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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

DRAFT FINAL PROVISIONS

capable of embodiment in the draft Convention on
international factoring drawn up by a Unidroit
committee of governmental experts

with

EXPLANATORY NOTES

(drawn up by the Unidroit Secretariat)

Rome, August 1987

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 (hereafter referred to as "the committee") 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 provisions 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 Sale 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. The Secretariat has also taken account of more recent models and in particular the Protocol of 1984 to amend the 1969 International Convention on Civil Liability for Oil Pollution Damage (hereafter referred to as "the 1984 Protocol").

2. - In conformity with the tradition 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 committee for the most part restricted its observations to those articles which were in one way or another related to the substantive provisions of the draft Convention. The text of the final provisions reproduced hereafter takes account of the observations and suggestions made by members of the committee at its second and above all its third sessions.

3. - The announcement by the Canadian Government of its decision to host the diplomatic Conference for the adoption of the draft Conventions on international factoring and on international financial leasing in Ottawa in May 1988 has permitted the Secretariat to complete some of the provisions of Articles A and K and of the Authentic text and witness clause.

DRAFT FINAL PROVISIONS CAPABLE OF EMBODIMENT IN THE PROPOSED
CONVENTION ON INTERNATIONAL FACTORING

Article A

1. - This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the adoption of the Unidroit draft Conventions on international factoring and international financial leasing and will remain open for signature by all States at Ottawa 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 largely 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 Sale Convention, although the language of paragraph 4 departs from that of the Geneva Agency Convention in favour of that of Article 12, paragraph 3 of the 1984 Protocol in view of the introduction of Article K, which is itself based on Article 17 of the 1984 Protocol.

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 third 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 third 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 Sale 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 originally^a drafted by the Secretariat involved 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. At the third session of the committee it was however decided to propose to the diplomatic Conference that the number of instruments necessary for the entry into force of the Convention should be further reduced to three, given the limited and technical nature of its contents when compared with such instruments as those dealing with international contracts of sale and related matters.

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 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.⁷

Commentary

Based on Article 90 of the Vienna Sale 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, it was proposed that 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.

On the occasion of both the second and the third sessions of the committee, criticism was levelled against the wording of this article on the ground that the proviso contained in the last three lines could have the effect of displacing the application of another international agreement for the sole reason that one of the parties to the factoring transaction, for example the debtor, did not have his place of business in a State party to that other agreement, a fact which might have been totally irrelevant to the question of the applicability of that instrument in accordance with the provisions governing its scope of application. It was therefore proposed that the last part of the article, beginning with the words "provided that", should be deleted or at the very least that the place of business of the factor alone should be relevant.

A more radical proposal was directed to the deletion of Article C as a whole. It was in particular argued that unlike other Conventions, such as the Vienna Sale Convention and the 1980 Rome Convention on the Law

Applicable to Contractual Obligations whose subject-matter was very broad, the prospective Convention on international factoring sought to regulate certain aspects of highly specific transactions, the application of the provisions of which Convention, it should be recalled, may be excluded by the parties. In these circumstances it was suggested that the *lex specialis* should prevail, while a further argument in favour of deleting the article was that it would avoid the danger of the so-called "negative conflict of Conventions", that is to say the situation where two or more international instruments contain provisions yielding precedence to another instrument. ⁽¹⁾ A number of representatives were however reluctant to accept the proposal for the deletion of Article C without giving the matter further consideration and it was accordingly agreed to submit the provision to the diplomatic Conference in square brackets.

Article D

1. - If a Contracting State has two or more territorial units in which different systems of law are applicable in relation 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 are to state expressly the territorial units to which the Convention extends.

(1) As regards conventions dealing with conflicts of law, such as the 1980 Rome Convention on the Law Applicable to Contractual Obligations, Article 21 of which provides that "This Convention shall not prejudice the application of international Conventions to which a Contracting Party is, or becomes a party", the difficulty might be overcome by following the precedent of Article 23 of the Geneva Agency Convention and adding the words "of substantive law" after the word "provisions" in line 3 of Article C.

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 a federal system 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 previous paragraph subsequently becomes a Contracting State, the declaration made will, as from the 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 of this article, provided that the new Contracting State joins in such declaration 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 Sale 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 1(b).

Commentary

Both the Vienna Sale 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 "where both the contract of sale of goods and the factoring contract are governed by 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 Sale 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 is intended 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

This Convention applies when receivables assigned pursuant to 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 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, provided that:

- (a) the factoring contract is concluded on or after that date; or
- (b) the parties to the factoring contract have agreed that the Convention shall apply.

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, paragraph 1 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 both the contract of sale of goods and the factoring contract are governed by 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 sale 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.

Alternative texts reflecting all three solutions were prepared by the Secretariat and at its third session the committee opted in favour of a combination of the requirements that both the factoring contract pursuant to which the receivables are assigned and the contract of sale of goods which gives rise to those receivables should have been concluded on after the date on which the Convention enters into force for the State or States referred to in Article 2, paragraph 1. Although the representatives of the factoring associations considered this solution to be generally speaking both equitable and practicable, some disquiet was expressed as to the need for the parties to a factoring contract to have to conclude a new contract subsequent to the entry into force of the Convention so as to render it applicable; it was therefore thought sufficient for them to make an appropriate amendment to an existing contract.

With a view to meeting this concern, the Secretariat has prepared a text for Article I, sub-paragraph (b) of the proviso to which would render the Convention applicable, always provided that the sale contract from which the receivables arise was concluded after the entry into force of the Convention for the State or States referred to in Article 2, paragraph 1, not only when the factoring contract has been concluded on or after that date, but also when the parties to the factoring contract have agreed that the Convention shall apply. While on the one hand the effect of this language is restrictive, in that the Convention would not become applicable simply because for example a minor term of the factoring contract had been amended after the entry into force of the Convention, it would on the other permit its application after that date not only in cases where an amendment to that effect is made to the factoring contract after the entry into force of the Convention, but also if such an amendment were made prior to that date so as to ensure the application of the Convention

from the earliest possible time. If such an application were thought to be too extensive, then the language of Article I could be altered so as to restrict it to those cases where the agreement of the parties to the factoring contract that the Convention shall be applicable is stipulated after the entry into force of the Convention.

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 and on Article 35, paragraph 2 of the Geneva Agency Convention.

Article K

1. - This Convention shall be deposited with the Government of Canada.
2. - The Government of Canada 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 and 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 Sale 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.

Authentic text and witness clause

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

DONE at Ottawa, this day of May one thousand nine hundred and eighty-eight 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 and that the authentic texts of Unidroit Conventions have accordingly hitherto traditionally been drawn up in these two languages.