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UNIFICATION OF THE LEGAL REGIME FOR RECEIVABLES FINANCING IN THE UNITED NATIONS RECEIVABLES CONVENTION

Introduction

Contemporary business conditions are characterized by more and more distinct connection of various markets which function is creating the global market. This is caused by more and more intense international trade i.e. by the clearly expressed trends of denationalization, "Europeanization" and globalization of trade which is an important factor for the common welfare. The contract law plays an important factor in the organization and in the process of saving and decreasing the transactions costs of the trade operations. Increased needs of the market subjects for loan and credits together with the necessity of transforming contractual monetary claims such as receivables into the mature finance have created the new instruments of the international trade law such as factoring, forfeiting, securitization, invoice discounting, asset-based lending as well as transactions in which no financing is provided. The growing number of legal instruments of the new emerging lex mercatoria are developing in the last decades which embracing the whole spectrum of the self-regulated legal instrument such as contracts on leasing, franchising, factoring and other legal instruments which was not regulated by the national legal systems.

At the same time the necessities of the availability of the capital and credit which will enable and facilitate the cross border movement of goods, services

and people emanated as the crucial need of the international market. But, existing varieties of contract law in European countries and gross differences among legal systems of civil law and common law especially in the sphere of private law become a special type of trade limit which opposed to the free flow of goods, services, persons and capital and at the end decreased wealth. In order for the global and common market to be created, it is necessary to secure legal instruments that will be unified in the highest degree.

The essence of the of the so called international secured transactions is enabling the creditor (supplier) to sell or assign its receivables to a factoring company, charge them to a bank or use receivables as a collateral for obtaining a new credit line.

Despite advantages of those instruments most legal systems displayed hostility towards security over receivables financing. Most of the restrictions exist in so called civil law countries. Some of the national legislators prohibits or impose restrictions on the assignment of future receivables or the assignment of bulk receivables as well as on the subsequent assignments. Those restrictive practices emanate as imposing notification or specification in transfer of receivables or with the debtor approval requirements. Those different solutions in national legal systems create restrictions to trade and commercial transactions which many times may be regarded as a non-tariff barrier to trade.

There are two international instruments indented to abolish those restrictions and promote the movement of goods and services across national borders by facilitating increased access to a lower cost credits. The first instrument of unification is the UNIDROIT (International Institute for the Unification of Private Law) Convention on International Factoring (Ottawa, 1988) which is entered into force in 1995 with the ratification of six countries (France, Hungary, Italy, Lithuania, and Nigeria) and became through that ratification a part of the national legislation of those countries. Under auspices of UNCITRAL (UN Commission for International Trade Law) another instrument of unification has been created in the field of receivables financing. It is the United Nations Convention on the Assignment of Receivables in International Trade which is issued in 2001 and it is open for signature. This article will pointed the main achievement of the UN Receivable Convention in facilitating the financing of contractual monetary claims including securitization, factoring and similar transactions in which no financing is provided.

The Legal Problems of Assignment of Receivables in Various Legal Contexts

When doing business in some other European country and especially trying to sell or to assign receivables deriving from different transactions, an assignor or creditor as a business person will typically experience the same frustration that Voltaire went through when he traveled to France. As he puts it, the laws have changed every time he changed his horses.

Creditors doing abroad are conscious of the fact that some of his contracts with foreign partners will be governed by foreign law and especially that transfer of property in receivables as intangible goods. The unknown law of foreign country is one of his risks. This risk make him to be unsecure on the foreign market because lack of knowledge of foreign law solutions create high grade of legal insecurity and unpredictability which may keep foreign business away from foreign markets in Europe.

On the other hand the intangible property such as receivables are for the financer the most valuable object of security and could be affected only by legal reasons and not by the factual events. Immobility could lose their values by the changes in real estate market, vehicles could be destroyed or damaged, expensive equipment could lose most of their value through the obsolescence but the debt and receivables deriving from the contract are protected from such factual risks. The biggest risk for those kind of property is sensitive to a legal impediments such as risk of mortgage or insolvency of the debtor, or insolvency of the surety, floating charges, frustration of contract or other forms of non-performance of contractual obligation. But the biggest risk are the different treatment of the assignment transaction in different legal systems.

The civil law countries traditionally have not looked very optimistically on the assignment of intangibles such as receivables. There are lot of restrictions which has been settled in order to prevent , future assignment, and some of the countries ask notification rules to be fulfilled before assignment is came into the legal force.

In the case of Serbian law of obligation assignment is prescribed as the transaction which denotes change of the person of creditor in the contract , on the basis of separate contract on assignment (*pactum de cedendo*) between an old creditor (*cedent*) and the new creditor (*cessionar*). This contract has the legal effect on the third party which is the debtor from the original transaction (*cesus*). In Serbian law there is no claim for the consent of the debtor for assignment of the rights deriving from original legal instrument (Art. 438 par. 1 Serbian Code of Obligation). Differing from the most civil law countries Serbian Code of Obligation (Art. 436–445) doesn't put too much requirements for the assignment transactions. There are no form requirements[1], nor the prohibition of the assignment of the future receivables as well as bulk receivables. The only demands which prescribes Serbian Code of Obligation for the legality of the assignment is the notification of the original debtor. Then, transfer of obligation is legal upon debtor receiving the notice of the transfer. On the other, side some assignment transactions are prohibited in Serbian law of obligation such as sovereign receivables, receivables *intuitu persone*, etc. In the case of existing in original agreement the so called *pactum de non cedendo* clause , which obliged the creditor not to assign its rights with the assignment contract, this clause doesn't have legal effects according to the assignment contracts, it

[1] This is the case in Susse Code of Obligation which in the Art. 165 par.1, prescribes the written form for the contract of assignement as forma ad solemnitatem.

is relevant only for the legal relationships of the creditor and debtor deriving from the original contract.

But as the difference from the liberal approach of Serbian Law of obligations other civil law countries create a lot of obstacles to the practices of the assignment of receivables such as:

– Prohibition of the transfer of *the future* and *the bulk receivables*;

– Imposing the concept of *obligatory notification* of the debtor which is the most of the civil law countries condition for the legality of the assignment contract. In some of the countries, (France CC art.1690) this transfer is create more restrictive- beside notary notification it is also the *consent of the debtor* an condition for the legality of the assignment contract. In this way factoring is preventing on the basis of the cessio contract;

– Imposing *the concept on the specification* of the assigned receivables. Receivables which could not be specified at the time of the assignment could not be transferred;

– Enacting the rule on *anti-asignement clause – pactum de non cedendo* which prohibited future contract between creditor and the new creditor in any form of transfer of receivables.

Those practices create restrictions which limits the financing possibilities available to many companies. Those restrictions create many additional costs, realizing in loss of time and money and administrative costs, which has impact on the cost on credit, such as costs of describing every receivable, costs of notifying the debtor.

On the other side, common law countries adopt a property approach to receivables or approach *in rem*, where the creditor has a property rights on receivables but only in its original collateral then also in the interests (proceeds) which obligation could have in its life cycle. For example, if some equipment was the object of security interest, the sale of this equipment without the consent of the secured creditor, rights of the secured creditor would not only continue on the equipment itself, but according to *in rem* approach security interest will automatically extend to the compensation or sales price which seller will received, independent if those payment instrument is check, letter of credit or cash. Because of the proprietary legal approach to the receivables common law country imposed registration system, where security may be given over existing debts, future debts or both, and independent of the type of receivables, if it is embodied as pure intangible or it is embodied in negotiable instrument such as bill of exchange.[2]

The differences among legal systems prevents use of the instrument such as factoring, securitization and other instruments which was embodied in Anglo-Saxon contractual practice where transfer of receivables is equally easy as the transfer of any other goods.

[2] On security over receivables as well as on legal impediment to the creation of security over a receivable see: R. M. Goode, *Legal Problems of Credit and Security*, Sweet & Maxwell 1982, p. 80–87.

The preamble of the UNCITRAL Receivable Convention strictly identifies facilitation of credit at more affordable rate s and protection of the debtor as the primary goals of the Convention.[3]

UN Receivables Convention – Achievements and Impact in the Transfer of Receivables Unification Process

The goals of the Convention are prescribed by its authors on very ambitious way. The solutions of the Convention are projected to fulfill those objectives by:
– Removing the legal obstacles to certain international financing practices, such as asset-based lending, factoring, forfeiting, securitization, refinancing and project financing. To realize those objectives Convention creates rules which validate assignments of future receivables and bulk assignments, by partially invalidating contractual limitations to the assignment of receivables);
– Unifies assignment law with respect to a number of issues, such as effectiveness of an assignment as between the assignor and the assignee and as against the debtor;
– Enhances certainty and predictability with respect to the law applicable to key issues, such as priority between competing claims;
– Facilitates the harmonization of domestic assignment laws by providing a substantive law regime governing priority between competing claims that States may adopt on an optional basis.

Explaining its the scope and application mode Convention examines substantial terminology, among terms the most significant are "assignment", "assignor", "assignee", "debtor", "original contract". From the legal point of view those terms and common consensus among the legal systems is important for the facilitating the application of the secured transactions. By the notion of the Convention "Assignment" is a transfer of property of receivables, which includes the creation of security rights in receivables and the transfer of full property in receivables. "Assignor" is the old creditor in the transaction who is creditor from original contract, who is usually the borrower in the financing contract (for example in factoring contract). "Assignee" is the new creditor, who is in the financial contract usually the lender (factor or bank). "Debtor" is the obligor in the original contract. "Receivable" according the Convention terminology is the contractual monetary claim. Some contractual rights assignment are excluded from the scope of Convention, such as assignments for consumer purposes, and those deriving from other banking law instruments such as letter of credit, bank deposits, securities. Receivables deriving from other negotiable instruments such as bill of exchange are included in the scope of Convention. Application of the Convention is due the fact of internationality of receivables which is determined by the location of the assignor, the assignee

[3] S. Bazinas, *Multi-jurisdictional receivables financing:UNCITRAL's impact on securtiization and cross-border perfection*, 12 Duke,L. of Comp & Int. Law 365, p. 365.

or the debtor. By the territorial scope of application the Convention will be apply only if assignor is located in a state which is party to the Convention.

In spite the Convention doesn't content general substantive rule which relates to the formal or material validity of assignment, Convention contents solutions which overcrossing statutory limitations, contractual limitations and form requirement which are the main obstacles for the applying of the secured transactions. The Convention approach in order to unify varieties in different legal system is not typical for the instruments of the new lex mercatoria. The common method of giving the substantial rules contented in most of Conventions and legal documents is in the Convention substituted with the conflict-of-law-rules. Those rules providing the law applicable to the issues which regulates, in most cases it will be the law of the assignor's location-place of business of a party or the habitual residence is there is no place of business.

Conclusion

The UN Convention on the Assignment of Receivables in International Trade (UNCITRAL 2001) creates a significant international legal framework for the unification of the law of secured transactions which will facilitate the financing of contractual monetary claims, credit at more affordable rates in international trade and protect debtors. By accepting the conflict-of-law-rules for the solving the problem of restriction in the assignment in different legal context the Convention eliminates and minimizing the various impediments to cross border transactions among which the crucial are statutory limitations and contractual limitations (anti-assignment clause – *pactum de non contrahendo*). Among the important achievements of the Convention is also enabling the assignment of future receivables, bulk assignments. Solutions contented in the Convention gives adequate protection also to the debtor legal position (written notification which is obligatory) and separation of debtor discharge from issues of the priority.

The main achievements are giving the priority to the law of the assignor's location by so called "lock-box-arrangement" which is the law of the assignor's location. This solution helps to embrace and facilitate receivables financing in countries which doesn't recognize receivables as the property rights.

The unification of international trade law as the goal of new lex mercatoria in the third Millennium with the solutions contented in the UN Receivables Convention is looking a bit closer.