is to perform at least two of the following functions:
 - finance for the supplier, including loans and advance payments;
 - maintenance of accounts (ledgering);
 - collection of receivables;
 - protection against default in payment by debtors;
- (c) notice of the assignment of the receivables is to be given in writing to
debtors.

2. In this Convention references to "goods" and "sale of goods" shall
include services and the supply of services.

3. In this Convention "writing" includes any form of writing, whether or
not signed.

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

1. The parties to the factoring contract may exclude the application of this Convention.

2. The parties to the contract of sale of goods may exclude the application of this Convention only in respect of receivables arising at or after the time when 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 4

As between the parties to the factoring contract:

- (a) a contractual provision for the assignment of existing or future receivables shall not be rendered invalid by the fact that 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 5

1. 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.

2. However, such an assignment shall not be effective against the debtor when he has his place of business in a Contracting State which has made a declaration under Article X of this Convention.

Article 6

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 7

1. The debtor is under a duty to pay the factor if, and only if, the debtor does not have knowledge of any other person's superior right to payment and 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. Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability, payment shall be effective to discharge his liability pro tanto if made in accordance with paragraph 1 of this article.

Article 8

1. 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 assert against the factor any other defences, including 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 a notice of assignment conforming to Article 7 of this Convention.

Article 9

1. Without prejudice to the debtor's rights under Article 8 of this Convention, non-performance or defective or late performance of the contract of sale of goods by the supplier shall not alone 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. The debtor who has such a claim against the supplier shall nevertheless be entitled to recover money paid to the factor:

- (a) to the extent that the factor has not paid the purchase price of the receivable to the supplier ; or
- (b) where at the time the factor paid such purchase price he knew of the supplier's non-performance as regards the goods to which the debtor's payment relates.

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 provisions of Articles 7 and 8 of this Convention shall apply as if the subsequent assignee were the factor.

2. Notice to the debtor of the subsequent assignment may also constitute notice of the assignment to the factor.

3. This Convention shall not apply to an assignment which is prohibited by the terms of the factoring contract.

Article 11

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.

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Article X

A Contracting State may at any time make a declaration in accordance with Article 5, paragraph 2 of this Convention that an assignment under Article 5, paragraph 1 shall not be effective against the debtor when he has his place of business in that State.