

Legal Basics of International Factoring

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Legal Basics



- Receivables
- Assignment
- Insolvency
- All of you know the meaning under their domestic law but meanings may be different in legal environments

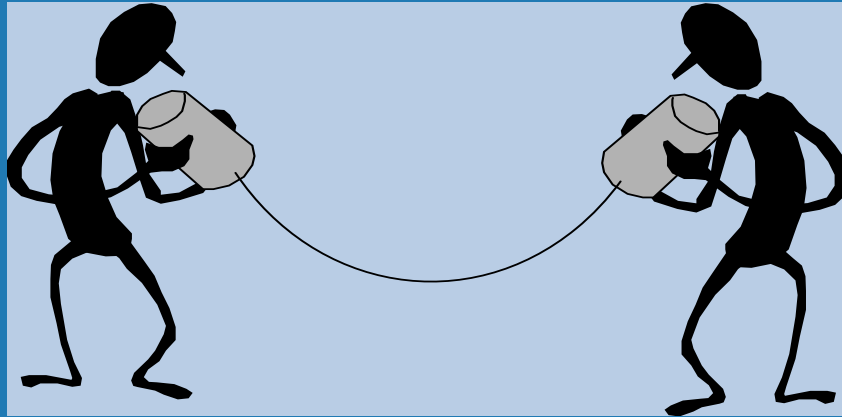
What is Factoring legally speaking: The IFG View

A factoring contract means a contract pursuant to which a supplier may or will assign

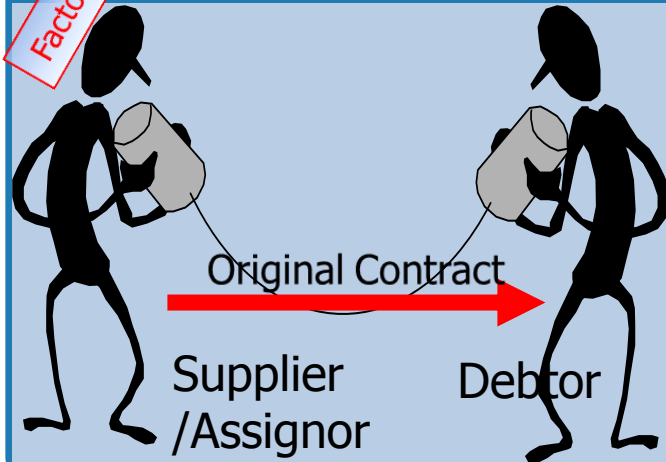
- Accounts receivable (referred to in these Rules as "receivables" which expression, where the context allows, also includes parts of receivables) to a factor,
- whether or not for the purpose of finance, for at least one of the following functions:
 - a) Receivables ledgering
 - b) Collection of receivables
 - c) Protection against bad debts

Receivables

Receivable = monetary claim arising from a **contractual** obligation



Assignment



Assignment
means

- The transfer
- From one person („assignor“)
- To another person („assignee“)
- Of all or a part
- In the assignors contractual right to payment of a monetary sum („receivable“)
- From a third person („debtor“)
- By Agreement (sc. Between the Assignor and the Assignee)

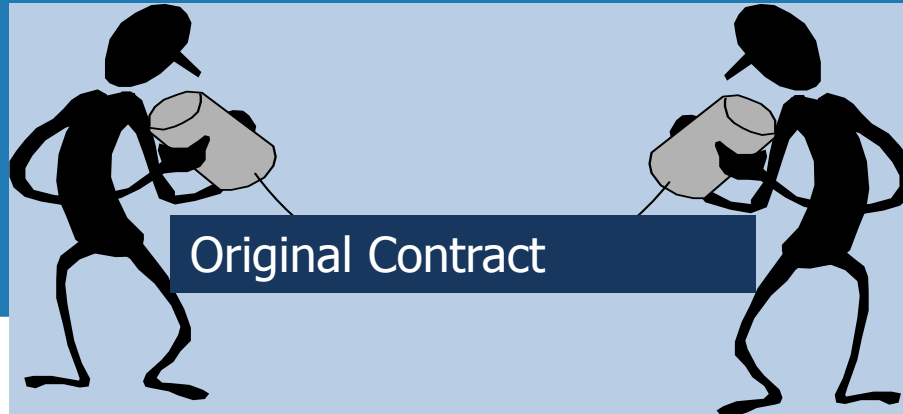
Export Factoring

Factor



Factoring Agreement

Client (Supplier)



Debtor

Import Factoring



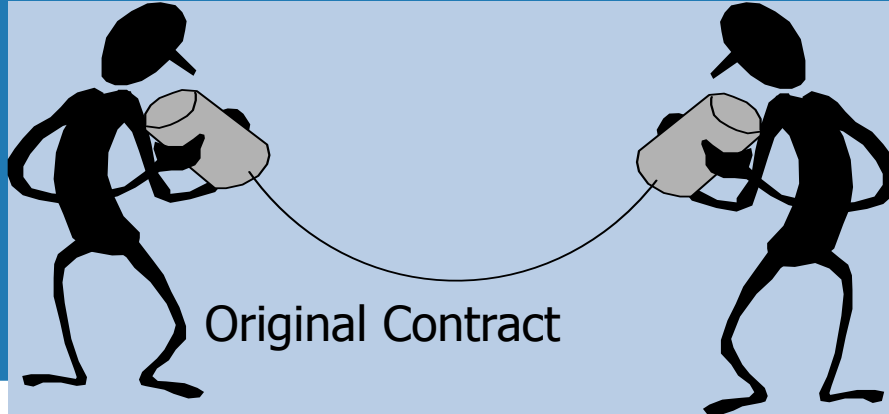
Factoring Agreement



Factor



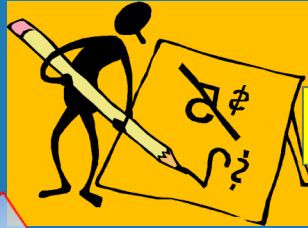
Client (Supplier)



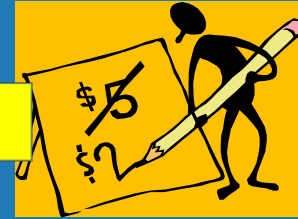
Debtor

Cross-Border Factoring (2 Factor System)

Export-Factor



GRIF



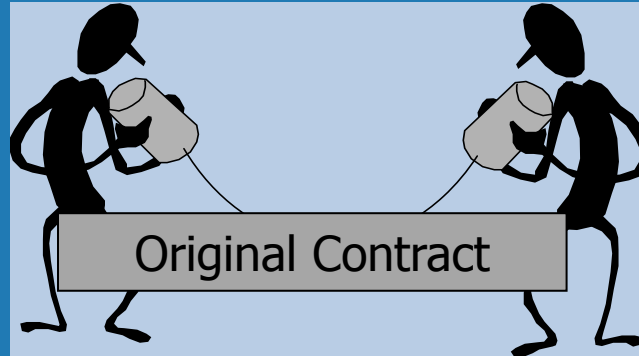
Import-Factor



Factoring Agreement



Client



Debtor

Typical clauses in a Factoring Agreement

Irrespective of the legal environment, a typical factoring agreement includes:

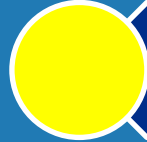


- **Transfer of the receivable from supplier (client) to factor.**
- **Purchase of the receivable by factor including payment of a purchase price by factor to client**
- **Advances on purchase price**
- **Client represents and warrants legal existence of receivable, assignability, absence of defenses or set-offs**
- **Factor takes default risk of debtor (“non recourse factoring”) or not (“recourse factoring”)**
- **Assignment is notified to debtor (“notified factoring”) or not (“non-notified factoring”)**
- **Maintenance of accounts and collection either by factor or client (inhouse-factoring)**

Legal Environments



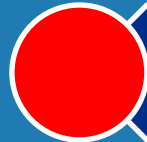
Most countries have a legal environment of their own



Some countries have more than one legal system



Some countries share a common legal system or a common legal history.



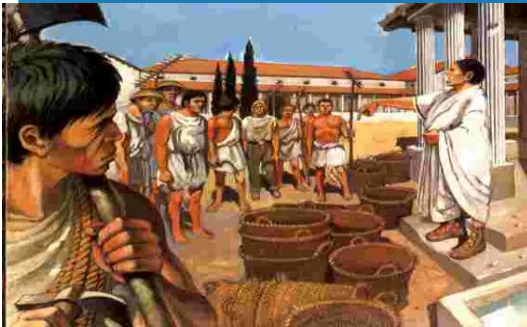
Some countries adopt the legal system of another country

Global legal environment



- Intense economic contacts require common legal understanding
 - Civil and Commercial law have not yet been unified
 - Domestic law prevails in many issues
- Cross-border factoring leads to contacts with more than one legal environment
 - Not familiar to the factor or the supplier

Cultural Views on commodities in history



Objects of private property have changed in history

- Land
- Slaves

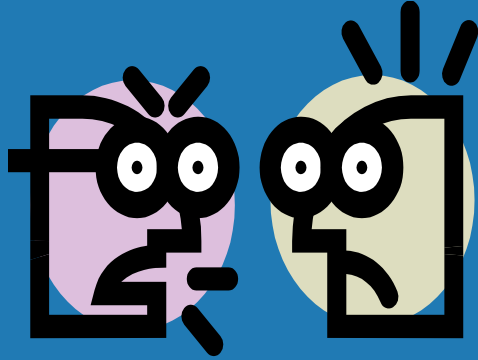
Receivables: Personal bond or proprietary right?

- Transfer of receivables is a commercial transaction
- Freedom of transfer subject to cultural views
- Various views and limitations, e.g. Sale of distressed loans

Which law to apply

- Each country has „conflict of law“ rules (international private law)
 - The forum state IPL decides which law applies
- Parties may choose applicable law („Choice of Law“)
 - In case of doubt: exporter's law prevails

Which law to apply in Europe



- European Law provides for specific conflict of law rules relating to assignments
- European Law does not provide substantive rules on assignment

EU Rome I Regulation



REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a **voluntary assignment** or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims

Transfer of Receivables under European Conflict of Law Rules

Relationship Assignor – Assignee

- The law agreed by factor and assignor in the factoring agreement,
- In the absence of such agreement, the law of the factor's location

Relationship Assignee – Debtor

- The law agreed by assignor (supplier) and debtor in the original contract,
- In the absence of such agreement, the law of the assignor

Relationship Assignee – Third Parties

- Multiple Assignments by the same Assignee
- Judgment Creditors
- Insolvency Practitioner

The importance of unification:

Transfer of Receivables in various jurisdictions

	UK	France	Germany
Form of assignment	Written if legal assignment, oral if equitable assignment	No form required but Code civil requires writing for proof if value exceeds 800 € (not applicable on commercial transactions)	Oral
Effects on debtor	None unless notified	None unless formally notified	None unless notified
Ban of assignment clause	valid	Basically valid (forbidden by other law outside assignment rules)	Invalid but payment to assignor discharges debtor even if made in bad faith
Priority	First to notify	Formal notification	First assignment valid only



Efforts made for Unification of Factoring Law



Ottawa Convention on International Factoring

- Small scope
- Few countries: France, Italy, Germany, Hungary, Latvia, Nigeria, Ukraine, Belgium

United Nations Convention on the Assignment of Receivables in International Trade

- Large Scope for all kinds of secured transactions, including factoring
- Not yet in force

Efforts made for Unification of Factoring Law (cont'd)



UNCITRAL Legislative Guide on Secured Transactions

- Large Scope
- Guidelines for national legislators, more than 500 pages

UNCITRAL Model Law on Secured Transactions

- Large Scope
- Work in Progress

The Ottawa Convention View on Factoring



For the purposes of this Convention, "factoring contract" means a contract concluded between one party (the supplier) and another party (the factor) pursuant to which:

- (a) the supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use;
- (b) the factor is to perform at least two of the following functions:
 - finance for the supplier, including loans and advance payments;
 - maintenance of accounts (ledgering) relating to the receivables;
 - collection of receivables;
 - protection against default in payment by debtors;
- (c) notice of the assignment of the receivables is to be given to debtors.

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

4. - For the purposes of this Convention:

- (a) a notice in writing need not be signed but must identify the person by whom or in whose name it is given;
- (b) "notice in writing" includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form;
- (c) a notice in writing is given when it is received by the addressee.

Ottawa Convention Scope

Ottawa Convention covers many factoring practices, but not all of them:

- Ottawa factoring definition omits Reverse factoring facilities unless supplier is involved in contract
- Ottawa factoring definition omits non-notification factoring
- Ottawa Convention refers only to B2B factoring

UN Convention refers to Assignments in International Trade not restricted to factoring

- Scope larger than factoring including all kinds of asset-based lending
- Includes some rules not applicable to factoring

IFG Draft Model Law on Factoring



- Prepared by IFG Legal Committee
 - Model Law for implementation By the national legislators
 - Substantive Rules for factoring
- Based on the ideas of Unidroit and UNCITRAL

IFG Draft Model Law on Factoring

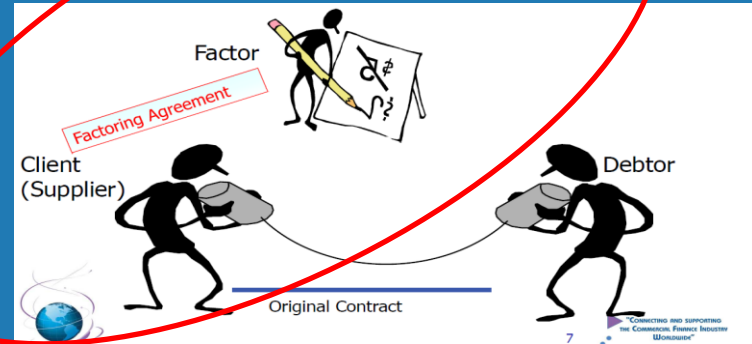


- Definitions
- General Rules on Assignments
 - Future Receivables
 - Global Assignment
 - Ban of Assignment Clauses
 - Legal Bans on Assignment

IFG Draft Model Law on Factoring

Assignor – Assignee (=Client-Factor)

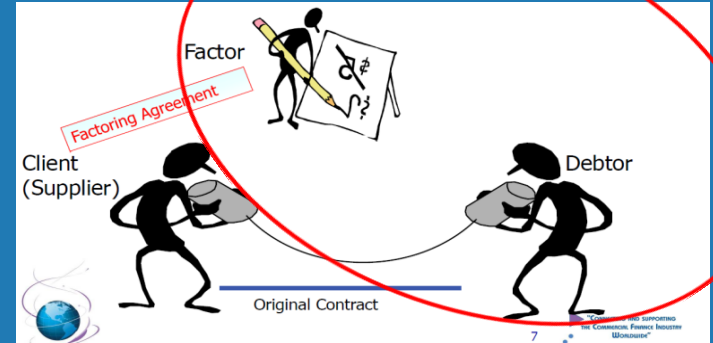
- Representations of the Assignor
- Default Protection: Non-Recourse and Recourse Factoring



IFG Draft Model Law on Factoring

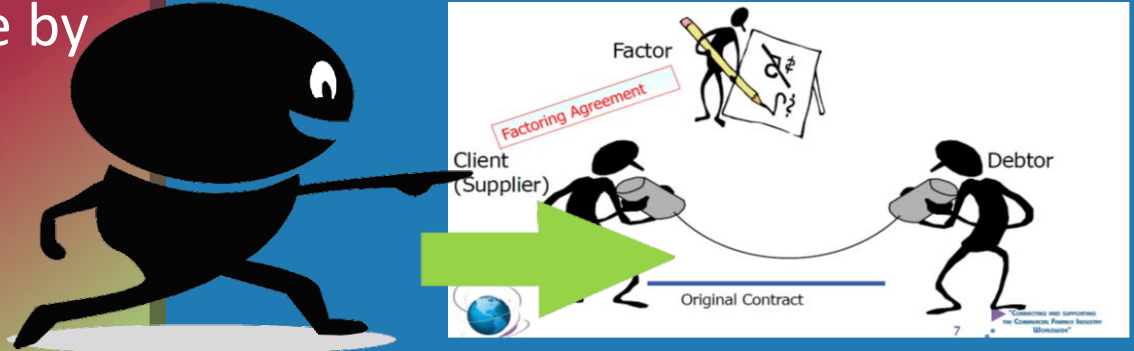
Assignee – Debtor

- Payment obligations of the debtor
- Defenses of the debtor



IFG Draft Model Law on Factoring

- Priority Issues
 - Multiple Assignments of the same receivable by the same assignor
 - Judgment creditors
 - Insolvency



Insolvency Issues



- Insolvency refers to a procedure by which the assets of a business or a private person are used to cover its debts in formal procedure, usually overlooked by a court or official agency, and subject to preferential rights of some creditors, all creditors are treated on an equal basis
- Insolvency is generally regulated by the domestic laws of the insolvent estate
- EU law provides that main insolvency proceedings be opened wherever the main interest of the insolvent estate was located, and secondary procedures in any other country where assets are located
- Basically, **the law of the insolvent estate determines the legal position of the factor**
- Factor's legal position
 - In debtor's insolvency
 - In client's insolvency

Client insolvency



(Domestic or Export) Factor must have full ownership in the receivables purchased

Insolvency Practitioner must not interfere with factor's collection procedure

Domestic insolvency law of client's jurisdiction may interfere with such aims

Debtor Insolvency



(Import) Factor must have full ownership in the receivables purchased

(Import) Factor will cover any losses caused by debtor's insolvency in non-recourse factoring

Thank you for your attention



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