Unidroit Convention on International Factoring (28 May 1988)

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[Preamble]

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 their personal, family or household use;

(b) the factor is to perform at least two of the following functions:

- finance for the supplier, including loans and advance payments;

- maintenance of accounts (ledgering) relating to the receivables;

- collection of receivables;

- protection against default in payment by debtors;

(c) notice of the assignment of the receivables is to be given to debtors.

3. - In this Convention references to “goods” and “sale of goods” shall include services and the supply of services.

4. - For the purposes of this Convention:

(a) a notice in writing need not be signed but must identify the person by whom or in

whose name it is given;

(b) “notice in writing” includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form; 20

(c) a notice in writing is given when it is received by the addressee. 21

Article 2 22

1. - This Convention applies whenever the receivables assigned pursuant to a factoring contract arise from a contract of sale of goodsbetween a supplier and a debtor whose places of business are in different States and: 23

(a) those States and the State in which the factor has its place of business are Contracting States; or 24

(b) both the contract of sale of goods and the factoring contract are governed by the law of a Contracting State. 25

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 regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that contract. 26

Article 3 27

1. - The application of this Convention may be excluded: 28

(a) by the parties to the factoring contract; or 29

(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. 30

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. 31

Article 4 32

1. - In the interpretation of this Convention, regard is to be had to its object and purpose as et 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. 33

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. 34

CHAPTER II - RIGHTS AND DUTIES OF THE PARTIES 35

Article 5 36

As between the parties to the factoring contract: 37

(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; 38

(b) a provision in the factoring contract by which future receivables are assigned operates to transfer the receivables to the factor when they come into existence without the need for any new act of transfer. 39

Article 6 40

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. 41

2. - However, such assignment shall not be effective against the debtor when, at the time of conclusion of the contract of sale of goods, it has its place of business in a Contracting State which has made a declaration under Article 18 of this Convention. 42

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. 43

Article 7 44

A factoring contract may validly provide as between the parties thereto for the transfer, with or without a new act of transfer, of all or any of the supplier's rights deriving from the 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. 45

Article 8 46

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: 47

(a) is given to the debtor by the supplier or by the factor with the supplier's authority; 48

(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 49

(c) relates to receivables arising under a contract of sale of goods made at or before the time the notice is given. 50

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. 51

Article 9 52

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. 53

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. 54

Article 10 55

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. 56

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: 57

(a) the factor has not discharged an obligation to make payment to the supplier in respect of that receivable; or 58

(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. 59

CHAPTER III - SUBSEQUENT ASSIGNMENTS 60

Article 11 61

1. - Where a receivable is assigned by a supplier to a factor pursuant to a factoring contract governed by this Convention: 62

(a) the rules set out in Articles 5 to 10 shall, subject to sub-paragraph (b) of this paragraph, apply to any subsequent assignment of the receivable by the factor or by a subsequent assignee; 63

(b) the provisions of Articles 8 to 10 shall apply as if the subsequent assignee were the factor. 64

2. - For the purposes of this Convention, notice to the debtor of the subsequent assignment also constitutes notice of the assignment to the factor. 65

Article 12 66

This Convention shall not apply to a subsequent assignment which is prohibited by the terms of the factoring contract. 67

CHAPTER IV - FINAL PROVISIONS 68

Article 13 69

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. 70

2. - This Convention is subject to ratification, acceptance or approval by States which have signed it. 71

3. - This Convention is open for accession by all States which are not signatory States as from the date it is open for signature. 72

4. - Ratification, acceptance, approval or accession is effected by the deposit of a formal instrument to that effect with the depositary. 73

Article 14 74

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. 75

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. 76

Article 15 77

This Convention does not prevail over any treaty which has already been or may be entered into. 78

Article 16

79

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. 80

2. - These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends. 81

3. - If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends. 82

4. - If a Contracting State makes no declaration under paragraph 1, the Convention is to extend to all territorial units of that State. 83

Article 17

84

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. 85

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. 86

3. - If a State which is the object of a declaration under the previous paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration. 87

Article 18

88

A Contracting State may at any time make a declaration in accordance with Article 6(2) that an assignment under Article 6(1) shall not be effective against the debtor when, at the time of conclusion of the contract of sale of goods, it has its place of business in that State. 89

Article 19

1. - Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

2. - Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

3. - A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 17 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

4. - Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

5. - A withdrawal of a declaration made under Article 17 renders 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 reservations 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 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. 105

Article 23 106

1. - This Convention shall be deposited with the Government of Canada. 107

2. - The Government of Canada shall: 108

(a) inform all States which have signed or acceded to this Convention and the President of the International Institute for the Unification of Private Law (Unidroit) of: 109

(i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof; 110

(ii) each declaration made under Articles 16, 17 and 18; 111

(iii) the withdrawal of any declaration made under Article 19(4); 112

(iv) the date of entry into force of this Convention; 113

(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; 114

(b) transmit certified true copies of this Convention to all signatory States, to all States acceding to the Convention and to the President of the International Institute for the Unification of Private Law (Unidroit). 115

[Post Provisions]

[Post Clauses (If any: Signed; Witnessed; Done; Authentic Texts; & Deposited Clauses)]

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention. 116

DONE at Ottawa, this twenty-eighth day of May, one thousand nine hundred and eighty-eight, in a single original, of which the English and French texts are equally authentic. 117

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