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FACTORING MODEL LAW

**PREPARED BY THE LEGAL COMMITTEE
OF INTERNATIONAL FACTORS GROUP (NOW INTEGRATED INTO FCI)**

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EDITOR'S NOTE

The ideas and most of the wording are taken from the United Nations Convention on the Assignment of Receivables in International Trade (New York 2001). However, its large scope of application was narrowed to factoring as described in the Ottawa Convention on International Factoring (Ottawa 1988), including however non-notified factoring and other forms of modern factoring, such as reverse factoring and invoice discounting.

Conflicts with the wording of the United Nations Convention on the Assignment of Receivables in International Trade (New York 2001) should be avoided; however, some rules conflict with the Ottawa Convention on International Factoring (Ottawa 1988), or the Rome I Directive of the European Commission, art. 14. Such conflicts should give rise to discussions.



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INTRODUCTION¹

In 1988 UNIDROIT² (Institute for the Unification of Private Law, Rome) finalized the Ottawa Convention on International Factoring³ which introduced important principles for international factoring transactions. Meanwhile, UNCITRAL⁴ (United Nations Committee on International Trade Law, Vienna) prepared the UN Convention on Assignment of Receivables in International Trade (New York 2001)⁵, followed by the UNCITRAL Legislative Guide on Secured Transactions (2007)⁶ supplemented in 2010 by the Guide on Security Rights in Intellectual Property⁷. A Guide on the Implementation of a Security Rights Registry followed in 2013⁸. At present, UNCITRAL is discussing a Model Law on Secured Transactions⁹.

Those efforts show the importance of unification of international law for the enhancement of credit in order to make financing of international trade easier and more accessible.

IFG recommends implementing those ideas in a system of Secured Transaction Law for the benefit not only of financiers, but for the benefit of all traders and producers seeking finance at lower costs. The ratification of the UN Convention on Assignment of Receivables in International Trade (New York 2001) is strongly suggested.

Based on the ideas developed by international experts and expressed in the documents mentioned above, this suggestion of a Model Factoring Law reduces the scope to only cover factoring transactions. While a wider scope extending to secured transactions may generally be preferable, but will require longer periods of intense discussions in the legislative bodies, the Model Law strives to be shorter, less complex and easier to handle. It may be extended at any time to cover other secured transactions which a state wishes to promote or regulate.

The Model Law is designed for adoption in more than one country, and should not be changed in substance. Thereby, a unification of national private law can be achieved. Therefore, in the interpretation of this Law, regard is to be had to its object and to the need to promote uniformity in its application and the observance of good faith in trade. Questions concerning matters governed by this Law that are not expressly settled in it are to be settled in conformity with the general principles on which it is based.

National legislators, with the assistance of national or international advisors, may wish to consider the implementation of the rules suggested into the national law. Some rules may be incompatible with national law as it exists; however, for the benefit of promoting finance and trade, national law should be reconsidered and modernized pursuant to the suggestion in this model law.

This model law will be enacted by the states striving to align national law with the ideas internationally developed and promoted

Reaffirming their conviction that international trade on the basis of equality and mutual benefit is an important element in the promotion of friendly relations among states,

¹ The ideas of this draft are taken from UNITED NATIONS LAW ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, The Ottawa Convention on International Factoring, and the GRIF of International Factors Group

² www.unidroit.org

³ <http://www.unidroit.org/english/conventions/1988factoring/convention-factoring1988.pdf>

⁴ www.uncitral.org

⁵ <http://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf>

⁶ http://www.uncitral.org/pdf/english/texts/security-lg/e/09-82670_Ebook-Guide_09-04-10English.pdf

⁷ http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_Ebook_Suppl_SR_IP.pdf

⁸ http://www.uncitral.org/pdf/english/texts/security/Draft_Registry_Guide.pdf

⁹ <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V14/002/62/PDF/V1400262.pdf?OpenElement> (Work in Progress)



Considering that problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade,

Desiring to establish principles and to adopt rules relating to the assignment of receivables that would create certainty and transparency and promote the modernization of the law relating to assignments of receivables, while protecting existing assignment practices and facilitating the development of new practices,

Desiring also to ensure adequate protection of the interests of debtors in assignments of receivables,

Being of the opinion that the adoption of uniform rules governing the assignment of receivables would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international trade,

CHAPTER I

SCOPE OF APPLICATION

1. Article 1

Scope of application

- 1.1. This Law applies to domestic or international assignments of domestic or international trade receivables made under a factoring contract. Subsequent assignments are also included, provided that
 - 1.1.1. They satisfy the criteria set forth in paragraph 1 of this article even if it did not apply to any prior assignment of the same receivable or,
 - 1.1.2. Any prior assignment is governed by this law.
- 1.2. For the purposes of this Law, "factoring contract" means a contract concluded between one party (the client)¹⁰ and another party (the factor) pursuant to which¹¹:
 - 1.2.1. The client will be the manufacturer or wholesaler of the goods or the provider of the service to which the receivable relates
 - 1.2.2. The client will assign to the factor a trade receivable or trade receivables,
 - 1.2.3. Notice of the assignment of the receivables may or may not be given to debtors.
 - 1.2.4. The factor must perform at least the initial function as described in 1.2.1 to 1.2.3 and may perform any or all of the remaining functions below:

¹⁰ In a reverse factoring situation, additional agreements may be concluded between the debtor and the factor; however, only the supplier being the creditor may assign receivables. Typically, in a reverse situation, a debtor will take the initiative to have factored more than one of his suppliers. The definition does not require that trade receivables against more than one debtor are assigned..

¹¹ The scope should be wide enough to include typical factoring agreements, including invoice discounting and reverse factoring. National legislators are invited to adapt the scope to the specific legal environment, and should ascertain that recourse and non-recourse factoring are included. The industry sees a secularization as being different from factoring, hence the mentioning of the direct relation of the value and risk assessment of the receivables. National legislators will decide whether to widen the scope to also include bulk assignments used in secularization.



- Finance for the supplier, including advance payments that are directly related to the value and risk assessment of the receivables
- Maintenance of accounts (ledgering) relating to the receivables;
- Collection of receivables; collection made by the client for the benefit of the factor is deemed to be made by the factor¹²
- Protection against default in payment by debtors;

2. **Article 2** **Assignment of receivables**

For the purposes of this Law:

- 2.1. "Assignment" means the transfer by agreement from one person ("assignor") to another person¹³ ("assignee") of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("receivable") from a third person ("the debtor"). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer.¹⁴
- 2.2. In the case of an assignment by the initial or any other assignee ("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.¹⁵

3. **Article 3** **Internationality¹⁶**

- 3.1. A receivable is **international** if, at the time of conclusion of the original contract, the assignor and the debtor are located in different states. An **assignment** is international if, at the time of conclusion of the contract of assignment, the assignor and the assignee are located in different states.
- 3.2. A receivable is domestic if, at the time of conclusion of the original contract, the assignor and the debtor are located in the same state. An **assignment** is domestic if, at the time of conclusion of the contract of assignment, the assignor and the assignee are located in the same state.

4. **Article 4** **Exclusions and other limitations¹⁷**

- 4.1. This law does not apply to assignments made:
 - 4.1.1. To an individual for his or her personal, family or household purposes;
 - 4.1.2. As part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.
- 4.2. This law does not apply to assignments of receivables arising under or from:
 - 4.2.1. Transactions on a regulated exchange;

¹² To include invoice non-notified discounting practices where the client collects for the benefit of the factor to whom the receivables are assigned

¹³ This term includes natural persons and legal persons, such as corporations.

¹⁴ In some countries, pledge is used as a legal basis for factoring. This law provides for assignments to be used; however, it acknowledges that in an international context there may be other legal frameworks

¹⁵ Receivables may be assigned in a chain of assignments; assignor 1 assigns to assignee 1, and assignee 1 assigns to assignee 2. In such a situation, assignee 1 becomes assignor 2 in the second assignment although remains assignee 1 in the first assignment.

¹⁶ It is unusual for a domestic law to state definitions for internationality. Laws apply to domestic and international transaction. However, this being a model law covering all types of factoring transactions, a definition of internationality seems useful.

¹⁷ The national legislator will have to decide to what extent such clarifications are necessary, dependent on the sophistication of the national law.



- 4.2.2. Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;
- 4.2.3. Foreign exchange transactions;
- 4.2.4. Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;
- 4.2.5. The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;
- 4.2.6. Bank deposits;
- 4.2.7. A letter of credit or independent guarantee.
- 4.3. Nothing in this Law affects the rights and obligations of any person under the law governing negotiable instruments.
- 4.4. Nothing in this Law affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household purposes.
- 4.5. Nothing in this Law:
 - 4.5.1. Affects the application of the law of a state in which real property is situated to either:
 - 4.5.1.1. An interest in that real property to the extent that under that law the assignment of a receivable confers such an interest; or
 - 4.5.1.2. The priority of a right in a receivable to the extent that under that law an interest in the real property confers such a right; or
 - 4.5.2. Makes lawful the acquisition of an interest in real property not permitted under the law of the state in which the real property is situated.

CHAPTER II

GENERAL PROVISIONS

5. Article 5

Definitions and rules of interpretation

For the purposes of this Law:

- 5.1. "Original contract" means the contract between the assignor and the debtor from which the assigned receivable arises;
- 5.2. "Existing receivable" means a receivable that arises upon or before conclusion of the contract of assignment and "future receivable"¹⁸ means a receivable that arises after conclusion of the contract of assignment;
- 5.3. "Writing" means any form of information that is accessible so as to be usable for subsequent reference.¹⁹ Where this Law requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;²⁰

¹⁸ The assignment may relate to receivables that will be created at a later date (art.7.2). Factoring agreements are master agreements that include all receivables arising from the business of the client after the conclusion of the factoring agreement. A contractual receivable is created by the conclusion of the contract, subject to national law.

¹⁹ This makes lawful the assignment by electronic means provided that further reference can be made to the transaction (e.g. it is possible to later print out the transaction), or the assignment of electronic invoices

²⁰ Signature can therefore be made by traditional means as well as by electronic means



- 5.4. "Notification of the assignment" means a communication in writing that reasonably identifies the assigned receivables and the assignee;
- 5.5. "Insolvency administrator" means a person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the assignor's assets or affairs;
- 5.6. "Insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the assignor are subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;
- 5.7. "Priority" means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied;
- 5.8. A person is located in the state in which it has its place of business. If the assignor or the assignee has a place of business in more than one state, the place of business is that place where the central administration of the assignor or the assignee is exercised. If the debtor has a place of business in more than one state, the place of business is that which has the closest relationship to the original contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person;
- 5.9. "Proceeds" means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;
- 5.10. "Financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any transaction referred to above entered into in financial markets and any combination of the transactions mentioned above;
- 5.11. "Netting agreement" means an agreement between two or more parties that provides for one or more of the following:
- 5.11.1. The net settlement of payments due in the same currency on the same date whether by novation or otherwise;
 - 5.11.2. Upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or
 - 5.11.3. The set-off of amounts calculated as set forth in subparagraph 5.12.1 of this article under two or more netting agreements;
- 5.12. "Competing claimant" means:
- 5.12.1. Another assignee of the same receivable from the same assignor, including a person who, by operation of law, claims a right in the assigned receivable as a result of its right in other property of the assignor, a creditor of the assignor; or
 - 5.12.2. The insolvency administrator.
- 5.13. "Receivable" means a contractual right to payment of a monetary sum
- 5.14. "Trade Receivables" mean receivables arising from an original contract that is
- 5.14.1. A contract for the supply or lease of goods or services other than financial services,
 - 5.14.2. A construction contract, or
 - 5.14.3. A contract for the sale or lease of real property;
 - 5.14.4. A contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
- Trade Receivables" also are receivables
- 5.14.5. Representing the payment obligation for a credit card transaction; or



- 5.14.6. Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.
- 5.15. "Subsequent Assignment" means an assignment of a receivable by an assignee, including the re-assignment to the assignor.

6. Article 6
Party autonomy

The assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Law relating to their respective rights and obligations. Such an agreement does not affect the rights of any person who is not a party to the agreement.

CHAPTER III
EFFECTS OF ASSIGNMENT

7. Article 7
Effectiveness of assignments

- 7.1. Assignments of trade receivables are valid and effective unless stated otherwise in this law.
- 7.2. An assignment is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant, and the right of an assignee may not be denied priority, on the ground that it is an assignment of more than one receivable, future receivables or parts of or undivided interests in receivables, provided that the receivables are described:
 - 7.2.1. Individually as receivables to which the assignment relates; or
 - 7.2.2. In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates.²¹
- 7.3. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.²²
- 7.4. Except as provided in paragraph 1 of this article, article 9 and article 10, paragraphs 2 and 3, this Law does not affect any limitations on assignments arising from law.²³

8. Article 8
Contractual limitations on assignments

- 8.1. An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.²⁴
- 8.2. Nothing in this article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or

²¹ This clause allows the assignment of receivables before they have come into existence.

²² The assignment of future receivables may be agreed on in advance in a factoring master agreement, and no new act of transfer is required when the receivable arises.

²³ Some receivables are excluded from assignment by other law, e.g. data protection or confidentiality rules relating to specific services such as medical doctors, attorneys or tax advisors, or laws protecting national security, such as military procurement contracts. Such limitations shall not be affected.

²⁴ Factoring transactions shall not be prevented by ban of assignment clauses imposed by the debtor. However, the debtor may claim damages from the supplier for breach of contract, but not from the factor.



the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.

9. Article 9
Transfer of security rights

- 9.1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.
- 9.2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor's right to assign the receivable or the right securing payment of the assigned receivable.
- 9.3. Nothing in this article affects any obligation or liability of the assignor for breach of any agreement under paragraph 2 of this article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.
- 9.4. The transfer of a possessory property right under paragraph 1 of this article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.
- 9.5. Paragraph 1 of this article does not affect any requirement under rules of law other than this Law relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.



CHAPTER IV
RIGHTS, OBLIGATIONS AND DEFENCES

SECTION I
ASSIGNOR AND ASSIGNEE

10. Article 10
Rights and obligations of the assignor and the assignee

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.

11. Article 11
Representations²⁵ of the assignor

- 11.1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:
- 11.1.1. The assignor has the right to assign the receivable;
 - 11.1.2. The assignor has not previously assigned the receivable to another assignee; and
 - 11.1.3. The debtor does not and will not have any defences or rights of set-off.
- 11.2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.²⁶

12. Article 12
Right to notify the debtor

- 12.1. 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.
- 12.2. Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph 1 of this article is not ineffective for the purposes of article 16 by reason of such breach. However, nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

13. Article 13
Right to payment

- 13.1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:²⁷

²⁵ Representation is a legal term to express a warranty by the party giving the representation.

²⁶ Under this article, in the absence of an agreement between assignor and assignee, the assignee bears the default risk of the debtor (non-recourse factoring).

²⁷ As a basic rule, the assignee is entitled to the payment, whether made to the assignee (para. 1) or to the assignor (para. 2). If payment is made to a third party, such as a judgment creditor or the insolvency administrator, the assignee can claim the payment if the assignee has priority over such third party. Those rules do not exclude



- 13.1.1. If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;
 - 13.1.2. If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and
 - 13.1.3. If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.
- 13.2. The assignee may not retain more than the value of its right in the receivable.

SECTION II

DEBTOR

14. Article 14 **Principle of debtor protection**

- 14.1. Except as otherwise provided in this Law, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.
- 14.2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change:
 - 14.2.1. The currency of payment specified in the original contract; or
 - 14.2.2. The state specified in the original contract in which payment is to be made to a state other than that in which the debtor is located.²⁸

15. Article 15 **Notification of the debtor²⁹**

- 15.1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.
- 15.2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.
- 15.3. Notification of a subsequent assignment constitutes notification of all prior assignments.³⁰

the right of the assignee to claim payment from the debtor.

²⁸ In a 2 Factor transaction, the import factor will collect in the debtor's country, and so the debtor should not claim that payment was agreed to be made to the supplier in the export country.

²⁹ The debtor may or may not be notified of the assignment. (see definition in 5.4). The debtor should be able to understand the notification (para. 1), and it may relate to receivables arising after the notification (para.2). In cases where a receivable is assigned in a chain ("subsequent assignments"), notification may relate to the second assignment only. For instance, in a typical international assignment, a receivable is assigned from the client (assignee 1) to the export factor (assignee 1 = assignor 2) who assigns it to the import factor (assignee 2). The notification will only show the end result, i.e. that assignor 2 is the new creditor to whom payment should be made.

³⁰ In cases of chain assignments,



16. Article 16
Debtor's discharge by payment

- 16.1. Until the debtor receives notification of the assignment, the debtor is entitled to be discharged by paying in accordance with the original contract.
- 16.2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.
- 16.3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.
- 16.4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.
- 16.5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in accordance with the notification of the last of such subsequent assignments.
- 16.6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.
- 16.7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this article as if the notification from the assignee had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.
- 16.8. This article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.

17. Article 18
Defences and rights of set-off of the debtor

- 17.1. In a claim by the assignee against the debtor for payment of the assigned receivable, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the assignment had not been made and such claim were made by the assignor.
- 17.2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor.
- 17.3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor may raise pursuant to article 9 or 10 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor against the assignee.



18. Article 18
Agreement not to raise defences or rights of set-off

- 18.1. The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 17³¹. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.
- 18.2. The debtor may not waive defences:
 - 18.2.1. Arising from fraudulent acts on the part of the assignee; or
 - 18.2.2. Based on the debtor's incapacity.
- 18.3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by article 19.2.

19. Article 19
Modification of the original contract

- 19.1. An agreement concluded **before notification** of the assignment between the assignor and the debtor that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights.
- 19.2. An agreement concluded **after notification** of the assignment between the assignor and the debtor that affects the assignee's rights is ineffective as against the assignee unless:
 - 19.2.1. The assignee consents to it; or
 - 19.2.2. The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.³²
- 19.3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

20. Article 20
Recovery of payments

Failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.³³

SECTION III
THIRD PARTIES

21. Article 21
Law applicable to competing rights

- 21.1. In case of more than one assignments are made by the same assignor relating to the same receivable, priority among the assignees will be determined by the general rules of law.

³¹ Such waivers are common in reverse factoring. The debtor is under the obligation to make payment to the factor, but may recover such payments from the supplier.

³² In cases of the assignment of future receivables, the parties of the original contract may make changes to the original contract before performance has been fully completed. Factors provide for finance receiving invoices only after full performance of the original contract. After that no change in the original contract is permitted unless the factor consents.

³³ The rights of the debtor against the assignor are unaffected.



- 21.2. With the exception of matters that are settled elsewhere in this Law the **law of the state in which the assignor is located** governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant.³⁴

22. **Article 22** **Special rules on proceeds**

- 22.1. If proceeds are **received by the assignee**, the assignee is entitled to retain those proceeds to the extent that the assignee's right in the assigned receivable had priority over the right of a competing claimant in the assigned receivable.
- 22.2. If proceeds are **received by the assignor**, the right of the assignee in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the assignee's right had priority over the right in the assigned receivable of that claimant if:
- 22.2.1. The assignor has received the proceeds under instructions from the assignee to hold the proceeds for the benefit of the assignee; and
 - 22.2.2. The proceeds are held by the assignor for the benefit of the assignee separately and are reasonably identifiable from the assets of the assignor, such as in the case of a separate deposit or securities account containing only proceeds consisting of cash or securities.
- 22.3. Nothing in paragraph 2 of this article affects the priority of a person having against the proceeds a right of set-off or a right created by agreement and not derived from a right in the receivable.

³⁴ It is of utmost importance to the factor that his rights are unaffected after assignment by third parties, such as judgment creditors of the client. Likewise, the factor must be in a position to collect even in the insolvency of the client. This Model law assumes that domestic law has rules on priority, based either on the time of the assignment, or notification given to the debtor, or a registration system. In the absence of such rules, a registry system is suggested. (see Annex). Note EU Rome I Convention has not yet solved the problem of third party rights. However, it is likely that the EU Commission will follow recommendations to link the priority issue with the location of the assignor. In general, priority issues are solved by either the date the assignment was made (e.g. Germany), or the date of the notification (e.g. United Kingdom). Alternatively, a registration requirement to ensure priority over competing claimants may be installed (e.g. U.S.). A registration system based on modern internet platforms might be useful for emerging market economies as the assignee can easily ascertain the priority of the assignment without detailed due diligence procedures, and thus the assignee is in a position to offer credit at a lower rate. A suggestion as contained in the UN Convention is reproduced as Annex at the end of the text, and should be used as a guideline by national legislators.



23. Article 23
Subordination

An assignee entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future assignees.

24. Article 24
Form of a contract of assignment

- 24.1. A contract of assignment concluded between persons who are located in the same state is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of the state in which it is concluded.
- 24.2. A contract of assignment concluded between persons who are located in different states is formally valid as between them if it satisfies the requirements of either the law which governs it or the law of one of those states.

Chapter V
International Factoring

25. Article 26
Relations between factors in international factoring

- 25.1. Relations between factors in international factoring transactions relating to the assignment of international receivables, e.g.
 - 25.1.1. export factoring
 - 25.1.2. import factoringshall be governed by rules of an association of which the factors are members, and, in the absence of such rules, by the law agreed to by the factors.
- 25.2. Unless agreed otherwise by the factors involved or regulated by statutes or by-laws of an association of which the factors are members, the rules of Chapters I to IV shall apply accordingly.

26. Article 27
Entry into force

- 26.1. This Law enters into force on
- 26.2. This Law applies only to assignments if the contract of assignment is concluded on or after the date when this Law enters into force



Annex: Priority based on Registration

Unless a priority system is already in place in the enacting country, it is suggested to base such priority on registration.

A registry system is to be devised by UNCITRAL ("UNCITRAL Guide on the Implementation of a Security Rights Registry") and may be obtained from http://www.uncitral.org/pdf/english/texts/security/Draft_Registry_Guide.pdf.