CHAPTER - 2

COMPARATIVE STUDY ON SOME ISSUES OF FORFAITING IN IRANIAN LAW: THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES AND URF800

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I INTRODUCTION

Forfaiting is a method of trade finance between exporter and forfaiter who purchases the payment claim at a discount and on a without-recourse basis. A forfaiting transaction usually is associated with the transfer of documents evidencing the payment claim, such as a bill of exchange, promissory note and letter of credit. There are several relationships between parties of forfaiting such as forfaiter and exporter, forfaiter and importer, exporter and importer, and the Uniform Rules for Forfaiting (URF800) has rules just for the first relationship. In addition, there are sorts of documents evidencing payment claim effective on the relationships that URF800 does not have rules for. So there is an essential need to refer to the UNCITRAL rules.

In this chapter the following issues will be considered in the United Nations Convention on Assignment of Receivables in International Trade (UNCITRAL Convention) rules, URF800 and Iranian Law:

- Legal requirements of validity of forfaiting and other methods of assignments.
- Degree of debtor's consent or notice to an assignment for being valid and effective against him.

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- Validity and effects of anti-assignment clauses between creditor and debtor.
- Legal situation of assignment of future payment claim.
- Legal situation of guarantees and credit support rights associated with the payment claim when the debt is assigned to the forfaiter.
- Defense and right of set-off of the debtor against forfaiter.
- Non-recourse payment in forfaiting and its exceptions.

Before attention is paid to the above issues, we should know about the difference between the concepts of debt and assignment in the URF800, UNCITRAL Convention and Iranian law on the one hand and nature of forfaiting in these legal sources on the other.

II BASIC CONCEPTS AND NATURE OF CONTRACT

2.1 Concept of Debt

URF800 uses "payment claim" and the UNCITRAL Convention uses "receivables" for the debtor's obligation of payment of money to the creditor and although these terms are synonyms in the Roman-Germanic law system they are not synonyms in the Iranian law system. In the Persian and Arabic languages "debt" is a loan with payment due in the future and in the legal language "debt" is used for a non-existent object. In the other words, in Islamic law "debt" is used when we want to sell a non-existing object. Therefore, receivables are "property" which can be subject of sale and not just a right to demand.[1] According to this view, the relationship between the creditor and the debt is a relationship between owner and property and it is not just a personal right. So the creditor is the owner of debt and can demand it as his property and personal right.

However, in Roman-Germanic law "debt" as an element of obligation means duty to pay money or provide a thing or do work. In this legal system "debt" is the negative aspect of "obligation" and "personal right" is the positive aspect of obligation. In other words, although medieval lawyers had no problem with the concept of incorporeal property, these rights were considered personal[2] and the more general view was that "property" meant something tangible.[3]

URF800 uses the phrase "payment claim" and defines that as "the obligation of the primary obligor to make payment of a specified amount on a specified date or

1 Ebrahim Abdipour Fard and Nasrollah Jafari Khosroabadi "Theoretical Confusion Caused by the Error in Terminology" [2014] Private Law 81.

2 Greg Tolhurst *The Assignment of Contractual Rights* (HP 2006) 11.

3 Ibid 19.

on demand…". Also in the UNCITRAL Convention "receivables" means the contractual "right" for demand of money.[4] So "receivable" in Iranian and Islamic law systems is a creditor's property but it is a personal right in Roman-Germanic law, UNCITRAL Convention and URF800.[5]

2.2 Nature of Forfaiting Transaction

Article 2 of UNCITRAL Convention has used "assignment" for the transfer of receivables. The term "assignment" is used to cover both the outright (true) sale of receivables and the creation of rights in receivables as security for debt.[6] About forfaiting, most writers introduce that as the sale of receivables that have been raised from providing goods or services and their maturities is in the future, on a without-recourse base.[7]

In Islamic jurisprudence and the Iranian law system the assignment of receivables is the sale of debt if debt is exchanged with money. Traditionally the Roman-Germanic law did not accept the sale of debt, because the subject of the sale should be tangible property and obligation was a personal relationship and not tangible property. But now debt is accepted as property which has economic value that can be the subject of dealing and "assignment of receivables" or "assignment of payment claims" emerged. Most writers use the phrase "sale of claim" for assignment of receivables, which is stating something in the Roman-Germanic law system about the nature of receivables and acceptance of debt and receivables as the subject of property and that they can be the subject of a sale contract.

However, although in Roman-Germanic law "assignment of receivables" is a suitable contract for transfer of debt, in Iranian and Islamic law systems the "sale" contract is more suitable because there is no "assignment of receivables" as an independent contract in these regimes and debt is property that can be subject of the sale. Therefore, the assignment of receivables may be the subject of sale

4 Orkun Akseli "Turkish Law and the UNCITRAL's Work on the Assignment of Receivables with a Special Reference to the Assignment of Future Receivables" [2007] Law and Financial Markets Review 30.

5 Ibid 48.

6 Ibid 12.

7 Gunter Dufey and Ian H Giddy "Innovation in The International Financial Markets" [1981] Journal of International Business Studies 33; Michael R Rice "Four Ways to Finance Your Exports" [1988] Journal of Business Strategy 30; Ian Guild and Rhodri Harris *Forfaiting* (Woodhead-Faulkner 1985) 1; Tarsem Singh Bhogal and Arun Kumar Trivedi *International Trade Finance* (Palgrave Macmillan, 2008) 137; Douglas Wood and James Byrne *International Business Finance* (the Macmillan Press Ltd, 1981) 70; Andre M Coussemnet "Investing and Financing in a New Era" [1978] Long Range Planning 2.

contract as a certain contract or a non-certain contract under article 10 of the Civil Code in Iran.

III LEGAL REQUIREMENTS OF VALIDITY OF FORFAITING AND OTHER METHODS OF ASSIGNMENTS

3.1 To be Written

The general rule is that an act of assignment need not be in writing and is not subject to any other requirement as to form.[8]

URF800 defines a forfaiting agreement as: "the "written" agreement signed by the primary forfaiter and the initial seller setting out the terms of the forfaiting transaction".

The UN Convention contains a conflict of laws rule on the formal validity of the assignment contract in article 27 under Chapter V. For the application of Chapter V, it is not necessary that an assignment be connected to the assignor's or the debtor's state. Just, the forum must be in a Contracting State and Chapter V acts as the private international law rules of the forum. If the assignor or the debtor is located in a State party to the Convention or the law governing the original contract is the law of the State party to the Convention, this article may apply.[9]

So in this Convention a written assignment is not necessary for the validity of contract, but requirements of validity of the assignment contract between parties of different countries is determined in either the law which governs it or the law of one of their states.

In Iranian law, as there is not any regulation about forfaiting and because of the principle of non-formal contracts, forfaiting will be concluded by the agreement of the parties whether orally or in writing. But it should be noted that if the instrument of debt is a commercial paper or letter of credit, negotiation of these documents has formal requirements such as endorsement and delivery. As in article 223 of the Trade Law, some formal requirements have been set and according to article 226, the transfer of a bill of exchange without one of those conditions will not be a commercial transfer. This practice has been accepted in other systems as article 13 of the UNCITRAL Convention on International Bills of Exchange and Promissory Notes emphasizes this requirement for transfer of commercial instruments and article 14 determines that an endorsement must be written.

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8 Christian Von Bar and others "Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR)" [2016] <http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf> accessed 21 November 2016.

9 Akseli, (above n 4) 45.

3.2 Notice to the Debtor

Some writers believe that forfaiting is a trilateral contract between assignor, assignee and the debtor[10] but we accept that the forfaiting is a mutual contract and UNCITRAL Convention adopted later view about assignment of receivables. Although consent of the debtor is not necessary for conclusion of a forfaiting contract and assignment of receivables, notice to the debtor is useful and it is said that all the legal problems of accounts receivable financing stem from the prevalent non-notification methods.[11]

URF800 is just about relationships between the assignor and the assignee; it has no rule about the debtor's obligations and rights. The UNCITRAL Convention in article 5(4) defines "notification" and emphasizes in article 13[12] notification by the assignee or assignor to the debtor. According to article 17(1)[13] an uninformed debtor about assignment will be discharged by the payment to the creditor (assignor) and assignee would not be able to claim against this uninformed debtor.

So although notice to the debtor is not required to effect the transfer of right from the assignor to the assignee, notice to the debtor plays a significant role in identifying a point in time after which the debtor is not discharged by paying to the assignor.[14] Also according to some opinions, there are apparently at least three situations where the assignee should give notice: first, where the account debtor, in good faith and without knowledge of the assignment, pays his obligation to its original owner or to a subsequent assignee, the account debtor is discharged. This effect has been adopted in the UNCITRAL Convention. Second, how can the lender guard against the possibility of an earlier assignment? One way to prevent this double financing would be to ask the account debtor if there was a previous assignment. Third, if a debtor has received notice of the assignment, he cannot assert against the assignee a counterclaim that matured after notice of the assignment.[15] Some believe that: "there are two types of accounts receivable

10 John Velentzas, Nick Kartalis and Georgia Broni "The Factoring and Forfaiting Contract as Contemporary types of Finance, Especially the Greek Regulations" [2013] Procedia Economics and Finance 757.

11 Shale D Stiller "Inventory and Accounts Receivable Financing: The Maryland Maze" [1958] Maryland Law Review 185.

12 Article 13 "Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction".

13 Article 17 (1): "Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract".

14 Von Bar and others (above n 8) 1038.

15 Stiller (above n 11) 185.

financing: One is called "factoring". Here a "factor" purchases the borrower's accounts receivable, assumes all credit risks, and notifies the account debtor to pay directly to him. The other is usually referred to as "non-notification" financing. Here a financer makes loans on the security of assigned accounts receivable without assuming any credit risks and without notifying the assignor's customers, the account debtors.[16]" According to this view forfaiting is a sale of receivables and the buyer assumes all credit risks. Therefore the seller or buyer has to give notice to the debtor. But this view is not absolutely acceptable because we should differentiate between the documents of receivables:

(a) If the documents evidencing the payment claim is a negotiable instrument or letter of credit, endorsement, even in some cases delivery of this paper to the holder, is enough for transfer and holder or endorser does not have any obligation of notification to the debtor.
(b) If the document of payment claim is an ordinary document, the assignor or assignee may give notice to the debtor otherwise the uninformed debtor will be discharged by payment to the creditor (assignor) on the due. The UNCITRAL Convention has selected this view in article 17 about assignment of receivables. Also in Iranian law there is no legal rule about notification to the debtor and article 17 of the UNCITRAL Convention has the same general rules and principles as Iran.

3.3 Existence of Payment Claim

All European legal systems recognize the assignability of rights under an existing contract.[17] Existence of a present property right is one of the main ingredients in any assignment or one of the substantive formalities. Also when there is dealing in property rights, there is always a requirement that the property be inherently identifiable and adequately identified.[18]

There are some cases in Common Law regimes about assignment of non-existing receivables that courts have judged as benefit to the assignor because of the necessity of existence of receivables.[19] Traditionally in this legal regime there is difference between the Equity view and the legal view: in Equity the assignment of

16 Ibid 186, 187.

17 Von Bar and others (above n 8) 1044.

18 Tolhurst (above n 2) 32.

19 EFB Jr "Assignment of Future Book Accounts" [1931] Virginia Law Review 384; ML "Assignment of Future Earnings under Contract Not Yet Made" [1934] California Law Review 446; L Corbin "Assignment of Contract Rights" [1926] University of Pennsylvania Law Review 207.

a non-existing receivable is valid and that is against neither positive law nor morality nor public policy.[20] Also this assignment is valid in theory that a trust in favour of the assignee will be impressed on the debt when it comes into existence.[21] But in the legal view, the assignment is correct and valid, when the receivables are valid and free from fraud. So there is no valid assignment at law where there is no underlying contract.[22]

Although assignment before conclusion of the original contract may be regarded as an "obligation" to transfer of receivables, for an effective assignment the right assigned should be clearly identified.[23]

The UNCITRAL Convention emphasizes assignability of future receivables and in article 8 states that an assignment cannot be deemed as ineffective against the assignor, the assignee, and the debtor or a third party just because it is an assignment of future receivables or a receivable that is not individually identified at the time of the assignment. Also article 8(1) expressly determines that the right of the assignee cannot be denied priority just because there was an assignment of future receivables. The only condition that the Convention provides in article 8(1) (a) and (b) is that the receivables should be identified as receivables to which the assignment relates. Therefore a description such as "all my receivables from the sale of freezers" would be sufficient in assignments of the future receivables.[24] Therefore, according to article 8 the agreement on assignment of future receivables is valid but only effective when assets or receivables exist.[25]

In the URF800 and international practice about forfaiting, the existence and non-existence of the payment claim and its instrument affects the sort of agreement and forfaiting contract.

3.3.1 Sale of the Existing Receivables

In some cases, the subject of forfaiting is the sale of receivables where their underlying contract is concluded and receivables exist. In this situation, the

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20 EFB Jr, (above n 19) 384. ML (above n 19) 446.

21 Stanton J Schuman "Assignment of Debt Arising under a Contract to Be Made in the Future" [1939] Michigan Law Review 475.

22 Notes "The Nature of the Assignment of Future Earnings" [1914] Virginia Law Review 634.

23 Corbin (above n 19) 207; Orkun Akseli "The UNCITRAL Convention on the Assignment of Receivables in International Trade, Assignment of Future Receivables and Turkish Law" [2006] International Business Law Journal 767.

24 Akseli (above n 4) 45.

25 *UNCITRAL Legislative Guide on Secured Transactions* (United Nations, 2010) 78.

forfaiter purchases debt at a discount and on a without-recourse basis. The rate of discount may be fixed or floating.[26]

3.3.2 Commitment to Buying the Future Receivables of Concluded Contract

In many cases of forfaiting agreements, only the original contract has been concluded and there is not any debt yet. In these situations the forfaiter and exporter may agree about the forfaiter's commitment to buying receivables in the future and exporter's commitment to selling those when the receivables exist. So there is a period between the acceptance of tender and the delivery of goods. During this period, both the forfaiter and exporter are committed to the financing deal and a commitment fee is charged for this period to the forfaiter.[27]

For this reason URF800 distinguishes between the forfaiting agreement and the forfaiting transaction, where later the payment claim should exist. In other words, when a sale contract is concluded between an exporter and importer but there is no debt yet, a forfaiting agreement is suitable for the financing relationship, which explains the terms of the forfaiting transaction when debt exists in the future, and the forfaiting transaction happens when the receivables exist.

In Islamic law, there is disagreement between scholars about the commitment to the sale of something. Some believe that commitment to legal action does not have any commercial value and we cannot agree on commitment to selling or the commitment to discounting (buying). Some others believe that although an obligation to transfer cannot be the subject of selling, it can be the subject of other contracts.[28] It seems that as the Iranian legal system has not made any prohibition for the agreement on the promise to legal action, it can be subject of the contract. Furthermore the promise to the legal action has economic value as article 768 of the Iranian Civil Code permits the promise to payment livelihood is a subject of contract.

3.3.3 Option to Deliver of Future Receivable of Unconcluded Contract

In ideal conditions, the exporter receives the offer to provide the finance before the conclusion of the sale contract with the importer. In this case the "option" to

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26 Wood and Byrne (above n 7) 70; Eric Bishop *Finance of International Trade* (Elsevier Ltd, 2004) 148; Alan E Branch *Export Practice and Management* (Chapman and Hall, 1995) 226; Richard Willsher *Export Finance Risks and Documentation* (Macmillan, 1995) 52- 54.

27 Guild and Harris (above n 7) 24; Rice (above n 7) 30; Michael Rowe *Trade and Project Financing in Emerging Markets* (Publication PLC, 1988) 98.

28 Esmaeel Nematollhi "Effect of Obligation to Granting Ownership in Jurisprudence and Iranian Law" [2012] Islamic Studies 181.

sale/buy receivables is subject to the financing contract and may be during option period the forfaiter is committed to financing future receivables that their basic contract has not concluded yet, without exporter commitment to the transaction.[29]

Although in Iranian law the notion of "suspended contract" has been recognized in article 189 of the Civil Code and we may say that by virtue of this article a financing contract is concluded and its effectiveness depends on the existence of payment claim, there are three errors with this view:

- In "optional forfaiting" seller and buyer are "free" to conclude a financing contract even though the trade contract is concluded and debt exists in the future. But in a "suspended contract", there is no optional situation, the contract is concluded and will be affected and performed when the payment claim exists.
- In the suspended contract, the subject of contract should be certain and definite while in the transfer of future receivables, the subject of contract is not certain and clear.
- Under article 691 of the Civil Code when there is no basic contract, guarantee of its debts will be void. Even Islamic jurists have no doubt about the nullity, such a guarantee is named "the guarantee of what is not obligatory".

Therefore if we want to transfer receivables or to make an obligation to transfer a receivable, conclusion of an underlying contract is necessary.

IV LEGAL SITUATION OF GUARANTEES AND CREDIT SUPPORT RIGHTS ASSOCIATED WITH PAYMENT CLAIMS WHEN DEBT IS ASSIGNED TO FORFAITER

Concerning the legal situation of guarantees and credit support rights associated with the payment claim, it first should be noted that if the instrument of payment claim is a letter of credit or negotiable document, the guarantee is made by signing on the instrument and the paper, containing the receivable and its guarantee, is negotiated to another person. About other instruments the UNCITRAL Convention in article 10 agrees with the transfer of them to the assignee. URF800 in article 2 under the "required document" says that "any document that is, as at the settlement date, required to transfer the payment claim and all rights under any credit support document"; and in article 7 determines delivery of the required document by the seller. Therefore, it seems in the forfaiting rules guarantees will transfer to the forfaiter with the essential payment claim. However, it may be said that the credit support document means that the guarantee or aval benefit the forfaiter under the

29 Guild and Harris (above n 7) 24; Rowe (above n 27) 66.

forfaiting agreement which did not exist before this agreement. But these terms are absolute and they are usable for both situations: guarantees associated with the receivables before the agreement of forfaiting or guarantees made for the forfaiter at the forfaiting agreement.

In Iranian law, we can say that the guarantee is for the payment of the contractual receivable and by the assignment of the contractual receivable to another person its guarantee will be transferred. Moreover, we may argue the "*Istishab*" principle which is a juridical principle and means when we have doubt about the existence or non-existence of something, we have to assume that the recent state continues. But it seems that the guarantee is a personal right and has been made just to benefit the first holder of debt. Therefore, a guarantee of simple debt will be destroyed with assignment. And for negotiable instruments, the general rules relating to transfer guarantees in commercial paper has been accepted in Iranian law too.

V VALIDITY AND EFFECTS OF NON- ASSIGNMENT CLAUSES TO THE THIRD PERSON BETWEEN CREDITOR AND DEBTOR

Although in some countries, the courts have generally held that such clauses are valid and effectively prohibit assignments of any claims,[30] now it is said that a contractual prohibition of, or restriction on, the assignment of a right does not affect the assignability of the right.[31]

In URF800, the agreement between the seller and the buyer is enough for the forfaiting agreement. A question arises if there is a non-assignment clause in the original contract between the creditor and the debtor. Of course if there is a clause that if the creditor assigns the receivables to others it has to pay penalty to the debtor, the assignment of the receivable will be valid, but the creditor has to pay a penalty to the debtor. Where a contract contains a clause prohibiting the creditor from assignment rights under it two conflicting interests immediately come into play. One interest is respect for freedom of contract and party autonomy. Therefore, a contractual prohibition should be respected. The other relevant interest is in the free alienability of assets. Rights to performance of obligations, particularly monetary obligations, are important assets.[32]

30 Stiller (above n 11) 185.

31 Von Bar and others (above n 8) 1051.

32 Ibid.

Therefore, in some legal systems, effect is given to contractual restrictions on assignment of receivables, in order to protect the interest of party in whose favour the restriction has been stipulated. In other legal systems, no effect is given to contractual restrictions in order to preserve the assignor's freedom of disposition and the right of the assignee, especially if the assignee is unaware of the contractual restriction. In the other legal systems, only a limited effect is given to contractual restriction on the assignment of the receivables.[33] Although in some codes such as the Uniform Commercial Code, an anti-assignment clause is ineffective, the obligor has a certain degree of protection: he is relieved by payment to an assignor made without notice of the assignment and all defences or claims good against the assignor, arising out of the original contract or accruing before notice of the assignment, are enforceable against the assignee.

On effectiveness of non-assignment clause in the forfaiting transaction we have to distinguish between documents of receivables:

(a) If the document is a negotiable instrument, the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes in article 17 has the idea that endorsement with such words as "not negotiable" or "not to order" is deemed to be an endorsement for collection. And the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes in article 14 provides: "…When the drawer has inserted in a bill of exchange the words 'not to order' or an equivalent expression, the instrument can only be transferred according to the form, and with the effects of an ordinary assignment…". This view has been accepted in Iranian law.
(b) If the document of receivable is a letter of credit, the principle is that it is not transferable unless there is a transfer clause between parties.
(c) If the document of receivable is an ordinary document such as a book of receivables, URF800 has no rule related to the effect of a non-assignment clause and article 7 (c) (iv) determines that the forfaiter is entitled to examine whether the payment claim and the rights under the credit support documents are freely transferable. UNCITRAL Convention in article 9 provides that the assignment against non-assignment clause is effective but the assignor will be liable for breach of such agreement to the debtor.

According to Iranian law, the validity or effectiveness of a non-assignment clause must use the general rules and principles of the contracts such as the principle of the party's freedom to the conclusion of contract and the principle of

33 *UNCITRAL Legislative Guide on Secured Transactions* (above n 25) 92-93.

the validity of contract for effectiveness to the assignment of the receivables against the non-assignment clause. Also a debt is the property of the creditor and it should be transferable freely. Therefore, when there is a non-assignment clause, the creditor may assign his receivable but he will be responsible for breach of the contractual clause. So article 9 of the UNCITRAL Convention is the same as Iranian law principles on this issue.

VI DEFENSE AND RIGHT OF SET-OFF OF THE DEBTOR AGAINST FORFAITER

Assignment of receivables does not make any contractual relationship between the assignee and the debtor but the debtor has to respect this contract. Therefore, the forfaiter can claim against the debtor for the payment. Here there is a question, whether the debtor can raise against the assignee all defenses and rights of set-off arising from the original contract?

It is said that by conclusion of assignment agreement, the assignor undertakes that the debtor has no defense against an assertion of right.[34] But some have the opinion that any existing defense or set-off right against the assignor at the time of assignment or previous to notice thereof to the obligor can be urged against the assignee, because he does not hold the legal title. Of course in this opinion, there is no defense for the debtor of a bill of exchange or promissory note to the argument that the holder of commercial paper can pass a legal title by endorsement.[35]

Concerning the debtor's defence and right of set-off, there is difference between a negotiable instrument and an ordinary instrument of debt:

(a) About negotiation of commercial instruments - according to article 30 of the UNCITRAL Convention on International Bills of Exchange and Promissory Notes the principle is that a party may not set up any defense against a protected holder. Of course this principle has several exceptions such as defenses based on the underlying transaction between himself and the holder or raised from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party.

(b) And about ordinary assignment of receivables, the UNCITRAL Convention in article 18 emphasizes that the debtor may use all defenses and rights of set-off arising from the original contract against the assignee. Of course it must be distinguished between before and after of payment of receivable to

34 Von Bar and others (above n 8) 1061.

35 Clarence D Ashely "Assignment of Contract" [1910] The Yale Law Journal 180.

the assignee. As according to article 21, the debtor may raise defenses and rights of set-off before the payment to the assignee.

URF800 just determines the liabilities of the seller and the buyer of the payment claim in article 13. Paragraph 2(4) provides that the exporter is liable if before or after the settlement date, the exporter complied with or has breached any obligation binding on it under the payment claim, any credit support document or the underlying transaction that affects the existence of the payment claim on its due date, or the existence of any rights and obligations under any credit support documents. According this article, it seems that URF800 has accepted the idea that the debtor may use defenses and right of set-off before payment of the receivable to the assignee. Then assignee can sue the assignor by proving its failure to perform the original contact and disadvantage to the assignee because of it.

In Iranian law, there is a difference between documents of receivables, so article 30 of UNCITRAL Convention on International Bills of Exchange and Promissory Notes for assignment of receivables with negotiable instruments and article 18 of UNCITRAL Convention on Assignment of Receivables in International Trade for assignment of receivables with ordinary instruments are useable rules in this legal system.

VII NON-RECOURSE PAYMENT IN FORFAITING AND ITS EXCEPTIONS

Two important functions of forfaiting are financing and non-recourse payment.[36] After documents are complete, the exporter takes them to the forfaiter and he will discount them immediately according to terms of their financing contract.[37] Hence it is said that forfaiting is the purchase, without recourse to any previous holder of instruments, of a debt instrument due to its maturing in the future and arising from the provision of goods and services.[38]

Conditions of payment are determined in article 11 of URF800. Immediate payment and payment in the specified currency are validity requirements for payment in the forfaiting. Also the payment is definite and unconditional, which means the forfaiter assumes all the risks of non-payment. In the other words, in the forfaiting transaction, the seller obtains immediate and definite payment by discounting the receivables. In this contract, any rights of recourse against the exporter in case of non-payment are excluded when the relevant papers are

36 Coussemnet (above n 7) 2; Rice (above n 7) 30.

37 Guild and Harris (above n 7) 26.

38 Ibid 1.

assigned to the forfaiter.[39] In practice, the seller in endorsing the instruments to the buyer uses the words "without recourse". The goal of this phrase is to pass all risks and responsibilities of collecting of debt to the forfaiter.[40]

Non-recourse payment in forfaiting has some exceptions. In certain circumstances a forfaiter can seek repayment from the exporter. If the payment claim assigned to a financial institute is illegal, the assignment contract will be void and the forfaiter will be able to seek repayment of what he has paid to the exporter.[41]

Paragraph (b) of article 13 of URF800 has determined that the exporter will be liable to the forfaiter and article 4 says: "On the settlement date, the seller sells to the buyer and the buyer purchases from the seller the payment claim without recourse. The buyer will have no claim against the seller or any prior seller for the non-payment of any amount due in respect of the payment claim except as provided under article 13 or article 4b". Therefore, article 13 is an exception for without-recourse payment in forfaiting.

Here there is a question whether there is any possibility for a "non-responsible" clause for exporter? In other words, is it possible that the exporter will not be responsible in all situations if the forfaiter cannot receive the debt from the debtor irrespective of whether this problem raises from exporter default or not?

It should be noted that the "non-responsible" clause is different from the non-recourse clause. The non-recourse clause means the forfaiter will not have recourse to the exporter if he cannot receive payment from the debtor, without failure of the exporter, but in the non-responsible clause, the exporter will not be responsible, even if non-payment arises from its failure. Agreement on a "non-responsible" clause is possible. But this term will be void if it is against public policy or goodwill. For example, when the exporter causes the failure of the demand of the payment claim, the non-responsible clause is not effective because roguery is against the public policy.[42]

The UNCITRAL Convention in article 11(1) has determined: "the mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein". So mutual rights and obligations of

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39 Rowe (above n 27) 91.

40 Guild and Harris (above n 7) 1.

41 Rice (above n 7) 30.

42 Naser Katuzian *Public Rules of Contracts* (Company of Publishing, 2009) vol 1, 583.

the assignment contract parties will be determined in their financing contract and they can agree on the "non-responsible clause" for each party.

The URF800 has some exceptions for without-recourse payment in article 13 but it does not have any rule related to a non-responsible clause. Therefore, even if parties can agree about non-responsible clause, under article 13 this agreement does not work if the exporter has engaged in any fraudulent behaviour related to debt or support right.

UNCITRAL Convention pays attention to public policy in several articles, such as articles 23(1) and 32. But there is no express rule about the effect of the non-responsible clause in the agreement between the assignor and the assignee. We can use general rules related to the public policy and say this clause will be valid and effective if it is not against the public policy of the forum state.

At the end about non-recourse payment in forfaiting, which means that purchaser of receivables takes on the credit risk that the acceptor and guarantor may not pay also the risk that force majeure may prevent payment, in the assignment of the receivables and letter of credits, principle is that the transfer of debt discharges the assignor who will not be responsible for non-payment from the debtor. But for negotiable instruments, if he endorses commercial paper, he will be liable for payment on the due date unless he endorses the term of 'without recourse'.

Of course in Iranian law, there is disagreement about the validity and effectiveness of non-recourse clauses in negotiable instruments and article 249 of the Commercial Code provides that the endorser cannot be discharged by this clause. If this article is imperative, agreement against it is not valid and effective. Concerning assignment receivables with an ordinary instrument, it seems the assignor is responsible for non-payment from the debtor but according to the general rules and principles of contract, the assignor and the assignee may agree about non-recourse payment by the forfaiter.

VIII CONCLUSION

(1) Forfaiting is a financial method that with selling receivables on a without recourse basis helps exporters and importers in international trade. We need to know responses to some questions about this useful financial method.

(2) First we have to know meaning of "receivables" in different legal systems. "Payment claim" and "receivables" are synonyms in URF800 and the UNCITRAL Convention and they mean "personal right" to payment but in Islamic and Iranian law a "receivable" is "property" of creditor that may be sold. Concerning the nature of forfaiting, the UNCITRAL Convention uses

"assignment" for transfer of receivables and URF800 usually uses the "sale" contract for this financial method. However, in Iranian law there is no "assignment contract" and sale is a good way for transfer of debts and receivables by the forfaiting.

(3) There are different views related to forfaiting questions between URF800, UNCITRAL Convention and Iranian Law so we may select the best of them in each situation. For instance, while according to the URF800, a forfaiting agreement is a written agreement, in the UNCITRAL Convention and Iranian law, this agreement can be oral or written and there is no formal requirement for transfer of receivables with ordinary instruments. Of course, when the subject of forfaiting is receivable with negotiable the instrument there are some formal requirements for this negotiation.

(4) About debtor's rights and duties related to a forfaiting transaction there is no rule in URF800 and we have to use the relevant UNCITRAL Convention rules. So about the effect of consent or notice of the debtor, and about defences and the right of set-off of the debtor we can use the UNCITRAL Convention rules and principles. It should be noted that UNCITRAL Convention rules can be used when the subject of forfaiting is debt with an ordinary instrument, because letters of credit and commercial paper have special rules.

(5) Also about non-recourse the payment as an essential feature of forfaiting, we should note that although the UNCITRAL Convention and URF800 do not have express rules there are some exceptions.

(6) Forfaiting is a good method for the financing of trade and we can solve its vagueness by virtue of URF800, UNCITRAL Conventions and national legal systems.

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