



THE 1988 UNIDROIT CONVENTION ON INTERNATIONAL FACTORING

by
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I. Introduction

In the seventh decade of this century, the International Institute for the Unification of Private Law (hereinafter: UNIDROIT) started making uniform rules on both international financial leasing and international factoring. After many years of work,⁽¹⁾ a UNIDROIT committee of governmental experts (hereinafter: committee) adopted on April 24, 1987 a draft convention on international factoring. On April 30, 1987 another draft convention on international financial leasing was adopted. A diplomatic conference for the adoption of these two drafts was held in Ottawa, Canada from 9 - 28 May 1988 (hereinafter: Ottawa Conference). After consideration of these drafts, the Ottawa Conference drew up the UNIDROIT conventions on international financial leasing and on international factoring.

According to article 14 of the factoring convention, it entered into force on May 1, 1995 when Nigeria deposited the third instrument of ratification (after France and Italy). Also, the factoring convention entered into force on December 1, 1996 for Hungary, on March 3, 1998 for Latvia and on May 20, 1998 for Germany. The USA and the

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(1) The legislative history of the factoring convention will be addressed in this article, (see, infra: III.A).

Scandinavian countries are likely to ratify this convention.⁽²⁾

The main aspects of the UNIDROIT convention on international factoring (hereinafter: the factoring convention) will be clarified in the following paper. The UNIDROIT convention on international financial leasing has been already discussed by the present writer in a separate paper.⁽³⁾

The factoring convention contains a preamble and four chapters. The preamble addresses the purposes and objects of the factoring convention. Chapter one deals with the sphere of application and general provisions (articles 1 - 4). Chapter two addresses the rights and duties of the parties (articles 5 - 10). Chapter three governs the subsequent assignments (articles 11 and 12). The fourth chapter contains final provisions (articles 13 - 23).

Before discussing the different aspects of the factoring convention, the present writer will deal with factoring in general and then with the legislative history of the factoring convention, namely the efforts of UNIDROIT to unify rules on this particular type of transaction.

(2) Haeusler, in: Hagenueller and others, p. 272.

(3) See: Journal of Law - Kuwait University, Vol. 21, No. 4 (1997), pp. 3-56.

II. Factoring in General

A. Definition and Purpose of Factoring:

Factoring may be defined as a long-term contract under which the seller (supplier) assigns to the factor, often a bank, his already existed and future receivables resulting from contracts of sale of goods or supply of services made with the buyers (debtors).⁽⁴⁾ The assignment may also address certain receivables only, e.g. those against buyers from a certain country.⁽⁵⁾ In many cases the supplier concludes the sale of goods contract with the debtor only when the factor, after investigating the debtor's creditworthiness, establishes a credit limit; the factor assumes the risk of the debtor's non-payment up to the limit defined.

In addition to the certainty of payment, the factoring transaction provides financial liquidity, that is to say, the factor finances the supplier. He generally pays him in advance (almost 70% of the value of the receivable assigned, if the transaction is national, or 80% or 90% thereof in international factoring⁽⁶⁾). In fact, the supplier, who is normally a small or medium-sized enterprise, needs the advance payment by the factor in order that he himself makes payment to the suppliers with whom he deals.⁽⁷⁾

Besides, the factor may generally perform other functions, i.e., book keeping and debt collection services. When achieving all these purposes, the transaction is described factoring "old-line".⁽⁸⁾

For the functions supplied by the factor, he generally obtains a commission from the supplier, which may amount to up to 2% of the

(4) Thus, factoring today differs from the classical factoring which was known in the UK in the eighteenth century. The factor under classical factoring was a foreign based commission agent who sells (or buys) on behalf and on account of a principal, (Sassoon, in: Chinkin, p. 297. Rebmann, 53 *RabelsZ* 1989, p. 600, 601).

(5) Basedow, *ZEuP* 3/1997, p. 617. Bolzoni, in: Hagenueller and others, p. 300.

(6) Diehl-Leistner, p. 4, 5. Basedow, *ZEuP* 3/1997, p. 617, 637.

(7) Basedow, *ZEuP* 3/1997, p. 616.

(8) Kitsaras, p. 11, 12.

value of the receivable assigned.⁽⁹⁾ This commission depends upon how many function the factor performs. For instance, the commission will be lower if the factor does not assume the risk of the debtor's insolvency.⁽¹⁰⁾ It should not be forgotten that, when paying to the supplier in advance, the factor can in addition take interest.⁽¹¹⁾

B. Types of National Factoring:

Concerning national factoring transactions, the writers normally distinguish between the so-called non-recourse factoring and recourse factoring. The non-recourse factoring is that in which the factor takes the risk of the debtor's non-payment. According to the recourse factoring, by contrast, the factor may, if the debtor does not pay him, ask compensation from the supplier.⁽¹²⁾

Difference is also made between undisclosed and disclosed factoring. Either non-recourse or recourse factoring may be undisclosed or disclosed. In the undisclosed factoring, the debtor is not informed about the assignment of the supplier's receivables against him. In contrast, the factoring is described disclosed when the debtor is informed about this assignment.⁽¹³⁾ Since it is difficult for the factor to take the risk of the debtor's non-payment when factoring is undisclosed, the factoring institutions mostly use the other type, namely: the disclosed factoring.⁽¹⁴⁾

The literature had also described some other types of factoring, such as inhouse-factoring and the *Inkassozession*,⁽¹⁵⁾ i.e. collection-assignment.

(9) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 8, p. 87. Diehl-Leistner, p. 9. Basedow, ZEuP 3/1997, p. 617.

(10) Sassoon, in: Chinkin, p. 304.

(11) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 8, p. 87. Bolzoni, in: Hagenueller and others, p. 300.

(12) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 8, p. 87. Diehl-Leistner, p. 5. Kitsaras, p. 12. Alexander, Columbia J. Trans. L., Vol. 27 (1989), p. 358. Sassoon, in: Chinkin, p. 298, 304. Pleyer, in: Chinkin, p. 318, 319.

(13) Diehl-Leistner, p. 5, 6. Kitsaras, p. 12. Pleyer, in: Chinkin, p. 319 (confidential and open factoring).

(14) Kitsaras, p. 12.

(15) Diehl-Leistner, p. 126. Zaccaria, IPRax 1995, p. 283.

Under the collection-assignment, it is the factor who supplies the administrative functions, and only the administrative functions.⁽¹⁷⁾ Other functions, e.g., insurance against the risk of the debtor's insolvency, are still to be performed by the supplier.

Factoring plays a very important role in financing sale of goods and supply of services made between parties from different countries. In comparison with letters of credit and *forfeiting*, the methods traditionally used to finance international commercial transactions, the factoring provides many advantages.

In contrast, the international factoring eliminates the buyer's (debtor's) financial difficulties and secures the payment to the supplier as well.⁽¹⁹⁾ The reason for this is that, the debtor needs only to pay to the

(19) Bolzoni, in: Hagenueller and others, p. 302.

factor the debt the supplier has against him (debtor), and the factor normally assumes the risk of non-payment by the debtor. The international factoring is also a good means to override the language barriers facing the supplier and the problems relating to the supplier's non-knowledge of the applicable foreign law.⁽²⁰⁾ Clearly, factoring eases the conclusion of international sale of goods and supply of services.

2. Factoring and Forfaiting: According to the *forfaiting*, the *forfaiteur*, who is a financial institution, purchases from a supplier a receivable arising out of a sale of goods contract made between the supplier (whose place of business is situated in the *forfaiteur's* country) and a debtor in a foreign country. As it will be soon clarified, *forfaiting* is actually similar in particular to the direct-export factoring. However, factoring provides more advantages in relation to the quantity of the receivables assigned and their security as well as to the functions performed.

Under the *forfaiting*, the *forfaiteur* only buys a single receivable resulting from an already concluded sale of goods contract; there is no global assignment.⁽²¹⁾ Furthermore, the *forfaiteur* only buys the receivable which is adequately secured, e.g., by a bank guarantee or a letter of credit.⁽²²⁾ As this is not the case with regard to factoring, it has more potential to encourage international trade.

In addition, while the factor may service both administrative and financial functions, the *forfaiteur* only supplies a financial function.⁽²³⁾ The *forfaiteur* may not supply book keeping and debts collection services.⁽²⁴⁾

D. Types of International Factoring:

Where the supplier and the debtor have their places of business in one and the same country, the supplier will normally assign his receivables to a factor with a seat in the same country (national

(20) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 9, p. 88.

(21) It should be noted that the term of the receivables assigned to the factor is normally up to six months, whereas it is longer in the case of forfaiting, (Kitsaras, p. 36. Pleyer, in: Chinkin, p. 320).

(22) Kitsaras, p. 36. Pleyer, in: Chinkin, p. 320.

(23) Kitsaras, p. 36. Pleyer, in: Chinkin, p. 321.

(24) Nevertheless, the *forfaiteur*, unlike the factor, assumes not only the risk of the debtor's insolvency, but also economic and political risks, e.g., money control regulations in the debtor's country, (Kitsaras, p. 36. Pleyer, in: Chinkin, p. 320).

factoring). By contrast, the supplier may assign his receivables to a foreign factor in the event the sale of goods contract, out of which the receivables assigned arise, is international, i.e., the places of business of the debtor and the supplier are situated in different countries (international factoring). In this field one may, in any event, mention the following four types of international factoring:

1. Direct-Export Factoring: According to this transaction the supplier assigns his receivables resulting from an international sale of goods contract to a factoring institution in his country (i.e., the supplier and the factor are in one and the same country). As the debtor has his place of business in another country, the factor needs a personnel who is accustomed with the economic aspects of the transaction at issue and the legal norms prevailing at the debtor's country.⁽²⁵⁾ However, it would be difficult for the factor to investigate the credit of the debtor exactly. For this reason the supplier, besides the assignment to the factor of his receivables, normally assigns his rights and duties arising from a guarantee originally given to the supplier by "a credit insurance company or a state credit insurance institution".⁽²⁶⁾ The factor, may also, through his branch in the debtor's country, if any, get information about the debtor's financial situation.⁽²⁷⁾ This type of factoring is usually used in cases in which either there is no correspondent factor (i.e., import-factor) in the debtor's country or when the export-factor does not like to share with an import-factor the commission he earns from the supplier.⁽²⁸⁾

2. Direct-Import Factoring: Unlike the direct-export factoring, the factoring institution - under this transaction - has its place of business in the country of the debtor (the factor and the debtor are in one and the same country). Once the supplier sells to buyers from different countries, then he needs to deal with many import-factors. The law applicable to this type of factoring is foreign to the supplier, since the factor normally

(25) Kitsaras, p. 37, 38. Diehl-Leistner, p. 10. Sassoon, in: Chinkin, p. 305.

(26) Bolzoni, in: Hagenueller and others, p. 300. Compare: Kitsaras, p. 37.

(27) Diehl-Leistner, p. 10.

(28) Bolzoni, in: Hagenueller and others, p. 300.

stipulates in the contract that the law of his country is the applicable one.⁽²⁹⁾

Nevertheless, the direct-import factoring transaction is attractive to suppliers, as the factor with his seat in the debtor's country can better evaluate the credit standing of the debtor. Besides, the factor generally protects against the debtor's default in payment and finances the supplier in advance.⁽³⁰⁾ In certain cases however, the factor - due to control regulations of his country - can not make advanced payment.⁽³¹⁾ This factoring could therefore be used when the supplier exports to few countries and does not need advanced payment.⁽³²⁾

3. Two-Factor-System: This type of factoring involves four parties. Beside the export-factor, who has his place of business in the supplier's country, there is an import-factor with a seat in the debtor's country. The supplier agrees with the export-factor and informs him herewith of his customers in the different countries and of the required credit for each customer or for all of them together. As the export-factor does not want to assume the risk of the debtor's non-payment, he makes a contract with an import-factor under which the latter - after investigating the debtor's creditworthiness - establishes a credit limit.⁽³³⁾ In fact, this function would be easier performed by the import-factor than by the export-factor.

(29) Diehl-Leistner, p. 10. Kitsaras, p. 38.

(30) Compare: Diehl-Leistner, p. 10.

(31) Bolzoni, in: Hagenueller and others, p. 301.

(32) Bolzoni, in: Hagenueller and others, p. 301.

(33) It should be said that the export-factor-institutions normally belong to an international factoring group. In this field, one should mention the "Factoring Chain International" (FCI) in Stockholm, International Heller-Group in Chicago, owned by the Fuji-Bank in Tokyo, "International Factors Group" (IFG), which belongs to the First National Bank of Boston, and "Credit Factors International" (CFI) in London, belongs to the Westminster Bank. FCI is based on the principle that many factoring institutions from the same country may, at the same time, become members to this association. This is also the case concerning the IFG since 1987. In relation to the other two groups, only one factoring institution from each country can be a member to them.

Notably, the FCI is the strongest of these groups. The relationship between the different factoring institutions (export-factors and import-factors), that belong to this group, is normally governed by the so-called bilateral standard "Interfactor-Agreement", which may be completed by standard terms, the code of FCI, and separate contracts. (For more details, see: Diehl-Leistner, p. 11-14. Kitsaras, p. 129-130. Alexander, Columbia J. Trans. L., Vol. 27 (1989), p. 359, fn. 34).

type of international factoring in the practice,⁽³⁹⁾ especially when the sum involved is huge. This factoring has the advantage that the supplier, and the debtor as well, has to do with a factor in his country⁽⁴⁰⁾ so that he will not be surprised by legal norms or trade usage.⁽⁴¹⁾

4. Back-to-Back-Factoring: This type of factoring also involves four parties. According to this transaction, a mother company in country A assigns its claims vis-à-vis its daughter (or distribution) company in country B to an export-factor in country A. The daughter company also assigns its receivables resulting from a contract of sale of goods to an import-factor in country B. The export-factor assumes the risk of non-payment by the import-factor; the import-factor takes the risk of the non-payment by the debtor to whom the daughter company sells its goods. The import-factor collects the debts from the debtors and forwards them to the export-factor who will satisfy his duty to make payment to the mother company.⁽⁴²⁾

E. Legal Framework of Factoring:

This type of transaction has been differently dealt with in domestic laws. In the United States of America (hereinafter: USA), there is actually no specific law on factoring. However, the factoring - although not labeled as such - is governed by section 9 of the Uniform Commercial Code (hereinafter: UCC), that deals with the security interests in personal property. In USA, factoring is qualified as the sale by the supplier to the factor of receivables (resulting from a sale of goods contract made between the supplier and the debtor) in exchange for the in advance payment of purchase price, maintenance of accounts, and protection against the debtor's

(39) Haeusler, in: Hagenueller and others, p. 271, 280.

By the way, the first case decided under the factoring convention involved this type of factoring, (see the R. Caiato c. Sté française de factoring international Factor France "S.F.F.", decided by the court of Appeal of Grenoble - France on 13.09.1995, published in: Uniform Law Review, Vol. 1 (1996-2), p. 400 - 403).

(40) Basedow, ZEuP 3/1997, p. 618.

(41) Kitsaras, p. 39.

(42) Diehl-Leistner, p. 11.

non-payment. Notably, the future receivables (i.e. which are not existed at the time of the conclusion of the contract) can also be sold in USA, provided that they are supported with consideration.

In other countries of the world, the law of assignment of debt applies to this special type of transaction. This is, for example, the case under the civil laws of Belgium (article 1690), Luxembourg (article 1690), and Federal Republic of Germany (article 398).⁽⁴³⁾ In the United Kingdom of Britain (hereinafter: UK), article 136 of the Law of Property Act 1925 provides the terms necessary for the valid conclusion of a legal assignment of debt: The assignment should be in writing, full and absolute. It should also be expressly notified to the debtor in writing.⁽⁴⁴⁾

In France, there is also no specific law governing the so-called "Contrat d'affacturage", i.e. contract of factoring. In any event, the rules of civil law on assignment of debts are considered unfit for factoring, as the assignment of debts should, for its validity, be notified to the third party through bailiff.⁽⁴⁵⁾ But the principle of payment with subrogation (articles 1249 - 1252 of the civil code)⁽⁴⁶⁾ applies to the transfer of debt

(43) Alexander, Columbia J. Trans. L., Vol. 27 (1989), p. 363, 364, fn. 61.

(44) By contrast, the so-called equitable assignment may be validly concluded even if the conditions set forth in the Law of Property Act 1925, article 136 are not met, (Sassoon, in: Chinkin, p. 300).

(45) Kitsaras, p. 20.

(46) Article 1249 provides: "Subrogation for the rights of the creditor for the benefit of third person who pays him is either conventional or legal".

Article 1250 provides: "Such subrogation is conventional:

1. When the creditor receiving his payment from a third person subrogates him for his rights, actions, privileges or mortgages against the debtor; such subrogation must be express and made at the same time as the payment;

2. When the debtor borrows a sum for the purpose of paying his debt and of subrogating the lender for the rights of the creditor. It is necessary, in order that such subrogation be valid that the assignment of loan and the receipt be signed before notaries, that in the instrument of loan it be declared that the sum has been borrowed in order to make the payment, and that in the receipt it be declared that the payment has been made from funds furnished for this purpose by the new creditor. Such subrogation operates without the concurrence of the will of the creditor".

Article 1251 addresses legal subrogation.

Article 1252 provides: "The subrogation established by the preceding articles takes place =

from the supplier to the factor. Under the subrogation, the factor pays the supplier for the simultaneous transfer by the supplier of his receivables against the debtor, which must be existed at the time of transfer.⁽⁴⁷⁾ The factor thus stands on the footing of the supplier and uses his rights.⁽⁴⁸⁾

In the Arab world, several civil codes contain, in fact, provisions on the payment with subrogation which are very similar to articles 1249 - 1252 of the French civil code mentioned above. Examples of these could be articles 327 - 329, articles 380 - 381, and articles 262 - 264 of the civil codes of Egypt, Iraq, and Algeria, respectively. However, factoring should be governed by the legal rules relating to the transfer of rights (e.g. the Egyptian civil code, article 303 ff., the Syrian civil code, article 303 ff., the Libyan civil code, article 290 ff., the Algerian civil code, article 239 ff., and the Iraqi civil code, article 260 ff.), since these rules are more suitable to the factoring transaction addressed by the factoring convention, as it will be discussed soon.

Under the rules of payment with subrogation (namely: article 329, article 381, and article 264 of the civil codes of Egypt, Iraq and Algeria, respectively), the subrogator stands on the footing of the creditor only to the extent of what he paid to the debtor; the debtor is not obliged to pay the subrogator the whole debt. Under the transfer of rights, in contrast, the assignor actually sells his claim against the debtor to the assignee. Thus, the debtor is under a duty to pay the debt in complete to the new creditor, i.e. the assignee, regardless of whether the purchase price is less than this debt. Under such conditions, factoring would also be governed by the Arab civil codes which do not provide for the payment with

= against sureties as well as against debtors; it can not prejudice a creditor when he has been paid only in part; in such case he may exercise his rights for what remains due him by priority over the one from whom he has received only partial payment".

The translation into English of these provisions is taken from: "The French civil Code (as amended to July 1, 1976)", translated with an introduction by: Crabb, J.H., South Hackensack, New Jersey 1977.

(47) Kitsaras, p. 20, 21.

(48) It should be noted that French law knows the non-recourse factoring only, (Kitsaras, p. 19, 20).

the important purpose of this transaction. Therefore, the international community have in 1988 provided a legal framework for this transaction (namely: the factoring convention) that achieves predictability in this regard and avoids the uncertainty of domestic laws in respect of the matters it addresses.

Finally, it should nevertheless be mentioned that, within the last few years, some countries have made specific laws governing the factoring. Examples of these could be Italy. In comparison to the rules of the Italian civil code relating to assignment of debt (articles 1260 - 1267), the new law Nr. 52, dated February 21, 1991⁽⁵²⁾ is in many aspects for the factor's advantage. For example, article 3 thereof recognizes the assignment of future receivables and the validity of the global assignment as well.⁽⁵³⁾ In cases of multiple assignment by the supplier,⁽⁵⁴⁾ article 5 gives priority to the assignment under which the factor has paid the supplier with certainty (e.g., the date of the payment is expressly written on the receipt.)⁽⁵⁵⁾

III. Factoring Convention

A. Legislative History:⁽⁵⁶⁾

In 1974, the UNIDROIT governing council decided to include factoring in the work program for the period 1975 to 1977 and asked the secretariat to make a preliminary study on this question. After receiving

(52) Notably, this law which governs some aspects of factoring (and leaves others to be settled by the rules of the civil code on the assignment of debts) does not however use the term "factoring", (Zaccaria, IPRax 1995, p. 281, fn. 20. Kindler, RIW 1994, p. 693).

(53) Kindler, RIW 1994, p. 693. De Nova, in: Hagenueller and others, p. 340, 342.

(54) It should be mentioned that the supplier governed by this law must be an enterprise, (Kindler, RIW 1994, p. 693. Zaccaria, IPRax 1995, p. 282, fn. 27) and the factor should be a bank or a financial institution, (De Nova, in: Hagenueller and others, p. 341).

(55) In contrast, the Italian civil code, article 1265/1 gives priority to the first assignment which is notified to the debtor by bailiff, (Kindler, RIW 1994, p. 693. De Nova, in: Hagenueller and others, p. 341).

(56) On this subject, see: Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 1 - 5, p. 85, 86. Kitsaras, p. 45, 46. Rebmann, 53 RabelsZ 1989, 602, 603. Ferrari, Int'l Lawyer, Vol. 31 (1997), p. 44, 45.

this study in 1976, the governing council sent it out, together with a questionnaire, to the practitioners of factoring throughout the world.

Having analyzed the replies to the questionnaire, UNIDROIT set up a study group for the preparation of uniform rules on factoring. This study group held three sessions in 1979, 1981, and 1982. At the last one, the study group adopted the preliminary draft uniform rules on certain aspects of international factoring.

This preliminary draft had been approved by the UNIDROIT governing council in 1983 (hereinafter: the 1983 preliminary draft).⁽⁵⁷⁾ Together with an explanatory report, the 1983 preliminary draft had been sent to the governments of the member states of UNIDROIT, with a request for observations. After receiving the governments' observations, the governing council convened a committee of governmental experts.

The committee considered the 1983 preliminary draft at three sessions, namely: in 1985, 1986, and 1987. At the conclusion of its third session, the committee adopted a draft convention on international factoring (hereinafter: the 1987 draft).⁽⁵⁸⁾ This draft had been submitted to the Ottawa Conference, which, after 20 days of intensive work, adopted the factoring convention.⁽⁵⁹⁾

B. Scope of Application:

1. Description of Factoring: As the title of the convention under consideration "UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988)" already tells, this convention regulates factoring contracts. This is also emphasized by the factoring convention, article 1/1. It runs as follows: "This Convention governs factoring contract and assignment of receivables as described [below]":

Article 1/2 defines the factoring transaction to which the convention

(57) You may see the text of this preliminary draft in: Sasoon, in: Chinkin, p. 312-315.

(58) You may see this draft, in: Diplomatic Conference, Vol. I, p. 81-84.

(59) The text of the factoring convention has been included as an Appendix to this article.

applies.⁽⁶⁰⁾ Under this article, it is obvious that the factoring transaction involves three parties: the supplier, the factor, and the debtor. It necessarily entails two contracts, namely: the factoring contract made between the supplier and the factor and the sale of goods contract made between the supplier and the debtor. According to article 1/3 the term "sale of goods"- means the sale of goods in the strict meaning and includes the supply of services. However, the factoring convention does not define the term "services" and "supply of services". Taking into account the principles of interpretation laid down in the factoring convention, article 4/1, this term may not be interpreted in the light of the concepts traditionally attached to it in domestic law. In any event, the legislative history reveals that this term includes services arise out of contracts of insurance, contracts of carriage of goods, and contracts of consultancy.⁽⁶¹⁾ It also includes services result from contracts of distribution and from contracts of construction as well.⁽⁶²⁾ But it is not clear whether it also includes the bank services: According to the legislative history it does not;⁽⁶³⁾ some writers argue however, it does.⁽⁶⁴⁾

In order to apply the factoring convention, some conditions should be satisfied with regard to each party:

a. According to article 1/2(a) the supplier "may or will" assign to the factor his receivables against the debtor which result from a sale of goods contract. This element is considered to be the legal basis for factoring as a financial means.⁽⁶⁵⁾ Taking into account the distinct formula of this provision, the supplier must not however always assign his receivables to the factor. He may only undertakes to assign receivables that will arise thereafter. Together read with article 1/2(b), the supplier may also authorize the factor to collect his receivables from the debtor only. This

(60) In contrast, domestic law does not provide for such a definition, since factoring has arisen from and developed through practice, (Sassoon, in: Chinkin, p. 307). Even domestic laws made after the factoring convention is concluded, e.g., the Italian law of 1991, do not do that, (Zaccaria, IPRax 1995, p. 281).

(61) Diplomatic Conference, Vol. II, p. 312.

(62) Basedow, ZEuP 3/1993, p. 628.

(63) Diplomatic Conference, Vol. II, p. 312.

(64) Basedow, ZEuP 3/1993, p. 628.

(65) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 15, p. 90.

would be completely enough if the supplier in addition supplies book keeping relating to the receivables at issue.⁽⁶⁶⁾ Thus, it is clear that the factoring convention governs the so-called collection-assignment. In fact, this type of factoring is not often practiced at the international level. However, it would play an important role in the event the factor is also authorized by the supplier to collect the debts which exceed his credit limit.⁽⁶⁷⁾

In any event, the receivables, which are the subject matter of the factoring contract, may not arise from a sale of goods contract under which the debtor bought the goods "primarily for [his] personal, family or household use". In other words, the goods sold for private use, and only these, are excluded. In contrast, the factoring convention may apply to the assignment of receivables arising out of any other sale of goods contract regardless of whether or not it is made for business purposes,⁽⁶⁸⁾ e.g., supplies to schools, embassies etc.⁽⁶⁹⁾ In so doing, the factoring convention corresponds to CISG, article 2(a).

Taking into account the functions the factor has to perform under article 1/2(b), assignment of the receivables should be "on a continuing basis".⁽⁷⁰⁾ In fact, this was clearly provided for by the 1983 preliminary draft, article 1/1. the authors did not however maintain this formula, since a strict interpretation of such an expression under the concepts of domestic law could result in excluding the convention's application to certain cases.⁽⁷¹⁾

(66) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 17, p. 91.

(67) Diehl-Leistner, p. 126.

(68) In this regard, one should mention that a proposal of the Spanish delegation had not been maintained, under which the scope of application of the factoring convention should have been confined to the receivables relate to goods bought for business purposes, (Diplomatic Conference, Vol. I, p. 186. Diplomatic Conference, Vol. II, p. 245 ff.).

(69) Of this opinion, see: Goode, J. Bus. L. 1988, p. 510. Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 16, p. 90.

To the contrary, you may see: Basedow, ZEuP 3/1997, p. 628, (the factoring convention limits its sphere of application to the factoring of commercial receivables).

(70) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 15, p. 90.

(71) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 15, p. 90

b. According to article 1/2(b) the factor shall supply at least two of four functions.⁽⁷²⁾ First of all, it should be noted that the authors use the term "functions", which is actually neutral in comparison, for example, with services. The most important point under this term is the factor's activity; it is of no importance to whose interest this activity is done.⁽⁷³⁾ The four functions provided for in article 1/2(b) are:

- *finance for the supplier in the way of advance payment of the accounts receivable or giving loan, for instance,
- *supply of book keeping relating to the receivables at issue,
- *collection of the debtor's debts,
- *protection against the non-payment by the debtor.

When taken by the factor, the last function forms a heavy burden to him. Normally, the factor assumes the risk of the inability or unwilling to perform by the debtor. Under the function indicated by the convention, by contrast, the factor takes the risk of the debtor's non-payment by any reason,⁽⁷⁴⁾ except in the case where the debtor's non-payment is due to his disputing his duty to pay⁽⁷⁵⁾ (see: the factoring convention, article 9). Unfortunately, a proposal under which the factor should have protected against the debtor's non-payment "due solely to [his] financial inability to pay" had not been maintained at the Ottawa Conference.⁽⁷⁶⁾

It should be noted that the authors of the factoring convention provide in article 1/2 (b) a wide definition in order to make the scope of the convention embraces as much as possible types of the factoring known under domestic law.⁽⁷⁷⁾ Thus, this convention may clearly apply

(72) It should be mentioned that in the practice of international factoring, the factor often performs at least three of these functions, (Diehl-Leistner, p. 126).

(73) Zaccaria, IPRax 1995, p. 282.

(74) Kitsaras, p. 54, fn. 207.

(75) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 17, p. 91.

(76) This proposal had been submitted by the Italian delegation, (Diplomatic Conference, Vol. I, p. 247). See the discussion of it, in: Diplomatic Conference, Vol. II, p. 246 ff.

(77) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 14, p. 90. Zaccaria, IPRax 1995, p. 282.

to both the non-recourse and recourse factoring,⁽⁷⁸⁾ since assuming the risk of the debtor's default to pay is not a necessary element of the description of factoring transaction. It is rather a possible element: the factor may or may not ensure the debtor's credit.

Likewise, both the direct-import and the direct-export factoring, often used in the international trade, always fall within the realm of application of the factoring convention.⁽⁷⁹⁾

c. According to article 1/2(c), the debtor should be notified of the assignment by the supplier to the factor of the receivables resulting from the sale of goods contract made between the debtor and the supplier. Therefore, the debtor will not later on be surprised that he has to pay to a new creditor other than the supplier, namely: the factor. In the event the factor has, *inter alia*, to collect the debts, giving the notice will be accomplished by the notification which, under the factoring convention, article 8, gives rise to the debtor's duty to pay.

Under this condition, the factoring convention will not apply to the undisclosed factoring according to which the debtor may not be informed of the assignment of the receivables.⁽⁸⁰⁾ This would be the case in relation to the international banking operations in which the accounts receivable are used as security.⁽⁸¹⁾ Such transactions shall therefore be governed by domestic law applicable according to the rules of private international law.⁽⁸²⁾ In this regard, the authors had clearly derogated from the main

(78) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 14, p. 90. Basedow, ZEuP 3/1997, p. 628.

Ferrari, RIW 1996, p. 183. Diehl-Leistner, p. 126. Alexander, Columbia J. Trans. L., Vol. 27 (1989), p. 358. Rebmann, 53 RabelsZ 1989, p. 605, 618.

(79) Diehl-Leistner, p. 126.

(80) It should be noted that a proposal submitted by the Swedish delegation to delete the provision of the present Article 1/2(c) concerning the notice had been fortunately rejected, (Diplomatic Conference, Vol. I, p. 247, 248). Otherwise, other provisions of the factoring convention (namely: article 3/1(b), 8/1, and 9/2) would be inconceivable.

(81) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 18, p. 91.

(82) Of this opinion, you may see: Kitsaras, p. 56. Diehl-Leistner, p. 120. Basedow, ZEuP 3/1997, p. 628. Zaccaria, IPRax 1995, p. 282.

To the contrary, see: Goode J. Bus. L. 1988, p. 511.

principle that the factoring convention should have as wide as possible a realm of application.⁽⁸³⁾ Notably, the exclusion of such transactions will nevertheless not limit the sphere of application of the factoring convention very much, since this type of factoring is not often used.

Article 1/2(c) does not fortunately provide for a written notice, since this could have narrowed the scope of application of the factoring convention. Taken together (articles 1/2(c) and 8), the notice should be in writing. Otherwise, the factor would not be able to ask for the debtor's payment. In any event, the non-receipt by the debtor of the notice of the assignment of the receivables results in the exclusion of the factoring transaction from the scope of application of the factoring convention. If such an assignment is however notified to the debtor later on, the factoring contract may then be governed by the factoring convention.⁽⁸⁴⁾

It should be mentioned here that the factoring convention - according to its article 21(a) - comes into application when both the factoring contract and the sale of goods contract are made after the convention entered into force in the contracting states referred to in article 2/1. (Article 2/1 will be soon discussed). Under article 21(b), it would also suffice if only the sale of goods contract is made after that date (the factoring contract was made before that date) and the parties to the factoring contract have agreed to apply the convention to their transaction. Notably, the factoring convention applies in such a case to the three parties of the transaction. Therefore, this case differs from the opting-in the factoring convention under which this convention applies to the factoring contract parties, i.e. the factor and the supplier, only.⁽⁸⁵⁾ Besides, in case of opting-in, the factoring convention will not override the mandatory provisions of domestic law. In contrast, the factoring convention would prevail over conflicting (mandatory) national rules when it comes into application according to its article 21(b).⁽⁸⁶⁾

(83) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 14, p. 90, Nr 18, p. 91.

(84) Kitsaras, p. 56.

(85) Zaccaria, IPRax 1995, p. 280.

(86) Ferrari, RIW 1996, p. 185, fn. 90. Ferrari, Int'l Lawyer, Vol. 31 (1997), p. 56.

In its decision dated 13.09.1995, the court of appeal of Grenoble - France has however applied the factoring convention despite the fact that both the contract of sale of goods and the contract of factoring are made before the date in which this convention entered into force.⁽⁸⁷⁾ The court justified its decision by saying: "In the absence of objections by the parties to the dispute to the application of the Unidroit Convention and in view of their express reference to the Convention in their pleadings, the Court found the parties to be in agreement with the advance application to the dispute of the Convention, which had entered [into] force by the time of the judgment, notwithstanding the provisions of Article 21".⁽⁸⁸⁾ This argument is not convincing to me. It is correct that the parties to the factoring contract, although concluded before the date in which the convention entered into force, may under article 21(b) agree to the application of the factoring convention. According to article 21 however, the sale of goods contract should, in all cases, be made on or after the convention entered into force. Obviously, the Court has disregarded this distinct provision without giving any justification. To follow the court, article 21, the provision that defines the temporal sphere of application of the factoring convention, would be meaningless.

In this regard, it should finally be mentioned that the factoring convention will also apply to subsequent assignments of the accounts receivable which are governed by this convention, (see, *infra*: III., E.).

2. International Factoring: As the title of the convention under consideration "UNIDROIT Convention on International Factoring (Ottawa, 28 May 1988)" already tells, it only applies to cross-border factoring transactions. In order to make it easier for the states to adhere to the factoring convention, this convention excludes from its sphere of application the national factoring.⁽⁸⁹⁾ Such transactions should therefore be governed by domestic law.

(87) This decision is cited *supra*, fn. 39.

(88) Uniform Law Review, Vol. 1 (1996-2), p. 402.

(89) However, the factoring convention could serve as a model law for countries wishing to revise their legal rules applicable to national factoring, (Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 10, p. 88. Ferrari, RIW 1996, p. 183).

In order to reach the main object of the factoring convention, i.e. the facilitation of international trade, the international character of the factoring transaction is not established by reference to the factoring contract which the convention governs, rather by reference to the sale of goods contract out of which the receivables at issue arise.⁽⁹⁰⁾ In so doing, the factoring convention differs from CISG whose application depends upon whether or not the places of business of the parties to the sale of goods contract (governed by it) are situated in different countries.⁽⁹¹⁾ The criterion adopted by the factoring convention in order to qualify a sale of goods contract as international is that, the parties have their places of business in different states. This clearly corresponds to CISG, article 1/1.

Notably, Mr. Pelichet, the representative of the Hague Conference on Private International law to the Ottawa Conference, suggested that the factoring should be qualified as an international transaction if the parties to the factoring contract, i.e. the supplier and the factor, have their places of business in different countries.⁽⁹²⁾ This proposal had been rightly rejected, since, according to it, the scope of application of the factoring convention would have been seriously narrowed.⁽⁹³⁾

It should be noted in this regard that, when a factoring contract provides for the assignment of both national and international assignments, the factoring convention only governs the transactions concerning the latter receivables.⁽⁹⁴⁾

Nevertheless, the international character of the receivables assigned does not per se suffice to apply the factoring convention. One of the following two terms shall also be fulfilled:

a. Under article 2/1(a), all parties to the factoring transaction, i.e. the supplier, the factor, and the debtor, should have their places of

(90) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 21, p. 92.

(91) Ferrari, *Int'l Lawyer*, Vol. 31 (1997), p. 49.

(92) Diplomatic Conference, Vol. II, p. 251.

(93) Compare: Kitsaras, p. 58, fn. 220. Mr. Goode, the representative of the UK to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 252.

(94) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 22, p. 92.

business in a contracting state. Logically, this should not be one and the same state. Where the (different) states in which the supplier and the debtor have their places of business are contracting states, the factor may have his place of business in the supplier's country (direct-export factoring) or in the debtor's country (direct-import factoring). So long as the parties have their places of business in different states, it is of no importance whether or not they have one and the same citizenship.⁽⁹⁵⁾ Nor does it matter whether they are not merchants.⁽⁹⁶⁾

Clearly, the factoring convention has "an autonomous scope of application based on objective connecting factors". This is actually in the advantage of all parties, in particular the debtor who has a considerable interest to know the law applicable as his position is changed by the assignment of the receivables.⁽⁹⁷⁾

Once either party has more than one place of business, the one which should be considered is that "which has the closest relationship to the relevant 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 the contract", article 2/2.⁽⁹⁸⁾ This could clearly be the principal place of business or another.⁽⁹⁹⁾ But it may in no way be a place of business which comes into existence after the contract is made.⁽¹⁰⁰⁾ Nor could it be a place of "temporary sojourn".⁽¹⁰¹⁾

b. Under article 2/1(b), a law of a contracting state should govern both the factoring contract and the sale of goods contract. It makes no difference whether the law applicable to these contracts is determined by a choice of law clause or by the application of the rules of private international law.⁽¹⁰²⁾ The law applicable should not be a law of one and

(95) Ferrari, *Int'l Lawyer*, Vol. 31 (1997), p. 52, fn. 90. Ferrari, *RIW* 1996, p. 184, fn. 72.

(96) Haeusler, in: Hagenueller and others, p. 279.

(97) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 22, p. 93.

(98) In so doing, the factoring convention clearly corresponds to CISG, article 10(a).

(99) Ferrari, *RIW* 1996, p. 185. Ferrari, *Int'l Lawyer*, Vol. 31 (1997), p. 53.

(100) Ferrari, *RIW* 1996, p. 185, fn. 80.

(101) Ferrari, *Int'l Lawyer*, Vol. 31 (1997), p. 54.

(102) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 22, p. 93. Kitsaras, p. 58. Diehl-Leistner, p. 127. Ferrari, *Int'l Lawyer*, Vol. 31 (1997), p. 59.

the same state.⁽¹⁰³⁾

In fact, the parties would suffer heavy burden and costs when investigating whether or not the terms set forth in article 2/1(b) are met. In particular, the factor should have a look at each sale of goods contract in order to know whether or not the factoring convention applies to the transaction at issue. Nevertheless, the authors made this provision in order to enlarge the sphere of application of the factoring convention.⁽¹⁰⁴⁾

Notably, article 2/1(b) clearly corresponds to CISG, article 1/1(b). However, the contracting states may under CISG, article 95 declare that CISG, article 1/1(b) may not apply in it. In contrast, this is not possible under the factoring convention. In fact, a provision to this effect had been suggested. But it had rightly been rejected at the Ottawa Conference.⁽¹⁰⁵⁾ Otherwise, it would have been more difficult for a factoring institution to investigate whether or not the factoring convention applies to each receivable assigned to it.⁽¹⁰⁶⁾

In the light of the fact that only six countries have adhered to the factoring convention up to now, article 2/1(b) would play a very important role in applying the factoring convention.

C. Interpretation, Gap-Filling, and Exclusion of Factoring Convention:

1. Interpretation of Factoring Convention: Article 4(1) defines the purposes of the interpretation of the factoring convention. When interpreting any provision, the object and purpose of the factoring convention should be taken into account. The preamble clearly qualifies the purposes of the convention as the facilitation of international factoring and the maintenance of "a fair balance of interests between the

(103) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 22, p. 93. Goode, J. Bus. L. 1987, p. 219. Diehl-Leistner, p. 127. Zaccaria, IPRax 1995, p. 279, 280. Ferrari, RIW 1996, p. 186. Ferrari, Int'l Lawyer, Vol. 31 (1997), p. 57, 58.

(104) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 22, p. 93.

(105) Diplomatic Conference, Vol. II, p. 253.

(106) Mr. Pelichet, the representative of the Hague Conference on Private International law to the Ottawa Conference, in: Diplomatic Conference, Vol. II., p. 254.

different parties involved in factoring transactions". The special character of the factoring transaction (namely, that it involves three parties: the supplier, the factor, and the debtor) should not be prejudiced when interpreting a factoring convention provision.

In the interpretation of the factoring convention, attention must be drawn to "its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". In so providing, the factoring convention actually follows the approach already adopted by CISG. But both conventions do not provide for the means of interpretation. This subject has been discussed in detail in another paper of the present writer to which reference could be made.⁽¹⁰⁷⁾

2. Gap-Filling of Factoring Convention: The factoring convention only includes some of the rules concerning international factoring. In other words, this convention does not address all aspects of a factoring transaction. Of course, in relation to matters governed by the factoring convention, any dispute can be settled according to the rules of this convention. In cases of dubious provisions, tribunals may interpret them according to the principles set forth in article 4(1) mentioned above.

Needless to say, matters that are not dealt with by the factoring convention are still to be settled under domestic law applicable according to the rules of private international law. Examples of these could be the multiple assignment by the receivables to more than one factor, and the priority between the rights of the factor and those of others in the receivables assigned in the event of the supplier's insolvency.

But questions concerning matters governed by the factoring convention which are not expressly settled in it are to be settled in a different way. First, they should be settled according to the general principles on which the factoring convention is based. Examples of these could be the principle of good faith, and the principle that the debtor's position should neither be improved nor worsened by the factoring operation.

(107) See: Dawwas, Uniform Interpretation Under Article 7/1 of CISG, DIRASAT, Shar'ia and Law Sciences - University of Jordan, vol. 25, Nr.1 (1998), p. 206 - 225.

In fact, the drafters recognized the fact that these general principles do not provide any help in certain cases. Therefore, they - in the absence of the general principles⁽¹⁰⁸⁾ - allow reference to domestic law applicable by virtue of the rules of private international law.⁽¹⁰⁹⁾

Briefly, the settlement of such questions according to applicable domestic law is only permissible under article 4(2) as a last resort. This approach clearly supports the autonomous nature of the factoring convention.

3. Exclusion of Factoring Convention: It should, first of all, be mentioned that a proposal to make mandatory all provisions of the factoring convention had been rejected during the work of the committee.⁽¹¹⁰⁾ In article 3, the factoring convention recognizes the parties' autonomy. Under this provision, not only the parties to the factoring contract, but also those to the sale of goods contract may exclude the application of the factoring convention to the transaction at issue.⁽¹¹¹⁾ According to an opinion⁽¹¹²⁾ however, article 3 is extremely academic, since - when considering the individual provisions of the factoring convention - it is only article 6/1 under which a party (i.e., the debtor) has an interest in excluding the factoring convention. This opinion cannot however be followed, as each party may have a serious interest in excluding the convention whose provisions - as we will see - differ from domestic law otherwise applicable.

(108) It should be mentioned that the 1987 draft did not provide for the priority of general principles over applicable domestic law. Article 11(2) thereof provided that reference in such cases should be made to the general principles of the factoring convention **and** to the law applicable by virtue of the rules of private international law.

(109) In so doing, the factoring convention adopts word for word the formula of CISG, article 7(2). For more details on this topic, see: Dawwas, DIRASAT, *supra* fn. 107.

(110) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 24, p. 94.

(111) In contrast, the parties to the subsequent assignment, i.e. the factor and the assignee (e.g., export-factor and import-factor) may not exclude the factoring convention, (Kitsaras, p. 123. Zaccaria, IPRax 1995, p. 279, 281).

(112) Rebmann, 53 RabelsZ 1989, p. 607. Notably, Mr. Rebmann, who was the representative of the Federal Republic of Germany to the Ottawa Conference, had then argued this, in: Diplomatic Conference, Vol. II, p. 255 ff.

Clearly, the debtor, whose position is altered by the assignment, has the possibility to exclude the convention's application. In such a case, a certain requirement should however be fulfilled. The valid exclusion of the factoring convention by the supplier and the debtor may only be effected when the factor is given a notice thereof in writing; the excluding provision made in the sale of goods contract could not per se suffice in this context.⁽¹¹³⁾ This clearly protects the factor's interests, since only the receivables arising at or after this notice may not be governed by the factoring convention. To say it in other words, the receivables assigned by the supplier to the factor before the factor is given the notice of the convention's exclusion shall still be governed by the factoring convention.

In order to be effective, the notice in writing should identify the person who has given it; it must not however be signed by him, article 1/4(a). Under article 1/4(c), the notice should also be received by the addressee (here: the factor). Under article 1/4(b), the notice in writing "includes, but is not limited to, telegrams and telex and any other communication capable of being reproduced in tangible form", e.g. a computer disc.⁽¹¹⁴⁾ In contrast, a notice recorded on tape does not suffice here, as it can not be reproduced in tangible form.⁽¹¹⁵⁾ This would also be the case in relation to the telephone conversation recorded on an answering machine as well as to the communication that could only be reproduced on a screen.⁽¹¹⁶⁾ The expression "is not limited to" is used in this provision to make clear that the notice in writing could also be effectively given by other communications acceptable under domestic

(113) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 26, p. 94.

(114) Goode, J. Bus. L. 1988, p. 512. Diehl-Leistner, p. 128, fn. 28. Zaccaria, IPRax 1995, p. 279, 283, fn. 33.

(115) Goode, J. Bus. L. 1988, p. 512. Diehl-Leistner, p. 128, fn. 28.

See also the authors' understanding of the provision at issue, in: Diplomatic Conference, Vol. II, p. 296.

(116) Mr. Goode, the representative of the UK to the Ottawa Conference and the chairman of the working group on this provision at issue, in: Diplomatic Conference, Vol. II., p. 291. Report of the drafting committee on the 1987 draft, in: Diplomatic Conference, Vol. II., p. 303.

law, particularly those means which could be discovered later on.⁽¹¹⁷⁾

Under article 3/2, the factoring convention may only be excluded in *toto*. In fact, this all-or-nothing approach safeguards the interest of the one of the parties who did not exclude the convention.⁽¹¹⁸⁾ Thus, the parties to the factoring contract may not, for instance, agree to the exclusion of the factoring convention, articles 9 and 10 (which governs the rights of the debtor). Similarly, the parties to the sale of goods contract may not exclude the factoring convention, articles 5 and 7 (which govern some aspects of the supplier-debtor relationship); nor could they exclude the factoring convention, article 6 (which makes valid the assignment of the receivables notwithstanding the non-assignability clause).

Nevertheless, one could argue that an article under which two of the parties may exclude some provisions of the convention which concern their interests only (i.e., the provisions that do not affect the interests of the third (non-excluding) party) could not have prejudiced the purpose the present article aims to.⁽¹¹⁹⁾ In not making such a provision, the factoring convention, by the way, differs from the "UNIDROIT Convention on International Financial Leasing (Ottawa, 28 May 1988)" (hereinafter: the leasing convention), article 5.⁽¹²⁰⁾

However, this argument is not convincing to me. The leasing

(117) Mr. Goode, the representative of the UK to the Ottawa Conference and the chairman of the working group on this provision at issue, in: Diplomatic Conference, Vol. II., p. 291.

(118) Rebmann, 53 *RabelsZ* 1989, p. 607. Basedow, *ZEuP* 3/1997, p. 626. Kitsaras, p. 51. Diehl-Leistner, p. 128. Goode, *J. Bus. L.* 1987, p. 221. Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 26, p. 95, (the convention "could not be split up or modified without disturbing the balance which it was sought to achieve between the rights and obligations of the parties involved in factoring transactions").

(119) See the proposal of Mr. Pelichet, the representative of the Hague Conference on Private International Law to the Ottawa Conference, which runs as follows:

"In their relations with each other [alone], the supplier and the factor, on the one hand, and the supplier and the debtor, on the other, may exclude the application of this Convention or derogate from or vary the effect of any of its provisions", in: Diplomatic Conference, Vol. II., p. 254.

(120) This provides: "1.-The application of this Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it.

2.- Where the application of this Convention has not been excluded in accordance with the previous paragraph, the parties may, in their relations with each other, derogate from or vary the effect of any of its provisions except as stated in Articles 8(3) and 13(3) (b) and (4)".

contract differs from the factoring contract in that, whereas the former is one-shot transaction, the latter involves a continuous flow of receivables. The factoring institution has normally to deal with large numbers of invoices daily.⁽¹²¹⁾ Thus, it would be illogic to enforce the factor to investigate, in relation to each transaction, which provisions of the factoring convention the supplier and the debtor have derogated from and which not.⁽¹²²⁾

But, to ask with Mr. Kato, the representative of Japan to the Ottawa Conference,⁽¹²³⁾ what will happen if the parties have agreed, whether explicitly or implicitly, to exclude some provisions of the factoring convention? (There would be a case of implicit partial exclusion when the factoring contract includes stipulations which differ from certain provisions of the factoring convention). According to an opinion, one should determine whether or not the provisions excluded affect the interests of the excluding parties only. If not, then the exclusion is invalid. In case the answer is in affirmative, one should further ascertain the parties intent (i.e., whether they would exclude or apply the factoring convention).⁽¹²⁴⁾

According to the present writer, this opinion can not be followed. Under the distinct formula of article 3/2, only the explicit exclusion of the convention's application in its entirety may be valid. The exclusion of any part of it only, by contrast, can not be valid regardless of whether or not such an exclusion affects the interest of the other (non-excluding) party. This is also supported by the legislative history: In result, the opinion of Kitsaras mentioned above is amount to the proposal of Mr. Pelichet, the representative of the Hague Conference on Private International Law to the Ottawa Conference, which had not actually been maintained.⁽¹²⁵⁾

(121) Mr. Sommer, the representative of F.C.I. to the Ottawa Conference, in: Diplomatic Conference, Vol. II., p. 254.

(122) Mr. Goode, the representative of the UK to the Ottawa Conference, in: Diplomatic Conference, Vol. II., p. 254.

(123) Diplomatic Conference, Vol. II., p. 256 ff.

(124) Kitsaras, p. 51. Mr. Rebmann, the representative of the Federal Republic of Germany to the Ottawa Conference, in: Diplomatic Conference, Vol. II., p. 259.

(125) Diplomatic Conference, Vol. II., p. 253 ff.

As the factoring convention may only be excluded in *toto*, one could not conceive any exclusion, but the explicit one.⁽¹²⁶⁾ Therefore, the contractual provision which differs from the factoring convention would be invalid.⁽¹²⁷⁾ Whether the invalidity of such a contractual provision results in the invalidity of the whole contract or not will be defined according to applicable domestic law⁽¹²⁸⁾ as the factoring convention does not regulate this matter. In cases it does not, the convention, not domestic law, will govern the rest of the factoring contract.⁽¹²⁹⁾

In this regard, one should finally mention that, under the factoring convention, article 17, two or more states which have similar substantive legal rules to those of the factoring convention may exclude the application of this convention to the supplier, the debtor, and the factor who have their places of business in these states.

D. Rights and Duties of the Parties:

The factoring convention only governs factoring transactions. These, in turn, include two contracts: the factoring contract made between the supplier and the factor and the contract of sale of goods or supply of services (sale of goods contract) made between the supplier and the debtor.

1. Sale of Goods Contract: The sale of goods contract in the strict meaning is not in principle governed by the factoring convention; rather, it is normally governed by CISG. The factoring convention regulates however a clause which a sale of goods may include, namely: the non-assignability clause, under which the seller should not assign his receivables resulting from the sale of goods contract.

a. Factoring Convention and CISG: From the beginning, the authors acknowledged the fact that the receivables assigned, to which the factoring convention applies, most often arise out of an international sale of goods contract (strict meaning).⁽¹³⁰⁾ As this contract is often governed

(126) Basedow, ZEuP 3/1997, p. 626.

(127) Haeusler, in: Hagenueller and others, p. 278. Basedow, ZEuP 3/1997, p. 626.

(128) Compare: Haeusler, in: Hagenueller and others, p. 278.

(129) Compare: Basedow, ZEuP 3/1997, p. 626.

(130) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 11, p. 88.

by CISG,⁽¹³¹⁾ the authors, when making the factoring convention, were concerned to take into consideration as far as possible the provisions of CISG. For these reasons, one may argue with Basedow that the factoring convention is an annex to CISG.⁽¹³²⁾

In fact, both international instruments have some common features either in regard with the general structure, some specific provisions,⁽¹³³⁾ and the terminology used.⁽¹³⁴⁾ In order to apply either instrument, there should be an international sale of goods contract.⁽¹³⁵⁾ Under both instruments, this contract is qualified international when both parties, i.e. the seller and the buyer, have their places of business in different states. Furthermore, both conventions do not apply if the contract of sale of goods at issue is made for private purposes.

Nevertheless, the factoring convention may also apply even if the receivables assigned arise out of a contract of sale of goods contract not governed by CISG. This would be the case where the contract (covered by CISG, article 1/1) does not satisfy the condition set forth in CISG, article 1/2,⁽¹³⁶⁾ i.e. whenever the fact that the parties have their places of business in different states" does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract."

Similarly, the factoring convention may apply even if the receivables assigned result from a sale excluded from the sphere of application of

(131) In the case cited supra, fn. 39, the court applied CISG to the relationship between the French buyer and the Italian supplier.

(132) Basedow, ZEuP 3/1997, p. 621. Compare: Haeusler, in: Hagenuegger and others, p. 280.

(133) Examples of these would be the provisions of the factoring convention, articles 2/1 (the criterion adopted to qualify the contract governed as international), 2/2 (the party's place of business considered), 2/1(b) (application of the convention in a non-contracting state by virtue of the rules of private international law), and 4 (interpretation and gap-filling of the convention) which correspond to CISG, articles 1/1, 10(a), 1/1(b), 7 respectively.

(134) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 11, p. 88, 89. Basedow, ZEuP 3/1997, p. 625. Rebmman, 53 RabelsZ 1989, p. 603.

(135) It should be noted that the factoring convention also comes into application when the receivables assigned arise out of a contract of supply of services.

(136) Ferrari, RIW 1996, p. 184.

CISG. This is the case concerning the sales stipulated in CISG, article 2(b) - (f),⁽¹³⁷⁾ namely the sales, by auction; on execution or otherwise by authority of law; of stocks, shares, investment securities, negotiable instruments or money; of ships, vessels, hovercraft or aircraft; of electricity."

Taking into account the fact that the factoring convention also addresses the assignment of receivables resulting from a contract of supply of services, it does not matter whether the receivables at issue arise out of a contract which, according to CISG, article 3,⁽¹³⁸⁾ is excluded from the realm of application of CISG.⁽¹³⁹⁾

It should finally be noted that CISG, according to its article 11, applies to the sale of goods contract made orally. This rule is however qualified by CISG, articles 12 and 96 according to which a contracting state, whose legislation requires contracts of sale to be concluded in or evidenced by writing, may declare that CISG, article 11 does not apply where any party has his place of business in that state. The factoring convention, by contrast, does not include such provisions. Therefore, the question whether it applies to the assignment of receivables resulting from an orally made sale of goods contract should be determined by the law applicable under the rules of private international law.⁽¹⁴⁰⁾

b. Non-Assignability Clause: In domestic laws, this question has been actually addressed in different ways. According to the Hollandaise civil code, article 3:83/2,⁽¹⁴¹⁾ German civil code, article 399 and the civil codes of some Arab countries (e.g., article 303, article 303, article 290, article

(137) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 16, p. 90. Ferrari, RIW 1996, p. 184, fn. 63.

(138) This article provides:

"(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services."

(139) Ferrari, Int'l Lawyer, Vol. 31 (1997), p. 52. Ferrari, RIW 1996, p. 184. Haeusler, in: Hagenueller and others, p. 280.

(140) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 16, p. 90.

(141) Basedow, ZEuP 3/1997, p. 634, 635.

239, and article 260 of the civil codes of Egypt, Syria, Libya, Algeria, and Iraq, respectively), the debtor may successfully assert against the factor the defence of non-assignability agreed to between the debtor and the supplier. In principle, this is also the case under the Italian civil code, article 1260.⁽¹⁴²⁾ However, the debtor should establish the factor's knowledge of the non-assignability clause.⁽¹⁴³⁾

It should be mentioned that some German authors would nevertheless consider ineffective the non-assignability clause, when the factor offers the debtor alternatives, e.g., when he assures him that the payment erroneously made to the supplier will not be reclaimed from him.⁽¹⁴⁴⁾ In any event, the assignment should be valid under article 354(a) of the German commercial code - notwithstanding the non-assignability clause contained in the sale of good contract - if this contract is commercial concerning both parties or if the debtor is a legal person. Nevertheless, the payment by the debtor to the supplier (not to the factor) is effective according to this provision which is mandatory in character.

Notably, article 354(a) mentioned above deals with the validity of the assignment, not with the invalidity of the non-assignability clause. Thus, under the provision of this article, the non-assignability clause would be valid in relation to both the supplier and the debtor, and, as such, the supplier would be liable against the debtor if he - contrary to this clause - assigns his receivables to the factor.⁽¹⁴⁵⁾

Under French law, the non-assignability clause is effective as to the relationship between the parties; it does not however affect third parties.⁽¹⁴⁶⁾ Section 9-318(4) of the UCC provides the invalidity of such a clause as to the factor; the breach by the supplier of the prohibition of assignment of receivables may however results in his liability in damages vis-à-vis the debtor.

(142) Basedow, ZEuP 3/1997, p. 635. Kitsaras, p. 23

(143) Basedow, ZEuP 3/1997, p. 635.

(144) See the references cited by Pleyer, in: Chinkin, p. 324, fn. 33, and by Diehl-Leistner, p. 22, fn. 39.

(145) Basedow, ZEuP 3/1997, p. 634.

(146) Kitsaras, p. 21, 22. Diehl-Leistner, p. 41. Basedow, ZEuP 3/1997, p. 635, and references cited.

Taking into account the divergence amongst domestic laws in this field and the different interests of the parties, the clause prohibiting assignment of receivables was actually the most discussed question by the authors of the factoring convention. It raised the conflict between enforcing the prohibition of the assignment of receivables on one hand and encouraging the financing of international commercial transactions on the other. The supporters of the first opinion referred to the principle of parties' contractual autonomy. They argued, the debtor (buyer) should be able to avail himself of his contractual autonomy; the debtor's sound interest to guard himself against any change in his creditor and to be sure that he is discharged when paying to the supplier must be respected in the event the debtor agrees with the supplier (seller) to prevent the latter from assigning his receivables. Others argued, in contrast, giving absolute effect to the non-assignability clause would seriously impede the factoring practice, as the factor should look at each sale of goods contract to see whether or not it contains a non-assignability clause. The supplier sometimes needs the factoring to conduct his business, especially where his customers are unwilling to provide any kind of security.⁽¹⁴⁷⁾ He may not therefore be deprived from the assignment of his receivables even if the contract of sale of goods made between him and the debtor prohibits this.

The factoring convention, articles 6 and 18 provide for the effect of the non-assignability clause. They adopt a compromise solution: article 6/1 makes valid the assignment of receivables by the supplier to the debtor regardless of the non-assignability clause included in the sale of goods contract between the supplier and the debtor; this clause is invalid as to the factor. This should also be the case even if the prohibition of the assignment of the receivables is agreed to by the supplier and the debtor after the conclusion of the sale of goods contract.⁽¹⁴⁸⁾ However, the non-assignability clause is valid as to the relationship between the contracting parties, namely: the supplier and the debtor, article 6/3. The breach by

(147) Goode, J. Bus. L. 1987, p. 220.

(148) Kitsaras, p. 86.

the supplier of the clause prohibiting the assignment of his receivables leads to his liability in damages against the debtor.⁽¹⁴⁹⁾ The extent of this liability will be determined according to the law applicable to the sale of goods contract.

Obviously, article 6/1 protects the factor's interest. It aims to facilitate financing the international trade. The debtor may not therefore undermine this main object of the factoring convention. Even under article 9/2, the debtor may not assert the right to set-off in relation to his claim to damages.⁽¹⁵⁰⁾ Otherwise, article 6/1 would be meaningless.

Nevertheless, the rule set forth in article 6/1 may not apply if the debtor's place of business is in a contracting state that has made a reservation under the factoring convention, article 18.⁽¹⁵¹⁾⁽¹⁵²⁾ To date, France and Latvia made this reservation.⁽¹⁵³⁾ In such a case, the assignment of receivables, shall not be effective against the debtor", article 6/2. It should be noted that the interest of the debtor with a seat in a reserving state is better protected under the convention than in the past: According to article 6/2, the assignment by the supplier of receivables contrary to the non-assignability clause should be (directly) ineffective so

(149) Similarly, the validity of the assignment "shall not affect any obligation of good faith owed by the supplier to the debtor", article 6/3.

(150) Of this opinion, see also: Kitsaras, p. 87.

(151) According to the factoring convention, article 18, this reservation may be made at any time. It should, under article 23, be given to the government of Canada, which, in turn, informs all contracting states of it.

(152) One should here mention the joint proposal submitted by the delegations of France, Mexico, and Philippines to the Ottawa Conference, under which the assignment by the supplier to the factor, should as a rule, have been invalid in cases of a non-assignability clause. The assignment could, by contrast, exceptionally have been validly made notwithstanding any agreement to the contrary had the debtor had his place of business in a reserving state, (see this proposal, in: Diplomatic Conference, Vol. I, p. 251).

Representatives of some countries, whose (national) laws provide the general rule set forth in this proposal, had opposed it. This is the case in relation to the representatives of the Federal Republic of Germany, Switzerland, and Finland. By contrast, it is not conceivable for which purpose the representative of France had supported this proposal, since it is contrary to the legal rule prevailing in France in this regard. This proposal had not fortunately been maintained, since otherwise the practice of factoring could seriously been impeded, (see the discussion of this proposal at the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 264 ff.).

(153) Combare Basedow, ZEuP 3/1997, p. 636.

long as the debtor has his place of business in a contracting state that made the reservation under article 18; there is no need to look for domestic law applicable.⁽¹⁵⁴⁾ In such a case, the assignment could be declared effective not only by the reserving country's tribunals, but also by tribunals of other states which may apply the factoring convention.⁽¹⁵⁵⁾

Before the factoring convention is concluded, by contrast, the question whether or not the debtor (with a seat in a country whose law provides the invalidity of the assignment of receivables in cases of the non-assignability clause) may be protected completely depended upon the law applicable according to the rules of private international law. This is still the case concerning the states that did not yet adhere to the factoring convention. The rule of domestic law which makes the assignment invalid in cases of the non-assignability clause may only be enforced if this domestic law is applicable under the conflict-of-law rules.

In any event, the non-assignability clause, in cases of an effective reservation under article 18, has its effect under article 6/2 only against the debtor. This means that the factoring convention, articles 8-10, which govern the relationship between the factor and the debtor, may not apply in such cases. By contrast, the non-assignability clause has no effect as to the supplier-factor or the factor-others relationship.

2. Factoring Contract: According to the third paragraph of its preamble, the factoring convention only addresses certain questions relating to the international factoring transaction.⁽¹⁵⁶⁾ For instance, it does not deal with the situations involving third parties. Due to their "extreme complexity", the committee decided not to handle the question

(154) Of this opinion, you may see: Diehl-Leistner, p. 130. Kitsaras, p. 87, 88. Rebmann, 53 *RebelsZ* 1989, p. 610.

To the contrary, see: Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 33, p. 97. Alexander, *Columbia J. Trans. L.*, Vol. 27 (1989), p. 370 ff. Goode, *J. Bus. L.* 1988, p. 511. Zaccaria, *IPRax* 1995, p. 285.

(155) Basedow, *ZEuP* 3/1997, p. 638.

(156) For this reason the 1983 preliminary draft was titled "Preliminary Draft Convention on certain aspects of international factoring".

of priorities between the rights of the factor and those of third parties in the receivables assigned.⁽¹⁵⁷⁾

In the following, it would be clarified to which extent the factoring convention deals with the supplier-factor and the factor-debtor relationships.

a. Supplier-Factor Relationship: In fact, the factoring convention does not govern the legal relationship between the supplier and the factor. Admittedly, the rights and obligations of the factor and the supplier differ from one case to another according to the type of factoring used.⁽¹⁵⁸⁾ Therefore, it could be difficult to make uniform rules in this field. Due to the fact that the factors involved in financing international trade are normally large-sized institutions however, they would by contract regulate their relationships with suppliers satisfactorily.

Nevertheless, the factoring convention includes provisions which address some grounds of the validity of the factoring contract. (Other grounds of validity should therefore be decided under the applicable domestic law). Article 5 thereof deals with the question of the identifiability of the receivables. Article 7 addresses the transfer of the supplier's security rights to the factor.

aa. Identifiability of Receivables and Validity of Factoring Contract: Unlike certain domestic laws, the factoring convention, article 5(a), recognizes the global assignment of the supplier's receivables, including the future receivables.⁽¹⁵⁹⁾ The receivables assigned should not, under

(157) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 10, p. 88.

(158) Rebmann, 53 *RabelsZ* 1989, p. 603.

(159) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 28, p. 95. Goode, J. Bus. L. 1987, p. 220. Pleyer, in: Chinkin, p. 324. Haeusler, in: Hagenueller and others, p. 280.

An example of domestic laws that do not recognize the global assignment would be the French law, (Basedow, *ZEuP* 3/1997, p. 621).

It should however be mentioned that some domestic laws recognizes the global assignment under certain conditions. Under Swiss law, article 165/1 of OR, i.e. the law of obligations, such an assignment should be in writing, (Pleyer, in: Chinkin, p. 324). Under the Italian law of 1991, the debtor should be mentioned (article 3/4) and the future receivable shall come into existence within 24 months (article 3/2), (Zaccaria, *IPRax* 1995, p. 284. Basedow, *ZEuP* 3/1997, p. 632. =

article 5(a), necessarily be defined. It suffices, if they are determinable at the time the contract is made. The mere fact that the factoring contract does not specify them individually does not render invalid this contract. Similarly, the future receivables may also be validly assigned by the supplier to the factor, so long as they can, when coming into existence, be identified to the contract.

The factoring convention does not however define how the receivables may be determinable. Thus, tribunals are granted a wide measure of discretion in this regard. When defining this question, the tribunal should take into account the purposes of interpretation laid down in the factoring convention, article 4/1. In any event, the interpreter should consider the designation by the contract of the line of the goods contemplated, the countries from which the supplier's customers come, or a list of regular customers agreed by the supplier and the factor.⁽¹⁶⁰⁾

Under article 5(b), the future receivables assigned will - when they come into existence - directly transfer to the factor, i.e. "without the need for any new act of transfer". In so doing, the factoring convention differs from some domestic laws.⁽¹⁶¹⁾

It should not be forgotten that under the explicit formula of article 5, it only applies to the supplier-factor relationship⁽¹⁶²⁾ "[a]s between the parties to the factoring contract". It has no effect against others,⁽¹⁶³⁾

= De Navo, in: Hagenueller and others, p. 341).

In the Arab world, the future right may be transferred, too. This is explicitly provided for in the Lebanese code of obligations and contracts, article 281. It may also be deduced from the general formula used in article 303, article 290, article 239, and article 260 of the civil codes of Egypt, Syria, Libya, Algeria, and Iraq, respectively.

(160) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 29, p. 95.

(161) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 30, p. 96.

(162) According to the legislative history, the term supplier does not embrace "the trustee in bankruptcy carrying on the supplier's business", (Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 29, p. 95).

(163) It should be noted that a proposal of the delegation of USA, to make, under certain conditions, the provision of the (present) factoring convention, article 5 effective also vis-à-vis third parties, had not gotten enough support at the Ottawa Conference. This proposal run as follows, "[t]he provisions of paragraph one of this article shall also be effective as to third parties unless such =

including the debtor. As such, article 5 would almost be of no meaning as far as the effect of the global assignment against the debtor is concerned. Since this question is not governed by the factoring convention, it should be determined under the applicable domestic law. Taking into account the factoring convention, article 8, the debtor would therefore successfully rely as against the factor upon the applicable domestic law which invalidates the global assignment (e.g., French law) or that which recognizes it under some limitations (e.g., Italian law of 1991 and Swiss law).

bb. Transfer of the Supplier's Security Rights to the Factor:

According to article 7, the parties to the factoring contract may validly stipulate that the supplier transfers, with or without a new act of transfer, all or any of his security rights to the factor, e.g. the right reserves to the supplier the title of the goods. The parties may also agree that the supplier transfers his security rights relating to future receivables.⁽¹⁶⁴⁾ Likewise, the supplier's right to rescind the contract may also be transferred to the factor.⁽¹⁶⁵⁾ In the event the parties are silent on this question, it will be decided according to domestic law applicable under the rules of private international law.⁽¹⁶⁶⁾

It should be noted here that, at the Ottawa Conference, the Spanish delegation suggested that the transfer of the supplier's security rights to the factor could only be effected if the terms required under the law of the country, in which the debtor has his place of business, were satisfied.⁽¹⁶⁷⁾ This proposal had been fortunately not maintained on the ground that it

= provisions are not enforceable as to such third parties under other articles of this Convention or the domestic law applicable under the rules of private international law", (in: Diplomatic Conference, Vol. II, p. 263).

(164) Zaccaria, IPRax 1995, p. 284. Rebmann, 53 RabelsZ 1989, p. 611.

(165) Haeusler, in: Hagenueller and others, p. 281.

(166) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 36, p. 98.

Of another opinion you may see Haeusler, in: Hagenueller and others, p. 281. He argues that, in such a case, the supplier's security rights may not be transferred; these could only be acquired by the factor by means of an agreement to this effect.

(167) See this proposal in: Diplomatic Conference, Vol. I, p. 188, and in: Diplomatic Conference, Vol. II, p. 271.

would frustrate the purpose of the provision at issue, i.e. facilitation of the international factoring.⁽¹⁶⁸⁾

Article 7 clearly covers all supplier's rights deriving from the sale of goods contract regardless of whether they secure the assignment of the receivables or the performance of the contract.⁽¹⁶⁹⁾ It also makes no difference whether the supplier's security rights are contractual or legal.⁽¹⁷⁰⁾

Unlike the 1983 draft, the factoring convention does not provide for the automatic transfer of the supplier's rights of security.⁽¹⁷¹⁾ According to the present formula of the factoring convention, article 7, this could only be effected by a contractual provision⁽¹⁷²⁾ or, in the absence of any contractual provision, by domestic law.⁽¹⁷³⁾

b. Factor-Debtor Relationship: As mentioned above, the factoring transaction involves three parties, namely: the supplier, the factor and the debtor. The relationship between the supplier and the debtor is governed by their contract of sale of goods or supply of services. Likewise, the factoring contract governs the relationship between the supplier and the factor. Thus, the factor and the debtor are the only non-contracting parties involved in the factoring transaction. For this reason, the

(168) Mr. Goode, the representative of the UK to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 271.

(169) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 37, p. 98. Kitsaras, p. 78.

(170) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 37, p. 98. Kitsaras, p. 78.

(171) For this reason, the 1983 preliminary draft included a provision which clarified the limit of the factor's liability. Under article 10/1 thereof, the factor could not "incur liability to a third party for loss, injury or damage caused by the goods", whose title was automatically transferred to him. Under article 10/2 thereof, the factor could be held liable for selling or otherwise disposing of the goods to "a person who is not the supplier, another factor or the debtor".

This provision had not however been maintained for two reasons: Firstly, the factoring convention does not, as mentioned above, provide for the automatic transfer of the supplier's rights to the factor. Secondly, the authors of the factoring convention decided to limit the scope of application of the convention to the parties involved by the factoring transaction (i.e. the factor, the supplier, and the debtor); the convention does not apply to third parties, (Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 10, p. 88).

(172) Rebmann, 53 *RebelsZ* 1989, p. 611. Kitsaras, p. 79.

(173) Rebmann, 53 *RebelsZ* 1989, p. 611. Diehl-Leistner, p. 131. Zaccaria, *IPRax* 1995, p. 284.

factoring convention expressly regulates the factor-debtor relationship (articles 8 through 10⁽¹⁷⁴⁾).

aa. Effective Debtor's Payment to the Factor: Under the factoring convention, article 8, the debtor shall pay the factor provided that he "does not have knowledge of any other person's superior right to payment" and he has received adequate notice of the assignment of the receivables at issue.

According to article 8/1, one should under the first term consider only the debtor's positive knowledge;⁽¹⁷⁵⁾ to have knowledge can in no way be qualified by "or should have known".⁽¹⁷⁶⁾ The debtor should not pay the factor when he knows of a superior right of another person. But if he pays nevertheless, this payment could not be effective under the factoring convention, article 8/2. The rule set forth in article 8/1 is actually an indication of the good faith principle (factoring convention, article 4/1). However, it is onerous to the debtor, since he is under a duty to investigate whether or not the right of the third person is "superior".⁽¹⁷⁷⁾ The factoring convention does not itself define when the right of a third party is superior over the right of the factor. Nor does it determine the law applicable to this question. Thus, it is the duty of the debtor to decide this question, a matter - because of its complexity - the drafters of the factoring convention themselves left it open.⁽¹⁷⁸⁾ This approach could not be supported by the present writer. It could be much more satisfactory if the draftsmen would have only required the debtor to examine whether or not the factor is authorized to get the payment he asks for.⁽¹⁷⁹⁾

(174) These articles may not however apply if the assignment of the receivables is invalid against the debtor under the factoring convention, articles 6 and 18.

(175) Zaccaria, IPRax 1995, p. 283, fn. 36. Rebmann, 53 RabelsZ 1989, p. 612.

(176) Zaccaria, IPRax 1995, p. 283, fn. 36.

(177) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 39, p. 98, 99. Kitsaras, p. 106.

(178) According to the legislative history however, the right of the import-factor, for instance, prevails over the right of the export-factor, (Mr. Beraudo, the representative of France to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 274).

For more details, see *infra*: III., E.

(179) Haeusler, in: Hagenueller and othes, p. 282.

The notice of the assignment of a receivable will only be effective if it is in writing. In order to facilitate the factoring practice, the factoring convention, article 1/4(a) provides that the notice "need not be signed". Thus, a stamp or sticker affixed on an invoice issued to the debtor would suffice in this regard.⁽¹⁸⁰⁾ Furthermore, article 4/1(b) considers "telegrams, telex and any other telecommunication capable of being reproduced in tangible form" an adequate writing. The notice communicated by computer would therefore suffice, since it can be reproduced by a print-out.

Under the factoring convention, article 4/1(a), the written notice shall also include the name of the supplier or his representative. The factoring convention, article 8/1(a) clearly provides that either the supplier or the factor with the supplier's authority shall give the notice. In fact, each of them has a sound interest in giving the notice to the debtor. The supplier is the original creditor. The factor is the person to whom payment shall be made. In case the notice is given by the factor, it should clarify that the factor works with the supplier's authority.⁽¹⁸¹⁾ The convention does not however define the form of this authority and whether or not another person may also give the notice in the name of the supplier or the factor. Thus, these question shall be decided under the applicable domestic law.⁽¹⁸²⁾

In addition, the notice shall identify the receivables assigned and the factor to whom the debtor shall pay, article 8/1(b); it does not suffice that the notice merely mention that the receivables are assigned to a factor.⁽¹⁸³⁾ The debtor's payment to the factor may not therefore be effective if it concerns a receivable not assigned by the supplier to the factor. Furthermore, the notice shall address receivables resulting from a contract of sale of goods done at or before it is given to the debtor, article 8/1(c). Thus, the assignment of future receivables (i.e. receivables arise

(180) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 19, p. 91. Zaccaria, IPRax 1995, p. 283.

(181) Kitsaras, p. 107.

(182) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 40, p. 99.

(183) Goode, J. Bus. L. 1988, p. 512. Compare also: Rebmann, 53 RabelsZ 1989, p. 612.

rely upon this provision. In contrast, the supplier, for instance, may not avail himself of this provision.⁽¹⁸⁷⁾

bb. Factoring and Maintenance of Debtor's Rights Under the Contract of Sale of Goods: The factoring convention, article 9 restricts the rule laid down by article 8: the debtor may assert vis-à-vis the factor any right of set-off relates to a claim existing against the supplier in whose favor the receivables arose and available to the debtor at the time a notice was effectively given to the debtor under article 8. Taking into account the past tense "was given" the authors used,⁽¹⁸⁸⁾ the claim that could be asserted by the way of set-off should clearly be existed prior to, or at the latest at the time of, giving the notice. But, it does not matter if such a claim has become due thereafter.⁽¹⁸⁹⁾

However, the provision of article 9/2 shall not apply if the debtor asserts against the factor only rights of set-off relate to claims resulting from a direct factor-debtor contractual relationship. This would also be the case in the event the claims at issue result from contracts of sale of goods made with other suppliers who assign their receivables to the same factor.⁽¹⁹⁰⁾ In such cases, the applicable domestic law should rather decide whether or not and, if yes, under which requirements such claims may be set-off. But it is not clear whether the debtor may assert against the factor any right of set-off relates to claims resulting from another sale of goods contract made with the same seller, but the receivables arising out of it are not assigned to the factor. According to an opinion, the debtor may not.⁽¹⁹¹⁾ The court of appeal of Grenoble - France, by contrast, argues that "[a] claim corresponding to credits agreed by the

(187) Kitsaras, p. 108.

(188) Notably, the past tense used here differs from the tense used in other provisions of the factoring convention relating to notice, i.e. articles 1/4(c), 3/1(b), and 8/1(a). A proposal to change the past tense used in article 9/2 into present "is given" had been rejected by the draftsmen, (Diplomatic Conference, Vol. II, p. 42).

(189) Rebmann, 53 *RabelsZ* 1989, p. 613. See also the decision of the court of appeal of Grenoble - France, cited *supra* fn. 39.

(190) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 44, p. 100.

(191) Mr. Reisman, the representative of USA to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 278.

it should be decided according to the applicable domestic law.⁽¹⁹⁶⁾

cc. Returning by the Debtor of a Sum Already Paid to the Factor: Just as the assignment may not prejudice the debtor, the authors of the factoring convention, in article 10, acknowledge that the assignment may not also improve the debtor's position by giving him rights against both the supplier (under the applicable law) and the factor (under the factoring convention). In response to payment by the debtor to the factor prior to the supplier's non-performance, the debtor - despite his right to assert defences and to set-off claims - may not in principle bring a legal claim to recover the purchase price if he can do that against the supplier.⁽¹⁹⁷⁾ The mere fact of the supplier's non-performance does not enable the debtor to do that. But other reasons of recovery existed under domestic law are not affected.⁽¹⁹⁸⁾ The reason standing behind the rule of article 10/1 is the protection of the factor's interest; this rule prevents "the factor having to make a double payment, first to the supplier and then to the debtor".⁽¹⁹⁹⁾

However, it is not clear enough under the factoring convention, article 10/1 whether or not the debtor may recover from the factor the sum already paid to him if he (the debtor) can not recover it from the supplier. This would be the case if the debtor has waived the claims he may normally demand against the supplier in cases of non-performance by the latter. According to the opinion of the present writer, this case is not governed by the factoring convention. Article 10/1 thereof only addresses cases in which the supplier did not perform and the debtor has therefore a right to recover from the supplier. In the case under consideration, the applicable domestic law should therefore come into application. Under this law, it is not conceivable that the debtor would recover from the factor the sum he already paid him, simply because he

(196) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 44, p. 100.

(197) In so doing, the factoring convention differs from domestic law under which the debtor normally has the right to bring a legal action against both the supplier and the debtor, (Kitsaras, p. 123).

(198) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 46, p. 101.

(199) Mr. Goode, the representative of UK to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 281.

can not return it from the supplier.⁽²⁰⁰⁾

Nevertheless, there are some exceptions to the rule laid down in article 10/1. This article may not apply if the factor did not yet pay the supplier for the receivable in question, or if he (the factor) tendered payment with knowledge of the supplier's non-performance, article 10/2 a-b. In such cases, the debtor has the choice to return the sum already paid either from the factor or the supplier.

Through the provision of article 10/2, the authors of the convention maintains "a fair balance of interests" amongst the three parties involved in the factoring transaction.⁽²⁰¹⁾ The reason stands behind the first case is that, due to the non-performance by the supplier of his obligation under the sale of goods contract there could be no sound reasoning for any supplier's claim against the factor;⁽²⁰²⁾ as the factor's obligation under the factoring contract to make payment to the supplier is not yet discharged (in fact, the factor is not obliged to do that any more), the factor would not suffer loss from returning the purchase price to the debtor. Otherwise, the factor could make unjust enrichment.⁽²⁰³⁾ Concerning his commission and fees, the factor may demand them from the supplier.⁽²⁰⁴⁾

According to the second case, the factor is clearly under a duty to co-operate with the debtor and to act in good faith. This duty is actually in compliance with the factoring convention, article 4/1. The factor, who knows of the supplier's non-performance, but has paid him nevertheless, is obviously acting in bad faith. Therefore, he has only himself to blame.⁽²⁰⁵⁾ Furthermore, the debtor may - under article 10/2(b) - recover from the factor the whole sum already paid to him regardless of how much he (the factor) actually paid (or should pay) to the supplier under

(200) Compare: Kitsaras, p. 123. Mr. Reisman, the representative of USA to the Ottawa Conference, in: Diplomatic Conference, Vol. II, p. 281, 282.

(201) This is actually a main object of the factoring convention as clearly provided in its preamble.

(202) Rebmann, 53 *RabelsZ* 1989, p. 614. Kitsaras, p. 124.

(203) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 47, p. 101.

(204) Compare: Zaccaria, *IPRax* 1995, p. 286.

(205) Compare: Zaccaria, *IPRax* 1995, p. 286.

the factoring contract.⁽²⁰⁶⁾ But where the factor paid just a part to the supplier in bad faith, article 10/2 (b) should apply to this part of payment only. This means that the debtor may recover such a part paid in bad faith, but not the other part the factor had paid to the supplier before the former knew of the latter's non-performance.⁽²⁰⁷⁾ In any case, the debtor - in order to guard his interest - is strongly advised to notify the factor as soon as possible about the non-performance caused by the supplier.⁽²⁰⁸⁾

Notably, these exceptions to the rule set forth in article 10/1 are not justified by the debtor's financial position, rather by the factor's financial role.⁽²⁰⁹⁾ In the cases mentioned in article 10/2, it is the factor who shall assume the risk of the supplier's non-performance. The factor will not however be prejudiced by this, since he generally retains part of the advance payment (e.g., 20% of the value of the receivable assigned) in order to secure his position in the event of non-performance by the supplier.⁽²¹⁰⁾ Besides, the factor, where he did not pay the supplier in advance, may in fact guard himself by providing in the factoring contract that he can withhold payment to the supplier to the extent of any sum he should repay to the debtor.⁽²¹¹⁾

E. Subsequent Assignments:

So long as the factoring convention applies to the assignment of receivables as described above, it may also apply to any subsequent assignment of these receivables, article 11. This would be the case in relation to the two-factor-system under which the export-factor assigns the receivables (assigned to him by the supplier) to an import-factor in the debtor's country. In fact, it was a main purpose of the authors to make the convention, through its article 11, applicable to this type of factoring which is often used.⁽²¹²⁾

(206) Kitsaras, p. 124.

(207) Kitsaras, p. 124, 125.

(208) Haeusler, in: Hagenueller and others, p. 284.

(209) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 47, p. 101.

(210) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 47, p. 101.

(211) Goode, J. Bus. L. 1988, p. 512.

(212) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 48, p. 101.

Thus, it is not necessary that the places of business of the parties to the successive assignment are situated in different states, since the international character of the factoring transaction depends upon the sale of goods contract, not upon the factoring contract.⁽²¹³⁾ For the same reasoning, it is of no importance whether or not the successive assignment is governed by the law of a contracting state.⁽²¹⁴⁾

In order to be validly concluded, the subsequent assignment should also, according to the factoring convention, article 12, not be prohibited by the factoring agreement. In fact, this provision complies with the international practice concerning the direct-import factoring under which the supplier often excludes the possibility of making subsequent assignment by the factor.⁽²¹⁵⁾ In the event the factor, despite a prohibiting clause in the factoring contract, assigns the same receivables to a new factor, the validity of this subsequent assignment should be determined under domestic law.⁽²¹⁶⁾

According to article 11/1 (a) the rules of the factoring convention, articles 5 to 10 shall apply to the subsequent assignment. Notably, articles 8 to 10 shall however apply "as if the subsequent assignee were the factor", article 11/1 (b). Thus, the legal position of the debtor will not be worsened, no matter how many successive assignments follow. It is however disputed amongst the writers whether the debtor may assert against the subsequent assignee (e.g. the import-factor) any right of set-off in respect of claims existing vis-à-vis the supplier only, or also those existing against the (first) factor (e.g. export-factor). According to an opinion, the debtor may avail himself in this regard of all claims he has either against the supplier or against the (first) factor.⁽²¹⁷⁾ According to

(213) In fact, the committee did not maintain a proposal to this effect, principally because the new factor is mostly from the debtor's country, (Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 49, p. 102).

(214) Zaccaria, IPRax 1995, p. 281. Rebmann, 53 RabelsZ 1989, p. 615. Haeusler, in: Hagenueller and others, p. 280.

(215) Diehl-Leistner, p. 133, fn. 67. Kitsaras, p. 129.

(216) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 53, p. 104.

(217) Diehl-Leistner, p. 133, 134.

another opinion, the debtor may only assert against the new factor any right of set-off concerning his claims existing against the supplier.⁽²¹⁸⁾

Taking into account the formula of article 11/1 (b), the second opinion seems convincing. Under this provision the new factor is placed in the position of the first factor. The substantive provisions of the factoring convention should therefore apply as there were no first factor at all. Thus, the debtor's rights to set-off against the new factor which result from his relation to the first factor are not governed by the factoring convention. They should rather be settled according to domestic law.⁽²¹⁹⁾

It should be noted that the factoring convention, article 3 does not - under article 11 - apply to the successive assignment. In other words, the parties to the successive assignment may not exclude the application of the factoring convention to their transaction. The reasoning behind this rule is the protection of the debtor's interest.⁽²²⁰⁾

According to article 11/2, it would suffice if the debtor is given notice of the subsequent assignment; an extra notice of the first assignment is not necessary. The rule laid down in this article actually reflects a custom known as the cross-border factoring.⁽²²¹⁾ Taking into account the fact that the factoring convention does not govern the undisclosed factoring, this rule is actually necessary. Otherwise, one could understand that the factoring convention does not apply to the whole transaction. In any event, this rule is logic, since the debtor is not obliged to pay to the (first) factor. Thus, giving notice of the first assignment, which actually costs, would otherwise be for nothing.⁽²²²⁾

Nevertheless, it sometimes happens that the debtor is only notified of the first assignment by the supplier to the (first) factor, but not also of

(218) Kitsaras, p. 128.

(219) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 51, p. 103.

(220) Rebmann, 53 *RabelsZ* 1989, p. 616.

(221) Rebmann, 53 *RabelsZ* 1989, p. 616. Basedow, *ZEuP* 3/1997, p. 627. Goode, J. Bus. L. 1988, p. 512. Zaccaria, *IPRax* 1995, p. 281, fn. 17, and reference cited.

(222) Goode, J. Bus. L. 1988, p. 512.

the subsequent assignment. In such cases, the factoring convention may in its entirety apply to the first assignment, so long as the other requirements of its application are met. Concerning the subsequent assignment, in contrast, the convention's provisions governing the factor-debtor relationship (i.e., articles 8 to 10) may not apply. Only articles 5 to 7, which regulate the validity of the parties agreement to the assignment of receivables, could apply.⁽²²³⁾

As mentioned above, the factoring convention says nothing in respect with the legal relationship between the export and import factors. However, the so-called "Interfactor Agreement", made by the factoring association to which the factoring institutions at issue belong, governs this relationship in a very satisfactory way.⁽²²⁴⁾

Finally, it should be noted that the factoring convention, article 11 only governs the successive assignment of the receivables made by the factor to another factor. It does not (substantively) govern the multiple assignment which the supplier may conclude with more than one factor either in good or bad faith.⁽²²⁵⁾ Nor does the convention include a conflict of laws rule in this regard.⁽²²⁶⁾ Which assignment is validly made

(223) Explanatory Report, in: Diplomatic Conference, Vol. I, Nr. 52, p. 103. Kitsaras, p. 129. Diehl-Leistner, p. 134. Zaccaria, IPRax 1995, p. 281, fn. 19.

(224) See, supra, fn. 33.

(225) In this regard the USA suggested a substantive provision on this question. It run as follows: "Priority in receivables due from a debtor and payments received therefrom assigned by a supplier to more than one factor under more than one factoring contract shall be determined in favor of the factor named in the earliest notice of assignment of such reeivables received by the debtor, except as otherwise agreed in writing between such factors." (Alexander, Columbia J. Trans. L., Vol. 27 (1989), p. 381).

However, this proposal had been rejected.

(226) It should be mentioned that the USA proposed a provision to this effect. It run as follows:

"1. Priority in receivables due from a debtor, including the proceeds thereof, and assigned by a supplier to more than one factor under more than one factoring contract shall be determined either by mutual agreement of such factors or, in the absence of such mutual agreement, as follows:

(a) if the supplier's place of business is located in Contracting State which provides for the recordation or filling in a public office in such State of such assignment or notice thereof, priority shall rank according to priority in time of such filling in such public office; or

(b) if there is no such recordation or filling by any factor in such public office or if the supplier's place of business is located in a Contracting State which does not provide for such recordation =

in such a case should therefore be settled according to domestic law applicable under the rules of private international law.⁽²²⁷⁾ The factoring convention could however apply to both assignments, whether valid or not, so long as the terms of application stipulated in its articles 2 and 3 are satisfied.⁽²²⁸⁾

= or filling, priority shall rank according to priority in time of the notice of the debtor conforming to article 7 [article 8 of the factoring convention] of this Convention,

2. As between an assignment of a receivable by the supplier to a factor and conflicting claims to the same receivables of other persons who are not factors, the law (including the conflict of law rules) of the Contracting State in which the debtor's place of business is located governs the priority of the rights of the factor and such other persons to such receivable. Such conflicting claims of other persons may arise, without limitation, under applicable taxation, bankruptcy, insolvency, force majeure, employment, judgment, debtor and creditor, lien or similar laws, statutes or government regulations. (see the comment of the government of USA on the 1987 draft, in: Diplomatic Conference, Vol. I, p. 193, at p. 198, 199). However, this provision had not been maintained due to objections raised by representatives of different states.

(227) In this regard, domestic laws are different: The assignment that has priority is the first one notified to, or accepted by, the debtor under Italian civil code, or that simply notified to the debtor in the UK, or that filed in a public register under UCC, (Sassoon, in: Chinkin, p. 302). According to Gemran law, the assignment which is made earlier in time enjoys priority, (Pleyer, in: Chinkin, p. 321. Sassoon, in: Chinkin, p. 302). Under the Italian law of 1991 the assignment which has priority is the first one under which the factor has paid the supplier with certainty, (see, *supra*, the text accompanying to fn. 55).

Under the Jordanian civil code, article 1015/1 and the Algerian civil code, article 249, the assignment which has priority is that which first becomes effective in respect of the rights of third parties. Article 1015/2 of the Jordanian civil code makes the effectiveness of the assignment against others dependent upon the notification of the assignment to the debtor through the Notary Public who serves in the court or upon acceptance of the assignment by the debtor by a document of fixed date. According to the Algerian civil code, article 241, the assignment may only be effective against others when the debtor consents to it or it is notified to him by a non-judicial contract; the debtor's acceptance of the assignment will however only make it effective in respect of others if the date of this acceptance is fixed.

(228) Diehl-Leistner, p. 133. Kitsaras, p. 127, fn. 510. Alexander, *Columbia J. Trans. L.*, Vol. 27 (1989), p. 383.

IV. Conclusion

In conclusion, it is worth emphasizing the following remarks:

- 1 . Under article 1, the factoring convention enlarges its substantive scope of application, as it adopts a wide definition of the factoring transaction.
- 2 . According to article 2, the geographical sphere of application of the factoring convention is broad. It applies not only when the parties to the factoring transaction have their principal places of business in different contracting states (article 2(1)(a)), but also when both the sale of goods contract and the factoring contract are governed by the law of a contracting state (article 2(1)(b)). Moreover, the contracting states of this convention cannot declare that they will not be bound by subparagraph 2(1)(b).
- 3 . The factoring convention actually governs the important aspects of the factoring transaction only. It provides, for example, a good solution for the case of the non-assignability clause, a matter which is differently dealt with under domestic law.

The factoring convention also governs the relationship between the factor and the debtor who, unlike the other parties to the factoring transaction, do not have a contractual relationship between each other. It provides the conditions of an effective payment by the debtor to the factor (article 8), the maintenance of the rights the debtor has under the sale of goods contract (article 9), and the strict conditions for returning by the debtor of a sum already paid to the factor.

- 4 . Unfortunately, this convention does not address some important aspects of the factoring transactions, e.g. the effect of factoring on third parties, in particular priority in the receivables assigned by the supplier to more than one factor.
- 5 . The factoring convention does not include (uniform) conflict-of-law rules. Thus, the law applicable to the matters not addressed by this convention shall be defined according to the forum's conflict-of-law rules, with the difficulties and uncertainty attached to this approach.
- 6 . Finally, the factoring convention may, in any event, be a model to be used by states when making or developing their own laws concerning domestic factoring operations.

Appendix

UNIDROIT Convention on International Factoring*

THE STATES PARTIES TO THIS CONVENTION,

CONSCIOUS of the fact that international factoring has a significant role to play in the development of international trade,

RECOGNISING therefore the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring, while maintaining a fair balance of interests between the different parties involved in factoring transactions,

HAVE AGREED as follows:

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

- 1 - This Convention governs factoring contracts and assignments of receivables as described in this Chapter.
- 2 - For the purposes 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 its customers (debtors) other than those for the sale of goods bought primarily for the personal, family or households use;
 - (b) the factor is to perform at least two of the following functions:
 - finance for the supplier, including loans and advance payment;
 - maintenance of accounts (ledgering) relating to the receivables;

* The text of this convention has been taken from Diplomatic Conference, Vol. I. p. 340-347.

- collection of receivables;
- protection against default in payment by debtors;

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 and:
 - (a) those States and the State in which the factor has its place of business are Contracting States; or
 - (b) both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State.
- 2 - A reference in this Convention to a party's place of business shall, if it has more than one place of business, mean the place of business which has the closest relationship to the relevant contract and its performance, having agreed 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 application of this Convention may be excluded:
- (a) by the parties to the factoring contract; or
 - (b) by the parties to the contract of sale of goods, as regards

receivables arising at or after the time when the factor has been given notice in writing of such exclusion.

- 2 - Where the application of this Convention is excluded in accordance with the previous paragraph, such exclusion may be made only as regards the Convention as a whole.

Article 4

- 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 or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

CHAPTER II - RIGHTS AND DUTIES OF THE PARTIES

Article 5

As between the parties to the factoring contract:

- (a) a provision in the factoring contract 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 act of transfer.

Article 6

- 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 assignment shall not be effective against the debtor

3 - Nothing in paragraph 1 shall affect any obligation of good faith owed by the supplier to the debtor or any liability of the supplier to the debtor in respect of an assignment made in breach of the terms of the contract of sale of goods.

A factoring contract may validly provide as between the parties thereto for the transfer, with or without any act of transfer, of all or any of the supplier's rights deriving from the contract of 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.

- 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 in writing of the assignment:
 - (a) is given to the debtor 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 for this purpose if made in accordance with the previous paragraph.

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 arising under that contract of which the debtor could have availed itself if such claim had been made by the supplier.

- 2 - The debtor may also assert against the factor 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 a notice in writing of assignment conforming to Article 8(1) was given to the debtor.

Article 10

- 1 - Without prejudice to the debtor's rights under Article 9, non-performance or defective or late performance of the contract of sale of goods shall not by itself entitle the debtor to recover a sum paid by the debtor to the factor if the debtor has a right to recover that sum from the supplier.
- 2 - The debtor who has such a right to recover from the supplier a sum paid to the factor in respect of a receivable shall nevertheless be entitled to recover that sum from the factor to the extent that:
 - (a) the factor has not discharged an obligation to make payment to the supplier in respect of that receivable; or
 - (b) the factor made such payment at a time when it knew of the supplier's non-performance or defective or late performance as regards the goods to which the debtor's payment relates.

CHAPTER III - SUBSEQUENT ASSIGNMENTS

Article 11

- 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 5 to 10 shall, subject to subparagraph (b) of this paragraph, apply to any subsequent assignment of the receivables by the factor or by a subsequent assignee;
 - (b) the provisions of Articles 8 to 10 shall apply as if the subsequent assignee were the factor.

- 2 - For the purposes of this Convention, notice to the debtor of the subsequent assignment also constitutes notice of the assignment to the factor.

Article 12

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

CHAPTER IV - FINAL PROVISIONS

Article 13

- 1 - This Convention is open for signature at the concluding meeting of the Diplomatic Conference for the Adoption of the Draft Unidroit Conventions on international Factoring and International Financial Leasing and will remain open for signature by all States at Ottawa until 31 December 1990.
- 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.

Article 14

- 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.

Article 15

This Convention does not prevail over any treaty which has already been or may be entered into.

Article 16

- 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 substitute its declaration by 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.
- 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 purpose 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, the Convention is to extend to all territorial units of that State.

Article 17

- 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.

inoperative in relation to the withdrawing State, as from the date on which the withdrawal takes effect, any joint or reciprocal unilateral declaration made by another State under that article.

Article 20

No reservation are permitted except those expressly authorised in this Convention.

Article 21

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(1)(a), or of 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.

Article 22

- 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 six 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.

Article 23

- 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 accessed 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 16, 17 and 18;
- (iii) the withdrawal of any declaration made under Article 19 (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;
- (a) 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).

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

DONE at Ottawa, this twenty-eight day of May, one thousand nine hundred and eighty-eight, in a single original, of which the English and French texts are equally authentic.

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