EUFederation
Factoring & Commercial Finance

To:
Spyridon Bazinas
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UNCITRAL

Vienna International Centre
P.O. Box 500
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Dear Mr. Bazinas,

As the representative body for the factoring and commercial finance industry in Europe (total turnover in 2013: € 1.26 trillion, thereby representing 9.6% of the EU GDP in 2013), the EUF would once more like to thank the UNCITRAL Working Group VI for having been invited to its 26th session from December 8-12, 2014 in Vienna and thereby being able to contribute to the drafting process of the Model Law on Secured Transactions.
Although the Working Group VI was able to cover a substantial part of the Draft Model Law in its deliberations during the 26th session, unfortunately it lacked the time to discuss all provisions contained therein. Hence, although the EUF made a few interventions during the 26th session, we were not able to address all the issues which are relevant from the factoring industry's point of view. Therefore, we hereby present all our views on the Draft Model Law (as contained in the documents A/CN.9/WG.VI/WP.61, A/CN.9/WG.VI/WP.61/Add. 1-3 which were discussed during the 26th session) to you in writing, in order to make these viewpoints available for discussion and inclusion in the future drafting process of the Secretariat and deliberations of the Working Group VI.

<u>Art. 1 – Scope of application</u>
Art. 1 delineates the scope of application and clarifies that the Draft Model Law *"applies to outright transfers of receivables"*, with the exception of *"a security right created in favour of an individual secured creditor for personal, family or household purposes*". The EUF is of the opinion that the inclusion of the outright transfer of receivables within the scope of the Model Law on Secured Transactions is very, if not even too far-reaching: Factoring transactions are usually neither secured transactions nor does the transfer of receivables in such transactions constitute a security right. Security rights are generally ancillary to other agreements and transactions whereas factoring transactions are independent agreements in their own right.

The EUF wishes to point out that this as well as other differences between secured transactions/security rights and factoring need to be taken into consideration when discussing and drafting the Model Law, e.g. by including certain exceptions or factoring-specific provisions.
During its 26th session, the Working Group VI decided to delete art. 1 paras. 4 and 6 and asked the Secretariat to redraft para. 5 of the Draft Model Law. The EUF welcomes this decision, not only because the concept of "small companies" and "microbusinesses" cannot be universally defined, but also because factoring is a form of financing which is used particularly by SMEs, so that a uniform legal basis applicable to all factoring clients is an important and basic requirement.

Art. 2 - Definitions

Among the numerous definitions contained in art. 2, there are also definitions for the terms "*grantor*", "*debtor*", "*debtor of the receivable*" and "*secured creditor*". In the context of factoring and the outright transfer of receivables, these terms refer to the assignor or factoring client ("*grantor*" as well as "*debtor*") or to the assignee or factoring company ("*secured creditor*"). The EUF wishes to point out that this terminology can easily create confusion, especially if the terms "*grantor*" and "*debtor*" describe the same person in the case of an outright transfer of receivables. The EUF therefore suggests that, in the case of the outright transfer of receivables, it would be better to minimize the number of terms and perhaps also to use clearer terms, which are more specific to the outright transfer of receivables, such as "assignor"/"transferor" and "assignee"/"transferee".

Art. 10 – Anti-assignment clauses

The provisions on anti-assignment clauses contained in art. 10 of the Draft Model Law are very similar to the provisions of the 2001 UN Convention on the Assignment of Receivables in International Trade. By rendering assignments of receivables ineffective and hence practically impossible, anti-assignment clauses impede factoring substantially. The EUF therefore welcomes these provisions in art. 10 of the Draft Model Law. In fact, the EUF's rules of membership state that one of the EUF's objectives is "to consider the ratification of the Uncitral Convention by member states", which is why the EUF is currently discussing an explicit endorsement of the UN Assignment Convention as a further supporting step. We hope that the EUF's as well as other organisations' support will encourage states to sign and ratify the aforementioned Convention.

Art. 15 – General methods for achieving third-party effectiveness

Art. 15 states that a security right (and hence also a transfer of receivables) is effective against third parties if (inter alia) a notice of the transfer has been registered in a publicly accessible security rights registry (cf. Art. 27 of the Draft Model Law and Art. 2 of the Registry Regulation in Annex I). As already mentioned in one of the EUF's interventions during the 26th session, this creates an issue with non-disclosed assignments: In some countries, the assignment or transfer of receivables is valid and effective (also against third parties) even though the debtor of the receivable does not know of this assignment or transfer. By having to register the transfer in a publicly accessible registry, the element of non-notification has to be

given up in order to achieve third-party effectiveness. The EUF feels that the Model Law should reflect and allow for the variety of methods in achieving third-party effectiveness which exists today and therefore offer implementing states a possibility to choose other methods of achieving third-party effectiveness. As you can see from the attached EUF Legal Study ("Factoring, Receivables Finance & ABL – A Study of Legal Environments Across Europe 2013"), Italy provides another example of how to achieve third-party effectiveness, namely by payment of the purchase price for the transferred receivable (if the assignee has paid the purchase price and such payment bears a certain date, the assignment is effective against the creditors of the assignor and the bankruptcy estate of the assignor).
Moreover, the EUF wishes to draw your attention to the fact that art. 15 of the Draft Model Law is not in line with the aforementioned 2001 UN Convention on the Assignment of Receivables in International Trade as it in the end does not provide for the same choice between disclosure and non-disclosure (cf. Art. 13 and 14 para. 1 of that Convention).

Art. 32 – Period of effectiveness of a registered security right notice

The provisions for the period of effectiveness of a registered security right notice contained in art. 32 are a good example of provisions suited for security rights, but not for factoring transactions: With the transfer/assignment of a receivable for factoring purposes, the receivable is generally transferred for good. Therefore, such a period of effectiveness is not necessary for factoring. The EUF advocates clarifying this, e.g. by including an exemption similar to the one suggested in the note to art. 37.
Similar arguments also apply to art. 64 and the corresponding note, which addresses the obligation of an assignee to withdraw the notification of the debtor of the receivable.

Art. 36 of the Draft Model Law and art. 15 para. 3 of the Registry Regulation in Annex I

The EUF wishes to point out that the wording *"…unless the error would seriously mislead a reasonable searcher*" is quite vague and could hence lead to discussions and conflicts.
The same argument applies to the concept that "*a reasonable secured creditor would consent to the modification*" contained in art. 75 para. 2b of the Draft Model Law.

Therefore, the EUF is in favour of rephrasing these provisions in order to make them more easily understandable.

Art. 38 – Secured creditor's authorization

Also, but not only from a factoring point of view, the options A and B contained in Art. 38 of the Draft Model Law are surprising as it is generally expected that the secured creditor is to confirm that the registered security right can be deleted from the registry. Moreover, it seems that these options A and B stand in contradiction to art. 38 para. 1 of the Draft Model Law.

Art. 66 – Representations of the grantor

In the note to Art. 66 of the Draft Model Law, the words "*unless otherwise agreed between the grantor and the secured creditor*" are put up for discussion. From the EUF's viewpoint, these words are important as they leave enough room for the contractual parties of a factoring agreement to agree on factoring with recourse, i.e. a form of factoring in which the credit/default risk on the debtor remains with the assignor. In some jurisdictions, this is one of the most widely used forms of factoring. The

Model Law should therefore leave it up to the parties of a factoring contract or any other agreement involving the outright transfer of receivables whether or not to transfer also the credit/default risk.

Art. 67 – Right of the grantor or the secured creditor to notify the debtor of the receivable

The EUF would like to point out that the text contained in the second bracket in Art. 67 para. 1 should come after the word "*sent*" and before the word "*only*" as its current position in the text unfortunately does not make much sense. More generally, the EUF also wishes to note that making the receipt of the notification by the debtor another prerequisite to who may send the payment instructions may cause practical problems if the question of how and who has to prove this receipt is not regulated or at least clarified by the national laws of the implementing state.

Art. 71 – Notification of the security right in a receivable

The EUF wishes to stress that art. 71 para. 3 is an important provision for transactions involving outright transfers of receivables (such as factoring) as it implicitly states that the assignment of future receivables is possible. The EUF therefore welcomes this provision.

Art. 73 – Defences and rights of set-off of the debtor of the receivable

The EUF wishes to point out that the concept of rights "*arising from the original contract, or any other contract that was part of the same transaction*" in Art. 73 para. 1(a) is rather vague and could therefore create some (legal) uncertainty in practice.

Art. 78 – Rights and obligations of the depositary bank

In factoring transactions, security rights on bank accounts of the assignor are often given to the factoring company to ensure that the factoring company has access to debtors' payments effected to the assignor. It seems that the rights of the depositary bank contained in art. 78 are rather wide, which can lead to an unjustified imbalance of rights.

Arts. 103 and 106

The EUF explicitly welcomes that according to Arts. 103 and 106, the law applicable to a security right in or transfer of (certain) receivables is the law of the assignor's place of business or habitual residence. This is in line with both the aforementioned 2001 UN Convention as well as the EUF's suggestions for amending the EU's Rome I-regulation (EC) No. 593/2008 in order to close the current regulatory gap with a view to the law applicable to the third-party effectiveness of assignments.

Art. 7 of the Registry Regulation in Annex I

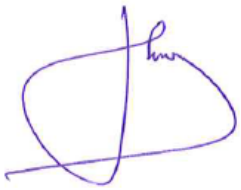
In art. 7 para. 2 of the Registry Regulation in Annex I, it is established that the secured creditor (i.e. for the outright transfer of receivables, the assignee) has to forward a copy of the registered security right notice to the grantor (i.e. the assignor) within a relatively short period of time. The EUF wishes to point out that for factoring transactions, this would be an unnecessary requirement and additional burden on the factoring company as assignee, also considering that as an alternative, the registrar could send two copies of the registered security right notice, one to the assignor and one to the assignee. Hence, the EUF feels that this is another example for a provision which should include an exemption for factoring.

We hope that these comments and viewpoints can help both the Working Group VI as well as the Secretariat in its further drafting and deliberation process regarding the Model Law on Secured Transactions.

Please do not hesitate to contact us should you require further clarification or information about our association and the factoring industry in Europe.

We look forward to keeping in touch with you and hope that we will be able to attend the future sessions of the Working Group VI.

With kind regards,



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