

# Factoring, Receivables Finance & ABL

A study of Legal Environments across Europe  
2011





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EUF - Members (June 2011):

 <p>The Asset Based Finance Association (ABFA) UK &amp; Ireland</p>	 <p>Asociación Española de Factoring (AEF) Spain</p>
 <p>Association Française des Sociétés Financières (ASF) France</p>	 <p>Association Professionnelle Belge des Sociétés de Factoring (APBF-BBF) Belgium</p>
 <p>Associazione Italiana per il Factoring (ASSIFACT) Italy</p>	 <p>Czech Leasing and Finance Association (CLFA) Czech Republic</p>
 <p>Deutscher Factoring-Verband e.V. (DFV) Germany</p>	 <p>Factoring and Asset Based Financing Association Netherlands (FAAN) Netherlands</p>
 <p>Factors Chain International (FCI) EU - Countries</p>	 <p>Finans og Leasing (FL) Denmark</p>
 <p>International Factors Group (IFG) EU - Countries</p>	 <p>The Hellenic Factors Association (HFA) Greece</p>
 <p>Österreichischer Factoring-Verband (ÖFV) Austria</p>	 <p>Polski Związek Faktatorów (PZF) Poland</p>
 <p>Swedish Bankers Association (SBA) Sweden</p>	 <p>Associação Portuguesa de Leasing, Factoring e Renting (FLA) Portugal</p>



## Introduction

The **EU Federation for the Factoring and Commercial Finance Industry (EUF)** is the representative body for the factoring and commercial finance industry in the EU. It is **composed of national and international industry associations** that are active in the EU.

The EUF seeks to engage with governments and legislators to enhance the availability of finance to business, with a particular emphasis on the SME community. The EUF acts as a platform between the factoring and commercial finance industry and key legislative decision makers across Europe, bringing together national experts to speak with one voice.

The factoring and commercial finance industry has a valuable role to play in the EU economy and the EUF works to engage in debate with regulators and legislators, to ensure they are fully aware of the benefits that the Industry has to offer within current financial markets.

The EUF offers itself as a source of reference and expertise between the factoring and commercial finance industry and key legislative decision makers across Europe. Its aim is to provide legislators and policy makers with vital industry information to inform, influence and assist with the direction of existing and future finance legislation with a view to ensuring the continued provision of prudent, well structured and reasonably priced finance to businesses across the EU.

This is why in 2011, the EUF acquired the project of a legal study originally started by the **UK Factoring Association, ABFA**, and **International Factors Group, IFG**. In 2007, these two associations, who are founding members of the EUF, formed a strategic partnership to carry out a study whose primary objective is to collate, compare and contrast the various legislative/regulatory models for factoring and receivables financing in existence in different EU jurisdictions and other major countries performing factoring services. In 2011, the **EUF** acquired the project and initiated an update.

The present study, updated in 2011, is a compendium of the different legal, fiscal and other environments appertaining to receivables financing in all of the 27 EU member states (no updated information received on Greece and Slovakia) and in 5 important non EU “benchmark” countries, Norway, Russia, Switzerland, Turkey and the USA.

**The value of this study lies in bringing this important information together in one place for reference purposes.**

To compile the necessary information, knowledgeable individuals from within the industry have been asked to answer a series of questions about their own national legal environment and the EUF is most appreciative of the assistance received from enterprises as well as national associations in the factoring, invoice discounting and receivables financing industry.

The study consists of 13 questions touching most of the areas of receivable financing and factoring. The questionnaire is produced in full following this introduction.

Due the complexity of some of the questions, there are instances where responses are partial, or in some cases, due to underdeveloped nature of the industry of receivables financing and factoring, no answer has been forthcoming.

All answers to the questions have been given by individuals in good faith and to their best knowledge of the environment of factoring and receivables financing existing in their respective countries at the time of responding. However, the study should not be regarded as a guarantee for being legally executable in any competent court or before any taxation authority or similar institutions. This document is for information purposes only and the information on tax and legal issues contained herein are purely indicative. Neither the EUF, its members and their representatives nor IDH Inkasso und Service GmbH, who assisted in collecting and editing the answers, make any representation and give no warranty relating to any information contained in this updated study. It has to be understood that no checks on the correctness and completeness of the answers have been carried out. Please keep in mind that answers are given on the basis of the rules in existence in the first half of 2011 and that any subsequent changes are not reflected in this document.

The country codes used in this study are taken from the published ISO 3166 country codes. The country code GB stands for the United Kingdom (UK) which includes England, Scotland, Wales and Northern Ireland.

The answers to question 12 have been completed by also consulting the official websites of

Uncitral

[http://www.uncitral.org/unictral/en/unictral\\_texts/payments/2001Convention\\_receivables.html](http://www.uncitral.org/unictral/en/unictral_texts/payments/2001Convention_receivables.html)

Unidroit

<http://www.unidroit.org/english/conventions/1988factoring/main.htm>.

John Gielen, Chairman of the EUF

**Disclaimer:**

The EUF (EU Federation for the Factoring & Commercial Finance Industry), its members, IDH Inkasso und Service GmbH and all individuals and/or companies who have answered or assisted in answering the questions will have no responsibility whatsoever regarding the correctness, completeness and legal enforceability of any subject contained in this study.

It is strongly recommended to request professional advice from competent parties (legal advisers, auditors, accountants, tax advisers etc.) before planning or carrying out any activities in factoring or receivables finance in any of the countries listed in this study.



# Questions



### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting ( *i.e non-disclosed factoring with or without recourse*)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

Please give details for each product.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Please describe the physical process for the assignment of receivables

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:

- registration
- stamp-duty or other documentary taxes
- notification ?

Are there any other requirements for a valid assignment?

Is it possible to assign future receivables by a so called "assignment in advance"?

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message?

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

### Question 4 Value Added Tax

Are there any VAT issues or problems in your country concerning the assignment of receivables?

What is the VAT treatment of factoring commission/ service charge?

What is the VAT treatment of discount or interest?

Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?

### Question 5 Third Party Rights

What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?

What are the rights against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?

Please indicate any difference between

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting

Do these rights have to be registered or notified to be valid?

## Question 6 Prohibitions against Assignments

Is a contractual prohibition against the assignment of receivables valid in your country?

What actions are needed to make the prohibition effective?

Is there any requirement for registration?

What is the effect of a prohibition upon factoring or invoice discounting (in each case with or without recourse)?

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is a security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency.

Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

Does a fixed or floating charge have to be publicly registered to be valid?

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are:

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)
- pledged to collateralize such a financing facility

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

- |                     |   |
|---------------------|---|
| ▪ Bank-Transfer     | % |
| ▪ Cheque            | % |
| ▪ Bill of Exchange  | % |
| ▪ Other instruments | % |

(please give details)

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

## Question 11 Late Payments

Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest.

## Question 12 International Conventions

Has your country ratified or does it intend to ratify either:

- The UNIDROIT Convention on International Factoring (1988)
- The United Nations Convention on the Assignment of Receivables in International trade (2001)

## Question 13 Any other Matters

Are there any other matters that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?



# Country details

## EU countries



## AT > Austria

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

According to Sec 1 Para 1 No 16 Austrian Banking Act the purchase of account receivables arising from delivery of goods or rendering of services, assumption of the credit risk on such claims - exempt credit insurance - and, in connection therewith, the collection of such receivables (factoring business) is exclusively restricted to so-called credit institutions.

A credit institution is an institution authorised to perform banking activities pursuant to Sec 4 or Sec 103 No 5 of this federal statute or pursuant to special federal statutory provisions. Pursuant Sec 4 para 1 a license from the Financial Market Authority (FMA) shall be required for performing such businesses.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

Under Austrian laws the assignment of receivables is governed by the provisions Sec 1392 et sqq Austrian Civil Code. These provisions cover the conveyance of assets (assignment). In relation to securitised debts and the transfer by way of securitisation the provision Sec 427 Austrian Civil Code is of importance. It governs the conveyance by means of signs ("Zeichen") as well as the provisions on publication governed by Sec 452 Austrian Civil Code.

*Please describe the physical process for the assignment of receivables*

Under Austrian laws the assignment contract can be concluded informally. The written form is not required for its validity. Generally the assignment does not require any particular deed of conveyance provided that they are not securitised. In case the receivables are securitised ("verbriefte") and the enforcement is dependant on the possession of the deed, this deed has to be handed over. Only if the assignment concerns receivables that are null and void due to a preliminary defect (dispute), the requirement of a mode ("Modus") pursuant to Sec 427 Austrian Civil Code has to be fulfilled also in case of an ordinary active (undisputed) debt in order to secure the underlying transaction and consequently the assignment contract. In this case it has to be a "sign" ("Zeichen") which can be linked to the property and is able to easily reveal the transfer to each interested party paying appropriate attention.

One exemption concerns the so-called assignment for collateralisation purposes ("Sicherungscession"). Its economical purpose is - similar to the pledging of goods - to provide the creditor with some security as allow the debtor a credit. In this form of assignment the assignee acquires the position of a proprietor of the assigned claim; however, he is bound by the internal relationship to make use of his rights exclusively for the purpose of securing his claims against the assignor. The assessment of an assignment for collateralization purposes has to follow the conforming intent of the contractual parties. In contrast to the full assignment the assignment for collateralisation purposes requires a particular legal form. It must be unambiguously transparent to the creditors of the assignor that the claim is separated from his sizable assets. Any kind of legal form ensuring the easy and secure possibility to ascertain fact, assignment, moment and dimension is deemed to be suitable. The written notification to the debtor as well as an endorsement in the accounts of the assignor conform to these requirements.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

The charge fee for assignment transactions is governed by Sec 33 Para J 1 TP 21 Austrian Fees Act 1957. A fee amounting to 0,8% is charged for a cession or the assignment of a debt or other rights.

Pursuant Para 2 certain claims are exempted from this liability to charges:

- Assignment of a debt to regional authorities in order to secure outstanding public charges;
- Assignment of debts between credit institutions, the Österreichische Nationalbank and home savings and loan associations ("Bausparkassen"), and assignment of debts against regional authorities between the mentioned institutions on the one hand and assurance companies and pension funds in the sense of the Pension Funds Act on the other hand;
- Assignment of debts in fulfilment of a factoring agreement;
- Assignment of debts arising from export transactions, if and as far as the Federal Minister of Finance has assumed liability on behalf of the Federal Government according to the Austrian Export Promotion Act 1981 ("Ausfuhrförderungsgesetz 1981");
- Assignment of debts which the Federal Minister of Finance has assumed liability on behalf of the Federal Government according to the Austrian Export Promotion Act 1981 ("Ausfuhrförderungsgesetz 1981") to the Federal Government after occurrence of the liability ;
- Assignment of claims against a private limited company, the transfer of shares in a cooperative society and the transfer of the duties and rights of a partner in a business partnership.
- Assignment of debts to securitisation companies.

As you can gather from this listing, factoring agreements are exempted if a framework agreement for the drawing on prepayments has been granted within the frame of the factoring agreement. In this case the fee in the amount of 0.8% is only charged once even if the frame can be exploited several times.

*Are there any other requirements for a valid assignment?*

Regarding this query we refer to the above given comments.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Under Austrian laws the assignment of future claims is permitted in general. However, a necessary requirement for the validity is the concretisation and individualisation of the claim.

This requirement is met, if e.g. all receivables arising in the business of the assignor are assigned. Whether the prospective debtor is not known yet is not relevant as far as determination is possible. On the other hand the actual assignment cannot happen before the receivable is in legal existence. However, the agreement on the assignment can be made in beforehand. Whenever these receivables come into existence they are automatically assigned to the assignee without the requirement of any further acts. This does not apply to the assignment for collateralisation purposes.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message.*

Under Austrian laws a valid assignment of receivables requires a valid agreement between assignor and assignee. Following the provisions of contracts this agreement can be concluded informally, i.e. by means of electronic data exchange. For the transfer by way of security ("Sicherungscession") the notification of the debtor is essential and requisite for its effectiveness.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

In Austria contracts concluded by means of an electronic signature are equated with written contracts. No further requirements are needed.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

The assignment of a claim in settlement of own debts is not deemed to be a "service" ("Leistung") which is covered by the measures of the Austrian Value Added Tax Code and therefore not subject to VAT.

In the case of non-recourse Factoring the receivables are assigned against remuneration. Pursuant Sec 6 Para 1 No 8 lit c Austrian Value Added Tax Code 1994 - containing a list of value added tax exemptions -

The assignor is exempted from the VAT. According to the ECJ (C-305/01) the factor renders services of independent economical value. The factor is not exempted, consequently entitled to assert input tax deduction (provided all other requirements are complied with).

In the case of recourse factoring the factor does not bear the risk of payment default. Therefore the receivables de facto are not assigned against payment but the factor renders economically independent services as administration, granting of credit, collection. These services only partly are exempted from VAT. The regular value added tax rate amounts to 20 %.

In the case of assignment of accounts receivable for collection ("Inkassozeession") the service of collection is not covered by the exemption but subject to the VAT.

*What is the VAT treatment of factoring commission/ service charge?*

In general the base for the factor's tax embraces any commission or service charge. For details please see our above-mentioned comments.

*What is the VAT treatment of discount or interest?*

Basically, discounts effect and lower the taxable base for the VAT whereas default interest, interest for deferment and interest receivable do not increase the taxable base. Interest based on Sec 1333 Austrian Civil Code represents compensation and is thus not even subject to the VAT.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

According to Sec 1 para 1 No 16 Austrian Banking Act the purchase of accounts receivable arising from delivery of goods or rendering of services, assumption of the risk of collection on such claims - exempt credit insurance - and, in connection therewith, the collection of such claims (factoring business) is exclusively reserved to so-called credit institutions, an institution authorised to transact banking activities.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

If several assignments of one single receivable conflict, it can be stated as a general rule that the first assignment in the time-line is valid and all further assignments will be considered void as the assignee cannot transfer more rights than he de facto holds. One receivable cannot be assigned simultaneously to several parties. However, provisions can be found in Austrian law that provide for an assignment of certain receivables by laws, e.g. under insurance law damage claims of the insured against the injuring party are assigned to the insurance company by law.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

If the situation arises that the client has already assigned all future receivables resulting from his business activities (blanket assignment) to the factor and a supplier delivers under the reservation of title, the situation is as follows. Authorising the client to resale on behalf of the supplier but to assign all receivables arising from the resale to the supplier in advance, the latter assignment is effected after the former blanket assignment. Consequently the factor is entitled to the receivable resulting from the resale, certainly provided that the assignment to the factor is valid.

If the client stipulates a right of retention of title against a third party in the underlying contract and assigns the receivable in connection with this sale to the factor the retention of title is also conveyed. The assignee (factor) takes the position of the assignor.

*Do these rights have to be registered or notified to be valid?*

No, the requirement to register only applies to immovable property.

## **Question 6 Prohibitions against Assignments**

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Pursuant Sec 1396a Austrian Civil code a corporate business agreement containing stipulations that receivables arising from business transactions must not be assigned (prohibition) does only take binding effect if stipulated in detail in each case and if the creditor is not grossly discriminated. However, the validity and effectiveness of the assignment is not affected by the stipulation of a valid prohibition to assign. Upon rightful notification the debtor cannot pay to the assignor with effect of discharging the contract.

*What actions are needed to make the prohibition effective?*

The prohibition is only valid if stipulated in detail in each case. A prohibition in General Terms and Conditions would not be valid.

*Is there any requirement for registration?*

Under Austrian law it is not required to register the prohibition separately, e.g. in some sort of register.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In the case of non-recourse factoring the assignor is liable for the risk of performance. In the case of recourse factoring the risk is borne by the assignee. In both cases the effects of the prohibition are generally the same.

## **Question 7 Security Interests**

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

A fixed charge could be reached in the form of transfer by way of security ("Sicherungsübereignung") which in fact is some sort of escrow. The Austrian jurisdiction does not accept the transfer by way of security, if and when the principle of the deposit of a collateral security ("Faustpfandprinzip") established by the Austrian Civil Code shall be circumvented, whereas the transfer by way of security is accepted in case it conforms to the requirements of the aforementioned principle, i.e. when the transfer is in conformity with the mandatory requirements of publication. In case of valid transfer for collateralisation purposes the creditor takes the position of a lienor or pledgee.

The pledge of receivables is accepted by the Austrian laws (Sec 448 Austrian Civil Code), however as receivables are immaterial goods according to Austrian law, the provisions of the Austrian law of property do not apply to them. The transfer therefore follows the provisions of assignment of goods pursuant Sec 1392 et seqq. Securitised assets can only be pledged by transfer of the respective security paper. Accounts receivables can be pledged by endorsement in the account books. Other receivables are pledged pursuant to Sec 427 Austrian Civil Code.

The agreement between pledgor and pledgee does not need to meet any formal requirements pursuant Sec 1368 Austrian Civil Code, however, the notification of the garnishee is required for its validity.

The major difference between transfer and pledge of receivables is that in the first case the absolute right ("Vollrecht") is transferred whereas in the case of a pledge only a somewhat limited right is granted to the pledgor in respect of the liquidation of the pledged receivable.

*Does a fixed or floating charge have to be publicly registered to be valid?*

No, the requirement to register only applies to immoveable property.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables*

(Factoring –Non-Recourse or Recourse, Invoice Discounting). In this case the purchaser obtains the right to collect the claim. The assignee is neither externally bound to refrain from collection nor internally.

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*

The situation is similar to the one before, but the assignee is entitled to collect externally. He is in the position of the former creditor (provided that the assignment itself was notified to the debtor); internally the assignee is bound to the agreement and liable for breach.

- *pledged to collateralize such a financing facility:*

Same situation as before.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer %*

*Cheque %*

*Bill of Exchange %*

*Other instruments %*

N/A

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

Regarding the factoring agreement itself, the insolvency of the client entitles the factor to terminate the contract without further reasons and with immediate effect following Sec 21 Austrian Bankruptcy Act. The assignment of receivables incurring after the termination is void for lack of a valid title. All receivables assigned before the commencement of bankruptcy proceedings are in general irrevocably assigned to the factor.

In the insolvency proceeding of the client the factor has a right for segregation ("Aussonderungsrecht"), i.e. he is entitled to separate assigned receivables from the bankrupt's assets.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. Interest*

Regarding late payments Sec 1333 Austrian Civil Code applies in its amended version which came into force 1 January 2007. Pursuant this provision any creditor is entitled to claim damages resulting from late payments in addition to interest. This claim comprises all costs emanating from appropriate recovery and enforcement measures out of court as far as such measures are in due proportion to the enforced claim. Furthermore in case of default interest amounting to 8 % above the base rate (9.97 % currently) falls due. The base rate is subject to biannual adaptation (Sec 352 Austrian Commercial Code).

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## BE > Belgium

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

As a general rule the abovementioned forms of operations do not entail specific regulated license requirements in Belgium, except if the operation “Protection against third party payment default” means the provision of credit insurance. Credit Insurance as a specific operation is specifically regulated in Belgium.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

The articles 1689 up to 1701 of the Belgian Civil Code with regard to the assignment of accounts receivable are most commonly used in Belgium to provide factoring services and the sale / transfer of the title in the accounts receivable to a respective factoring company.

Other options such as the endorsement of invoices or subrogation are valid, but however rarely used since the introduction of the amendments on the abovementioned articles of the Belgian Civil Code by means of the law of July 6th 1994.

Please describe the physical process for the assignment of receivables

The assignment of the accounts receivables between assignor and assignee takes place by mere agreement between both parties (*solo consensu*) whereby the assignment's validity and enforceability towards third parties is not subject to any specific formalities to be performed.

However, as stipulated here below, specific actions are to be taken with regard to the enforceability towards the respective debtors.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

#### **Against the debtor**

##### **Registration**

No registration is required.

##### **Stamp-duty or other documentary taxes**

No stamp duties or other documentary taxes are required.

## **Notification**

The assignment of the accounts receivable can only be enforced by the factor against the respective debtor of the account receivable as from the moment when such a debtor is properly notified that such assignment has taken place.

If the debtor pays the amounts due with regard to an assigned account receivable directly to the factor's client, such debtor is discharged from paying the account receivable to the factor (i) for as long as no notification with regard to the assignment has been served to such debtor, and (i) to the extent such debtor acts in good faith.

Although – as a general rule - the way such notification takes place is not subject to specific regulation or formalities, it is of course preferred that the debtors are notified in writing or by means of an assignment clause on supplier's invoice with regard to the respective accounts receivable.

However, as an exception hereto, certain restrictions and formalities are to be taken into account if such notification relates to the assignment of an account receivable originated from labour, deliveries or services provided to Belgian Government Entities (*Law of December 24<sup>th</sup> 1993 – article 23*). If this is the case, notification by registered letter to the respective Government Entity in charge of payment is obligatory.

***Against the suppliers insolvency practitioner. (See 10)***

***Against third party creditors***

- *Registration*
- *Stamp-duty or other documentary taxes*
- *Notification*

As stated here above, the assignment of accounts receivable between a factor and its client takes place by mere agreement between both parties (*solo consensu*) whereby, except for notification to be served to the respective debtor, no formalities are required for the assignment's validity towards third parties.

*Are there any other requirements for a valid assignment?*

Please see the answers given here above. No other formalities are required.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Accounts receivable that do not exist yet at the moment parties conclude a factoring (or similar) agreement can be made part of the subject matter of such agreements. Therefore, in Belgium it is possible to use global assignment of all current and future accounts receivable however subject to the condition that such future accounts receivable have to be determinable. From a legal point of view, and of course depending on the exact wording used in the respective (factoring) agreement, the legal transfer of such accounts receivable then takes place automatically (*ipso jure*) as from the moment such a (future) account receivable starts to exist.

## **Question 3 EDI**

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Yes, since the assignment of accounts receivable is not subject to any formalities, parties are free to use such Electronic Data Exchange messages.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

As outlined above, the assignment of accounts receivable is not subject to any formalities or requirements. Therefore a separate agreement with regard to an Electronic Data Exchange message is not a requirement, but it is however still advised to conclude an agreement with regard to the transfer for the purpose of the

factor being able to provide documented proof of the assignment of the accounts receivable and, in particular, the exact time and means by which such an assignment has taken place.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

N/A

*What is the VAT treatment of factoring commission/ service charge?*

Since the decision of the Court of Justice of the EU of 26.06.2003 (C-305/01, MKG-Kraftfahrzeuge GmbH) 'factoring' (with or without recourse) has to be considered as the 'collection of receivables'. Factoring is therefore excluded from the exemption of VAT in art. 13 B Sub d, point 3 Sixth Directive and is subject to taxation according to the standard VAT-rate (21%).

*What is the VAT treatment of discount or interest?*

The interest charged by the factor for the advances on receivables is exempted from VAT. (Art.44 § 3, 5° VAT Code)

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

N/A

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

In some cases the Belgian Tax Authorities and Social Security Authority have a claim on part of the amount of the invoice, for example in case of registered contractors up to 50% of the invoice might be payable to social security and VAT services.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

The principle of "retention of title" (*Eigendomsvoorbehoud*), being the fact that the property of the goods delivered to debtors only transfers to such debtors after full payment of the respective accounts receivable, is legally valid in Belgium. An "extended" retention of title (*Verlengd eigendomsvoorbehoud*) however is not legally valid in Belgium.

Retention of title can only be effected in Belgium in the event that the respective goods are still located at the buyers premises and insofar as such goods are still identifiable amongst the other goods located at buyers premises. Therefore retention of title shall not be enforceable towards such buyers if the respective goods are (in the meantime) processed or sold onwards.

Finally it should be taken into account that it is common practice in Belgium that, together with the assignment of the accounts receivable, all ancillary rights thereto (which is mainly the retention of title), are transferred/assigned to the factor.

*Do these rights have to be registered or notified to be valid?*

There are no formal registration requirements to be met for having a valid retention of title on goods. However it is required that a retention of title is agreed upon between the parties in writing, before the respective goods are delivered to the buyer.

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes, as a general rule non-assignment clauses can be agreed upon between parties and such provisions are not unlawful or legally invalid.

*What actions are needed to make the prohibition effective?*

Such provisions should be agreed upon in writing between the parties in a formal agreement between them. If such a provision is stipulated in debtor's general purchasing conditions (which is quite often the case), such debtor is required to provide the proof that its supplier has gained knowledge and has accepted such general purchase conditions.

*Is there any requirement for registration?*

No such registration requirements are applicable in Belgium.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

It is not possible to provide a general answer to this question. This question needs to be analyzed on a case by case basis, depending on the exact wording of such non-assignment clause and the specific circumstances of the client-factor-debtor relationship and history together.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

In Belgium it is possible to obtain a fixed charge by means of a commercial pledge ("*Handelspand*") on accounts receivable only (and thereby not over all assets). Security interest by means of a floating charge ("*Pand op de Handelszaak*") is available in Belgium too. Such floating charge however is taken over all assets, with the possibility to include accounts receivable in such floating charge.

*Does a fixed or floating charge have to be publicly registered to be valid?*

The Belgian alternative for a fixed charge, being the commercial pledge ("*Handelspand*") does not require any formal or public registration in order to be valid. A written agreement concluded between the parties is sufficient. However, optional registration is often used for the purpose of ascertaining the date such commercial pledge has been granted by the pledger.

The Belgian alternative for a floating charge ("*Pand op de Handelszaak*") however does require a formal procedure and registration concluded by a notary public. Registration rights are payable based on the value of the floating charge.

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are:

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*

Assignment in fulfilment of such an agreement results in the transfer of the ownership of such accounts receivable whereby the respective accounts receivable vest in the factor absolutely. In general, however in some specific circumstances subject to the exact wording of the factoring agreement, such transfer is to be considered as a true sale of the respective accounts receivable to the factor.

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*

If accounts receivable are merely assigned as a collateral for financing facilities such as Structured Finance or the Issuance of Guarantees, and of course depending of the exact wording of such an financing agreement, the full title of ownership in such accounts receivable is transferred to the other party. In such case, the rights of such party with regard to the accounts receivable are limited to the rights the beneficiary of a pledge on such accounts receivable would have in accordance to Belgian law.

- *pledged to collateralize such a financing facility*

If a pledge on the accounts receivable is granted as collateral for financing facilities such as Structured Finance or the Issuance of Guarantees, no transfer of title in the accounts receivable is perfected.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 95%

*Cheque* % no specific answers received

*Bill of Exchange* %

*Other instruments* %

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

As long as the assignment of the accounts receivable results in the effective transfer of the title to such accounts receivable whereby the respective accounts receivable vest in the factor absolutely, the assignment is and remains opposable to the receivership under the bankruptcy procedure.

Since the anteriority of either the assignment or the bankruptcy is decisive, the date of the respective assignment is to be considered as decisive compared to the date of the judgment declaring the company as bankrupt in accordance with Belgian insolvency legislation. The accounts receivable assigned to the factor before the opening of such bankruptcy procedure shall not be included anymore in the suppliers assets whether the respective debtors have been notified or not.

Furthermore, if debtors who were properly notified of the assignment, make payments directly to the bankruptcy estate, such payments are not pooled to the bankruptcy estate's mass. Such payment should be transferred to the factor.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. Interest*

In line with European Directive 2000/35/EG a Law against Payment default dd.02.08.2002 exists. It is (since 08.08.2004) applicable on all commercial transactions between enterprises, and between enterprises and governmental entities. The specific rules laid down in this law differ from the principles of the Belgian civil code and Belgian judicial code.

The law installs a standard payment term of 30 days upon reception of the invoice, or on delivery if the invoice preceded this. Parties are free to agree on other payment terms. If not the law provides 30 days.

The creditor can claim a default interest at the rate of 7% above the reference interest rate of the European Central Bank. This rate is published in the Belgian statute gazette. It is since this law no longer necessary to send a notice of default to claim the (legal or contractual) default interest. (A notice of default remains necessary however before coercion proceedings.)

Furthermore, the creditor is entitled to claim payment of the reasonable costs made to collect payment of the debtor.(e.g.: administration cost, legal fees.) Since the range of the term "reasonable" is uncertain it is advisable to enter a classic default penalty/fine in the General Conditions of Sale (e.g.: 10% on top of the invoice amount) to cover collection costs.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988)?*

Belgium has signed (21.12.1990) the UNIDROIT Convention on International Factoring and has ratified this Convention by means of the law of February 21<sup>st</sup> 2010.

- *United Nations Convention on the Assignment of Receivables in International trade (2001):*

No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## BU > Bulgaria

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting ( i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

The factoring services must be provided by a bank or any other financial institution. The financial institutions have to be registered in a special register according to Ordinance Nr. 26 of the Bulgarian National Bank.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Please describe the physical process for the assignment of receivables.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:

- registration
- stamp-duty or other documentary taxes
- notification?

Are there any other requirements for a valid assignment?

Is it possible to assign future receivables by a so called "assignment in advance"?

The transfer of receivables is regulated by art. 99-100 of the Obligations and Contracts Act. A creditor may transfer his claim unless the law, the contract or the nature of the claim do not permit this. The notification of the Debtor is obligatory in order to have an opposability of the assignment to the debtor or third parties.

The assignment of future receivables is possible. At the time of the transfer of the ownership of the receivable it must be individualized.

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

N/A

### Question 4 Value Added Tax

Are there any VAT issues or problems in your country concerning the assignment of receivables?

What is the VAT treatment of factoring commission/ service charge?

What is the VAT treatment of discount or interest?

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

There are no VAT problems concerning the assignment of receivables. Interest on advances granted to customers are not taxable with VAT. They are treated as financial services under Article 46 (1) of the national Law on VAT. Commissions and fees are subject to a 20 percent tax under the national law on VAT. Determining the place of supply of services is in accordance with REGULATION (EU) No 282/2011. As for the companies engaged in the receivables financing, there is no difference in the VAT treatment between banks and non-banks.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

*Do these rights have to be registered or notified to be valid?*

At the stage of the compulsory procedures the state receivables have a priority. Third parties who have a retention of title must have claims toward the assignor. If the retention of title clause is not included in the contract or is not known by the assignee it cannot be invoked against him. The non-recourse factoring service includes collection of receivables, financing, risk coverage and other explicitly specified services. The service of recourse factoring does not include risk coverage, and the same goes for the invoice discounting.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

*What actions are needed to make the prohibition effective?*

*Is there any requirement for registration?*

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

Contractual prohibitions against assignment of receivables are valid in Bulgaria.

A change of the contract is needed in order to drop the prohibition against assignment.

There are no requirements for registration.

### Question 7 Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

*Does a fixed or floating charge have to be publicly registered to be valid?*

In Bulgaria, the special pledges registry is a state body which governs the pledges established without delivery of the pledged property. The register is public and in order to be valid, the pledge has to be entered in the register. When a pledge is established over the receivables a consent by the creditor is necessary. The equivalent of a floating charge is a pledge of a group. The pledge of a group shall be transferred to its components as of the time of receiving the notification about the procedure for its realization starting.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)?*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):*
- *pledged to collateralize such a financing facility:*

There is no difference in the legal status of receivables assigned in fulfilment of a purchase contract of these receivables and those assigned to collateralise a financing facility.

The receivables pledged to collateralize a financing facility fall under the regulations of the Registered Pledges Act. The way to get an enforcement order is shorter and easier.

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 90%

*Cheque* 0%

*Bill of Exchange* 5%

*Other instruments* 5%

Bank transfers are dominating the payment structure of the corporate businesses, amounting to 90%, cheques are rarely used. The share of the other financial instruments is not significant.

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In case of an insolvency of the client, the factoring company is not a privileged creditor. If the transfer of receivables is done after the date when the insolvency is determined by the court, there is a possibility for such a transfer to be challenged by the other creditors.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. Interest*

According to the legislation in case of late payments a legal interest is due. It is formed by the index of Bulgarian national bank plus 10%.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## CY > Cyprus

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

Only Structured Finance, Guarantees, Protection against default need permission

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

No specific laws regarding the above exist.

Please describe the physical process for the assignment of receivables

An agreement is signed between the factoring company and the supplier. Debtors are notified both by factors and suppliers about the agreement and the debtor's obligation to pay the factoring company

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

Signing of agreement and notification

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called "assignment in advance"? No

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

Test keys and passwords are used for EDI

### Question 4 Value Added Tax

Are there any VAT issues or problems in your country concerning the assignment of receivables?

No

*What is the VAT treatment of factoring commission/ service charge?*

Refundable for factoring agreements (not for undisclosed invoice discounting).

*What is the VAT treatment of discount or interest?* N/A

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Bankruptcy of debtor.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

N/A

*Do these rights have to be registered or notified to be valid?* Yes

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

*What actions are needed to make the prohibition effective?*

*Is there any requirement for registration?*

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

N/A

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

It is possible to obtain a fixed or a floating charge on receivables only.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Yes

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are:

- assigned in fulfilment of a purchase contract of these receivables (Factoring Non-Recourse or Recourse, Invoice Discounting)? No
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)? No
- pledged to collateralize such a financing facility? No

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 20%

Cheque 75%

Bill of Exchange 3%

Other instruments 2%

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

N/A

## Question 11 Late Payments

Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. Interest

Excess interest usually applies to overdue balances.

## Question 12 International Conventions

Has your country ratified or does it intend to ratify either:

- the UNIDROIT Convention on International Factoring (1988): No
- United Nations Convention on the Assignment of Receivables in International trade (2001): No

## Question 13 Any other Matters

Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?

No comments



## CZ > Czech Republic

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Except for “protection against third party payment default” in the form of insurance, the industry is not regulated in any way. Running an insurance company requires a license and supervision.

On the other hand, an unregulated factoring company could conclude a non recourse agreement with the client and the effect is very similar to the insurance product.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

The assignment of receivables is governed by the Civil Code.

The transfer needs to be in the form of a written agreement with sufficient identification of the receivable.

The debtor can ban the assignment in the contract with the seller and in that case, any kind of assignment is not valid.

*Please describe the physical process for the assignment of receivables*

A written contract on assignment is required by law, receivables can be assigned without the approval of the debtor. The debtor has to be notified about the assignment of a specific receivable without any delay.

After signing the assignment agreement, the supplier is obliged to send a notice to the debtor (separate notice or assignment legend printed on the invoice). The debtor has the right to raise any counter claims against the supplier (in case they exist at that time) and announce that he will lower the payment. If he does not do this in reasonable time after being informed about the assignment, he is obliged to pay the full amount to the factor.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Yes, as mentioned, notification is required and this limits the possibilities to offer undisclosed factoring. Any assignment is binding for the debtor after he is noticed about the assignment. You have to be able to prove that the debtor was given notice in written form to be able to sue him.

On the supplier's side – the assignment agreement is enough to achieve a valid assignment.

No registration or stamp duty is required.

*Are there any other requirements for a valid assignment?*

A written contract for exactly specified receivables is necessary.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Only in case they can be exactly specified at the moment of assignment. Exactly specified means e.g. to state the amount, invoice number, date of issue, due date etc.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Certified electronic signature (certificates are issued by licensed companies) will have to be used by both parties to obtain a valid assignment. Such assignment would be considered as legally risky, there are theoretical possibilities to use electronic signature but these processes are in the starting phase only at this moment.

There is already a certain legal frame that specifies the use of electronic signature however it is not used in case of assignment.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures. (See above)*

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

There are two possibilities for handling factoring transactions from an accounting point of view. There are differences in VAT treatment. The applied approach is not supported by law or any other official guideline but only by recommendation of the Association of Accounters. Re-selling the receivable to a third party will cause the factoring company to lose the possibility to reclaim VAT.

*What is the VAT treatment of factoring commission/ service charge?*

In both cases VAT has to be applied. There are two VAT rates in Czech Republic, the higher one has to be used. Factoring commission or service charge is subject to VAT (20 % in 2011)

*What is the VAT treatment of discount or interest?*

For discount, VAT has to be applied. If the contract sufficiently declares the factoring financing as credit, the interest charged is considered a financial expense and no VAT is applied.

It depends on the construction of factoring contract – if interest is considered as pure financial expense there is no VAT; if it is considered as a fee for a service VAT has to be applied.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing? No*

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Pledge

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No rights

*Do these rights have to be registered or notified to be valid?*

No

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes – the debtor has the right to ban the assignment

*What actions are needed to make the prohibition effective?*

It is to be agreed between the creditor and debtor in the contract.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In all cases the same – the assignment of receivable from a contract where any restriction on assignment was agreed is not effective.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

There is nothing like a charge over assets in Czech law – only pledge. You can put a pledge on receivables.

*Does a fixed or floating charge have to be publicly registered to be valid?* No

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)?* No
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)?* No
- *pledged to collateralize such a financing facility?*

As a creditor with a pledge over the client's receivables you will receive 100% of the yield from the receivable, in case the client will go to bankruptcy proceeding. Pledges created 2 months before the bankruptcy is declared are not valid.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 99%

*Cheque* %

*Bill of Exchange* %

*Other instruments* 1%

In domestic transactions nearly 100% are paid by bank transfer, the other instruments are used only in export transaction.

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

As mentioned, there are two accounting schemes and in none of them the factoring company is 100% in the position of an independent creditor. Detailed analysis would require three pages. There are no significant differences for the various types of factoring solutions. In the case of undisclosed factoring – ban of assignment -, the receivables are not assigned according to the Czech legislation. Despite this, the product is offered but should be considered as a pure credit transaction.

A creditor has the best position if he is the owner of an asset (like in factoring). Any solution based on a pledge will cause a loss of the value as the asset is not under full control of the creditor (the yield is done by the administrator).

In case of a client bankruptcy all receivables might fall due immediately depending on the factoring-contract. That also applies to unpaid parts of the purchase price of receivables to a factor. For example if the factor has only paid 80% of the purchase price he is obliged to pay the remaining 20% immediately, even if the receivable in question is not due or has not been paid by the debtor.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Those agreed in the agreement. Otherwise a rate defined by the law can be applied – 7 % above repo rate (9,75 % together).

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): Yes*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

Factoring and other financial instruments related to receivables assignment are completely unregulated. The third parties (courts, financial authorities) sometimes do not know how to handle it. There is a latent danger that the applied processes might be negatively influenced by future changes in legislation. The efforts of the factoring community to improve the position were without any results until now.

A revision of the tax took place during 2008/2009. Only a certain level of financial costs is now tax effective. This can create very tax adverse environment for highly leveraged companies.

## DE > Germany

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Factoring is defined by the German Banking Act (Kreditwesengesetz - KWG) as a financial service which comprises “the continuous purchase of receivables on the basis of a framework agreement, with or without recourse” (cf. § 1 para. 1a no. 9 KWG). This definition of factoring comprises all kinds of factoring as long as there is an ongoing purchase or acquisition of receivables based on a framework agreement which serves a financing purpose. This generally includes factoring with and without recourse, non-disclosed factoring and also cross-border factoring. However, some kinds of factoring (e.g. maturity factoring) are considered not to serve a financing purpose and are hence not included in the scope of the legal definition in the KWG. For further details, please consult the information on factoring provided by the BaFin on its website [www.bafin.de](http://www.bafin.de) (e.g. the leaflet on factoring dated January 5, 2009: “Merkblatt – Hinweise zum Tatbestand des Factoring”).

As a financial service (“Finanzdienstleistung”) in the sense of the KWG, factoring is subject to financial regulation. Therefore, factoring companies require a license from the German financial regulatory authority BaFin (“Bundesanstalt für Finanzdienstleistungsaufsicht”). Providing factoring services within the meaning of § 1 para. 1a no. 9 KWG without such a license constitutes a criminal offence.

Financing products based on lending against collateral are considered banking business and therefore require a banking license in accordance with German Banking Act. The same applies to banking services such as deposit transactions and issuing guarantees or sureties.

The service of protection against third party payment default provided as a (commercial) credit insurance is considered an insurance service and therefore requires a license under the German Insurance Act (Versicherungsaufsichtsgesetz – VAG).

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

§§ 398 ff. and 453 German Civil Code (Bürgerliches Gesetzbuch – BGB) govern the sale and transfer of receivables by assignment, § 354a German Commercial Code (Handelsgesetzbuch – HGB) contains specifications on the validity of prohibitions of assignment in commercial/B2B- transactions.

*Please describe the physical process for the assignment of receivables*

Factoring is based on an assignment subject to the purchase of the receivable, so in addition to the agreement on the assignment, the parties need to agree on the purchase of the receivable. This is commonly done by either sending the invoices to the factor or transmitting invoice data electronically to the factor. For the assignment, no particular physical process is necessary; the parties have to agree on which specific receivables are to be assigned. In the case of an assignment in advance, the assigned receivables must at least be determinable with regard to its legal basis, its object, its amount and debtor.

With the agreement between the assignor and the assignee, the transfer of ownership is completed.

The legal distinction between the purchase of the receivable and its assignment are due to German legal concept called the abstraction principle (“Abstraktionsprinzip”).

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

No

*Are there any other requirements for a valid assignment?*

The assignor must be in the position and have the power to transfer the receivable (i.e. he must be the owner of the receivable).

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes, if the receivable is at least determinable.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message? Yes*

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

None; such agreements are even valid when entered into orally only.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

§ 13 c of the German VAT Act (Umsatzsteuergesetz – UStG) establishes a contingent liability of the assignee for the VAT obligation of the assignor arising from the assigned receivables: If the assignor does not fulfill his duty to pay VAT on the assigned receivable, the assignee can be held liable instead.

*What is the VAT treatment of factoring commission/ service charge?*

The service provided by the factor which is subject to VAT is the debt collection plus (in the case of factoring without recourse) the default protection. The factor's base for tax is the difference between the nominal value of the assigned receivables and the amount the factor pays his client as purchase price for these receivables, including any factoring fee but minus the VAT-amount contained in the difference. Therefore, in the end the factoring fee is subject to VAT.

*What is the VAT treatment of discount or interest?*

If the factor does not take over the debt collection, then the assignment is an exempt service (cf. § 4 nr. 8 lit. c UStG) and the client's debt collection is not subject to VAT as it is considered either not as a service by the client for the factor or as an ancillary service to the exempt service. In this case, German VAT law considers that the factor pays the purchase price for the receivable and in addition to that grants a loan/credit while the client in return assigns the receivable. The granting of the credit is exempt from VAT (cf. § 4 nr. 8 lit. a UStG) as is the client's assignment, but there is an option to submit this to VAT for B2B-relations (cf. § 9 para. 1 UStG).

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No, factoring is subject to the same VAT-rules regardless of whether banks/credit institutions or non-banks/non-credit institutions provide the factoring services.

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

German law recognizes the advance assignment of receivables. "Blanket assignments" ("Globalzession") are often used as collateral for bank loans. Furthermore, the extended retention of title ("verlängerter Eigentumsvorbehalt") is commonly used in trade transactions. This often leads to the question of which assignment is valid. Generally, this is decided by the temporal priority of one assignment over the other. However, there is case law from the German Federal Court of Justice ("Bundesgerichtshof") on the question of if and when the factoring assignment takes precedence over a chronologically previous assignment: The extended or prolonged retention of title contains an advance assignment of future receivables which come into existence when the merchandise is sold onwards; if the prolonged retention of title also contains an authorisation for the buyer to administrate and collect the receivables from onward sales on behalf of the pre-supplier (which is the common practice in Germany) a decision of the Federal Court of Justice dated 1978 states that the chronologically later non-recourse assignment to the factoring company is nevertheless valid as the authority of administrating and collecting the account receivables entails such an assignment within a non-recourse factoring agreement, as long as the advances of the purchase price to be paid by the factor to the client are in excess of the pre-supplier's claim, which means that the client must be in the position to pay the pre-supplier with the money he receives from the factor. This is however only the case with non-recourse factoring; if a receivable is assigned on a recourse basis to a factor after it has already been assigned to the pre-supplier, then the chronological priority principle is applicable.

In case of staff hire or temporary employment businesses, the social security contributions have priority, even if the receivables have been assigned to a factor.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

According to German Law, a supplier of goods can gain security by a so-called extended or prolonged retention of title. In such cases, the receivables arising from the onwards sale of delivered goods are assigned to the supplier. This can lead to a conflict with the factoring assignment. Only an assignment based on non-recourse factoring gains priority over the rights of the (pre-)supplier (cf. above).

*Do these rights have to be registered or notified to be valid?* No

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes, pursuant to § 399 German Civil Code (BGB), but there is an exception for receivables from commercial/B2B-transactions in § 354 a German Commercial Code according to which the assignment is nevertheless valid. However, payment to the assignor will discharge the debtor. Likewise, the debtor will have all rights of set-off against the factor that are available to him against the assignor.

*What actions are needed to make the prohibition effective?*

Agreement between assignor and debtor

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

See above (§ 354 a German Commercial Code); the prohibition and the exception are valid for non-recourse and recourse and non-disclosed factoring alike.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

There are no floating charges under German law (with the exception of security interests in immovables which might tend to qualify under the definition). As for existing and future receivables, they may be assigned by way of security to a creditor. Such assignments are valid to the extent that no supplier has or will have a prolonged retention of title relating to the receivables.

*Does a fixed or floating charge have to be publicly registered to be valid?* No

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*

Generally, only non-recourse factoring is considered a purchase and leads to transfer of ownership according to German Tax Law

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*

Assignments by way of security will be considered as collaterals securing a credit; such assignments are valid (subject to the non-existence of prolonged retention of title rights). In the case of borrower's insolvency, however, the insolvency practitioner/liquidator will collect, and will keep a 9% share for the estate while paying out the rest to the lender.

- *pledged to collateralize such a financing facility*

Pledges of receivables have to be notified to the debtor to be valid, and are unlikely to be used in most cases.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer ?%*  
*Cheque less than ?%*  
*Bill of Exchange ? %*  
*Other instruments ? %*

No exact percentages available. The predominant form of payment for corporate businesses is bank transfer.

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

Non-recourse factoring enables the factor to continue collecting the receivables outside the insolvency proceedings. As owner of the receivable, the factor is entitled to segregation of the assigned receivables. With recourse factoring, collection will be with the insolvency practitioner/liquidator, who has to pay out 91% of the proceeds to the factor.

Inventory finance will allow the lender to claim 91% of the proceeds of inventory from the insolvency practitioner/liquidator who has the right of sale.

Guarantees to third parties are subject to banking supervision. In case of the insolvency of the client, payment may be demanded from the guarantor.

Protection against third party payment default provided as a (commercial) credit insurance is considered insurance and subject to licensing and supervision. In case of insolvency of the client, such agreements are likely to end.

Direct cross border and 2 Factor Cross Border factoring issues depend on the law governing the receivable. Experience shows, however, a certain reluctance of insolvency practitioners/liquidators to get deeply involved with conflict of law rules; they may wish to simply use German rules even if another law would apply.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. Interest*

Late payment interest of 8 % above base interest rate (0,12 % as in April 2011) for commercial entities, 5 % above base interest rate for consumers and others.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): Yes*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

As a result of the strong growth of the German factoring market over the last decades, the factoring ratio (indicating the ratio between the GDP and the total of outstanding balances bought by the factoring companies associated in the German Factoring Association) cleared the magical 5%-hurdle for the first time in 2010. Effectively, this means that a remarkable 5.3% of the entire German GDP was financed through factoring. Even though this is a positive development, there is still room for growth. The introduction of financial regulation and supervision for factoring companies in December 2008 has led to a consolidation of the factoring market and has also set the legal prerequisites higher for newcomers.



## DK > Denmark

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

There are no special legal or monetary requirements for companies who want to set up business within the areas mentioned above.

Providers in this line of business are not directly subject to special supervision by the authorities although bank owned businesses (i.e. due to consolidation of the balance sheet) would indirectly be subject to supervision.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

As from 1.1.2006 borrowers may offer lenders a floating charge on all assets including receivables or specifically in receivables. A floating charge requires registration of title in a central register.

Otherwise the title to a receivable is transferred by way of written assignment and an obligatory denunciation/notification to the debtor. Due to the above mentioned law factors would normally also request a so called "negative pledge" to be registered in order to avoid the title to receivables to be caught by a floating charge on all assets registered by other creditors at any time before or after the assignment.

*Please describe the physical process for the assignment of receivables. See above*

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Official registration and stamp duty applies for floating charge over assets. Old fashion factoring is free of duties and it is not obligatory to have the assignment registered.

*Are there any other requirements for a valid assignment? No*

*Is it possible to assign future receivables by a so called "assignment in advance"?*

No. However, this issue has been widely discussed among experts but with no clear conclusion: "It depends ....". One thing seems clear though: Assignment in advance requires that the underlying sales contract is very precise about content, timing and amount of the future deliveries and that this information is included in the assignment and notification. It is also clear that the notification to the buyers must take place, at the latest, at the time of assignment.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message? Yes*

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

Very technical, - in most cases it does require written agreements.

Note: State and municipal authorities in Denmark only accept e-invoices from its Danish suppliers. The necessary technical platform to do so is provided for by the authorities

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

Yes. Only the originator of a sale may deduct the VAT in case of a debtors' proven financial inability to pay (e.g. bankruptcy). Purchase of invoices therefore requires special arrangements.

*What is the VAT treatment of factoring commission/ service charge?*

These charges are subject to 25 % VAT

*What is the VAT treatment of discount or interest?*

No VAT applies for interest. Whether VAT applies to a discount factor depends on which elements of costs are imbedded in the discount factor.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing? No*

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

The Public and other creditors can levy execution on receivables

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

If a receivable is pledged for instance to a factoring company, the debtor has the same right to claims.

*Do these rights have to be registered or notified to be valid? No*

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

A written agreement e.g. a prohibition against assignment between two parties may be binding especially where such agreement has been signed in order to protect the interests of the buyer.

*What actions are needed to make the prohibition effective?*

Prohibition against assignment is not dealt with in the law text. It must be assumed though, that, as a minimum, a written agreement between the seller and the buyer is required.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The most important effect seems to be that the buyer, with releasing effect, may pay the receivable directly to the seller despite a possible assignment.

## Question 7 Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Floating charges exclusively on receivables are possible.

*Does a fixed or floating charge have to be publicly registered to be valid?* Yes

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)?* No
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):* No
- *pledged to collateralize such a financing facility:* No

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 99%

*Cheque* 1%

*Bill of Exchange* %

*Other instruments* %

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

You can only maintain the pledge if you have demands against the client, for instance financing of a receivable.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

In the absence of a written agreement between the parties the debtor will be liable to pay (penalty-) interest from the 30<sup>th</sup> day after advice (i.e. invoice date). The interest rate applied (i.e. currently 10% p.a.) is decided by law. If agreed in writing late payers must pay penalty interest and reimburse the creditors' reasonable cost for dunning procedures. If the undisputed debt is collected through the court the defaulting party is often condemned to pay the cost including e.g. creditor's lawyers cost related to the collection as specified by law. Note: The rates specified by law would normally **not** cover the actual costs of the creditor (!).

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

There are still some image problems with factoring.

New pledge rules from 2006 (Floating Charge/Registration) have resulted in a majority of financing of receivables & inventory financing moving from the Factoring business to the bank.

## EE > Estonia

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

There are no specific legal requirements for offering factoring services.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Governing law is "Obligation law".

*Please describe the physical process for the assignment of receivables*

Assignor and assignee sign a contract regarding the assignment of receivables. The assignor informs the debtors about the assignment, after that the debtor has the obligation to pay the receivables to the assignee.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Debtor has to be notified about assignment.

*Are there any other requirements for a valid assignment?*

According to the contract between assignor and assignee.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes, as factoring f.ex.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Can be assigned using „electronic signing” with ID-card

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

No specific requirements. Legality of digital signature is regulated by a separate law.

## Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?* No

*What is the VAT treatment of factoring commission/ service charge?*

Commission is subject to 20% VAT

*What is the VAT treatment of discount or interest?* No VAT

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* No

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Carrier pledge right

Rights arising from commercial pledge contract, which is signed before assignment agreement, on condition that assignment of receivables exceeds normal daily business.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No impact on assignee rights

*Do these rights have to be registered or notified to be valid?*

Commercial pledge has to be registered in public register

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Can be agreed, but is not valid for third parties. Agreement between parties does not restrict assignment by law.

*What actions are needed to make the prohibition effective?* N/A

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* N/A

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets? No

Does a fixed or floating charge have to be publicly registered to be valid? No

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees): No
- pledged to collateralize such a financing facility: Yes, it is done by signing a commercial pledge contract

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 99%

Cheque %

Bill of Exchange %

Other instruments 1% – cash-

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

In inventory financing, certain goods are pledged to the financier, the financier has the right to sell those goods. In factoring, buyers receivables are assigned to the financier, the financier is entitled to those receivables, they are excluded from bankruptcy estate.

If the financier has taken on the risk of the buyer (protection or non-recourse factoring), the financier has similar rights as other creditors.

## Question 11 Late Payments

Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest

Yes, late interest (penalty interest).

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## ES > Spain

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

In Spain most companies within the factoring business are banks or subsidiaries of banks named “establecimientos financieros de crédito” (financial establishments), both fall under the Bank of Spain’s regulation and supervision (circular 4/2004).

Nevertheless, in order to operate in factoring it is not compulsory to belong to one of those groups. Factoring activity can be developed by a simple “Sociedad Anónima o Limitada” (Limited Company).

This applies for all the products above mentioned except for: Structured Financing, Giving guarantees to third parties for obligations of clients, and Protection against third party payment default

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

- Law 1/99 of January the 5<sup>th</sup> regulating private equity companies includes an additional resolution where the regime for certain assignments can be found.
- Civil Code articles 1225, 1226 and 1227.
- Commerce code articles 347 and 348
- Law of Public Sector 30/2007 article 200

Please describe the physical process for the assignment of receivables

Once the factoring contract has been signed the client sends the invoices to the factoring company as well as a duly signed form with a detail of the credit transferred in that remittance.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier’s insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

No, the credit assignments will be valid in front of third parties once the factoring contract is signed and it has been notified.

Are there any other requirements for a valid assignment? No, there are not.

Is it possible to assign future receivables by a so called “assignment in advance”?

Yes, provided the name of the debtor is identified in the factoring contract or identified in the debtor’s and client’s agreement.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message? Yes, it can.*

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

N/A

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

No, there are not.

*What is the VAT treatment of factoring commission/ service charge?*

The factoring commission is subject to VAT and the rate is 18%. The factoring companies send invoices to the clients with the factoring fee and VAT.

*What is the VAT treatment of discount or interest?*

Discounts or financial interest is not subject to VAT.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

Basically the VAT treatment is the same for both, but some banks do not apply VAT to the commission if the operation is with recourse.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

If you have not notified the debtor of the assignment, those rights could affect your rights.

In the case of debtor insolvency, the financier's debt has preferential rights over taxes, social security debt with employees and the like.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

None

*Do these rights have to be registered or notified to be valid? N/A*

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country? Yes, it is.*

*What actions are needed to make the prohibition effective? An agreement between client and debtor.*

*Is there any requirement for registration?* No, there is not.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In factoring the assignment will not be valid.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency.*

*Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?* N/A

*Does a fixed or floating charge have to be publicly registered to be valid?* N/A

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):*
- *pledged to collateralize such a financing facility:*

N/A

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 25%

*Cheque* 10%

*Bill of Exchange* 35% Promissory Notes

*Other instruments* 30% – Direct Debits and Confirming® with 15% each.

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In case of client insolvency, as we have the receivables assigned, we collect the money directly from the debtor and our debt will not enter into the creditors' meeting/insolvency estate.

If the client enters into a bankruptcy proceeding the "retroactive effect" will be valid.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Yes, the companies are entitled to ask for interest from debt defaulters

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## FI > Finland

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licenses or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

All operations are under the supervision of Finnish Finance inspection in accordance with its rules and regulations. Cross-Border Factoring may include taxation issues, i.e. VAT or tax at the source. There is no possibility to finance receivables from consumers due to the Finnish Consumer Protection Act.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Finnish Promissory Notes Act 27 §: the assignee has the same rights and obligations as the assignor if assignor's performance is not accepted by the debtor, the debtor is not liable to pay to the assignee.

Please describe the physical process for the assignment of receivables

The seller (assignor) sends the invoice to the debtor and a copy thereof to financier (assignee). There is a clause in the invoice stating that the invoice is assigned to financier and the payment can happen only to financier's bank account nr XXX. Most of the invoices are sent and assigned electronically.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Notification

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called "assignment in advance"? Yes

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

Notification, separate agreements if necessary due to electronic transfer of data

## Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

None, but this may change in the future

*What is the VAT treatment of factoring commission/ service charge?* None

*What is the VAT treatment of discount or interest?* None

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* None

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

It is possible that e.g. taxes not duly paid by the assignor can be deducted from the assigned receivable, if the assignee has been liable to pay the sum in question due to the assignor's negligence (promissory notes act 27 § and legal praxis).

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Promissory notes act 27 §

*Do these rights have to be registered or notified to be valid?* No

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Assigning receivables of public nature may be prohibited, e.g. insurance payments.

*What actions are needed to make the prohibition effective?* None

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* None

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

All assets and then you may sign away some assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

No, but it is recommended. Notification is the most important.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are;*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees) No*
- *pledged to collateralize such a financing facility: No*

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer 100%*

*Cheque %*

*Bill of Exchange %*

*Other instruments %*

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In case of insolvency the factor has to notify a contingent demand on the property of the company in liquidation.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Overdue interest, reminder expense.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): Yes*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The factoring market in Finland has been growing rapidly over the last few years. Still the relative size of the market is modest compared to some other European countries. For that reason the factoring market in Finland will probably stay on the growing trend in future as well. Another important aspect in the market is the high level of automation. This has brought the price level of factoring down and for that reason the factoring alternative today is a very attractive solution for the companies of different size.

## FR > France

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

To operate any of these activities, an authorisation from the ACP (Autorité de Contrôle Prudentiel - Banque de France, our supervisory Authority) is necessary.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

It is the “subrogation” from the French Code Civil (art 1250 ) or the “cession Dailly” (ie “Dailly assignment”, see below)

Please describe the physical process for the assignment of receivables

The client signs a subrogatory receipt and remits the invoices which are recorded in the client’s current account with the factor. Each invoice (except in the case of undisclosed factoring) must contain a statement of subrogation according to the model provided by the Factor.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier’s insolvency practitioner or third party creditors:

- registration
- stamp-duty or other documentary taxes
- notification?

The notification is necessary and sufficient but not mandatory (there are examples of factoring products without notification)

Are there any other requirements for a valid assignment?

- The subrogate receipt
- The statement of subrogation
- The recording of the invoices in the client’s current account

Is it possible to assign future receivables by a so called “assignment in advance”?

Yes; with the cession DAILLY (art L-313-23 to 313-35 of the Code monétaire et financier) which is extremely cumbersome and therefore hardly used

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Yes, by transmission of invoice file (see below)

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

The client must send a written subrogate receipt (which can be permanent). The factor issues an advice of payment for each file when recording the invoices on the client's current account. The other requirements for a valid assignment remain.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

The assignment of receivables is based on tax included invoices. The VAT should not be seen as a risk for the factor, because it can be recovered in the event of loss via a debit to the client's current account

*What is the VAT treatment of factoring commission/ service charge?*

Factoring is considered by the French tax administration as VAT free, but the factors can choose an option to collect VAT which is the general choice. This option concerns the factoring commissions and the financing commissions as well.

*What is the VAT treatment of discount or interest?* See above

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

In France, a Factor needs to be a financial company or a bank; the French banks are used to not collecting VAT on banking services.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

- The subcontractor (direct action against the debtors)
- The right of set-off (dispute, contra accounts)
- Retention right of the carrier

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

There is no difference between these contracts. The reservation of title creates a retention right for the creditors which is enforceable.

*Do these rights have to be registered or notified to be valid?* No

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

It is not legally valid in France

*What actions are needed to make the prohibition effective?* None

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* None

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

The subrogation is a fixed charge and is self sufficient

*Does a fixed or floating charge have to be publicly registered to be valid?* No

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)* No
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)* No
- *pledged to collateralize such a financing facility* No

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

Bank-Transfer 36%

Cheque 27%

Bill of Exchange 37%

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

The Financier's rights are the same as those of other creditors. The Factor must make a statement of outstanding amounts to the Legal Administrator

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Penalties for late payments apply and are pursuant to law 2008-776 of 4th of August 2008 on « modernisation de l'économie ».

Under this law, payment terms between companies must be limited to 45 days from the end of the month or 60 days from the time when the invoice has been issued. A payment term of 30 days applies to specific sectors such as car renting.

Civil and penal enforcements for not applying are provided.

This new regime came into force on January 1st of 2009.

For the state and local public entities, payment terms have been shortened from 45 days to 30 days.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988):* Yes
- *United Nations Convention on the Assignment of Receivables in International trade (2001):* No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

French factors are regulated entities, considered by the French law as credit institutions. As such, they are submitted to many rules, such as the Basel ratios, which is not the case for all European factors.

## GB > Great Britain

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Licenses are not required in the UK for the provision of invoice finance and the industry is not directly regulated. There is regulation/supervision by the Financial Services Authority (FSA) in respect of any associated credit insurance and mortgage business, which some of the providers do get involved with. There is also registration and supervision in respect of financiers' compliance with Anti Money Laundering laws.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

If a statutory assignment (sometimes called a "legal assignment") is required to enable the financier to issue legal proceedings in its sole name then it must comply with the Law of Property Act 1925 (LPA), section 136. To create such an assignment it must be in writing, signed on behalf of the client and notice (oral or written) must be given to the debtor. It can only apply to an existing debt. Any other form of assignment strictly requires the client to join in any court proceedings for collection. Such alternative forms can be:

- Assignment of a future debt
- Oral assignment
- Assignment without notice to the debtor
- Assignment by conduct without writing.

*Please describe the physical process for the assignment of receivables*

Contracts are signed between the client and the financier outlining the agreement between the two parties.

Often these contracts will be "whole turnover" agreements that effectively assign *all existing debts and all future debts* the moment they come into existence. Where a whole turnover agreement exists the notification to the financier of the coming into existence of each debt can be achieved electronically or in paper form. Each financier will determine what physical paper is necessary depending upon their assessment of any specific client risks involved.

A second type of agreement known as a "facultative agreement" requires the client to *offer* all debts for sale to the financier. So the individual invoices are notified after creation accompanied by a signed statement *offering* the debts for assignment. The offer is *accepted* by crediting the debt value to a debts purchased account. With this type of agreement the financier is likely to accept an electronic submission but may sometimes reserve the right to await receipt of the physical paper before advancing any funds. This type of assignment is often used with unlimited partnership and sole trader clients in order to avoid registration of the agreement at the public Bills of Sale Registries for England and Wales and for Northern Ireland (which would be the case if such unincorporated clients signed a whole turnover agreement). Scotland has no such registration procedure.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Registration - Is required, in England, Wales and Northern Ireland (but not Scotland) at the Bills of Sale Registry for agreements containing whole turnover assignments if the client is an unlimited partnership or a sole trader. Failure to register would mean that the financier would have no title to debts upon the client's insolvency.

Stamp duty - Upon assignments of debts was abolished in 2003.

Notification to Debtors - Is essential if the factor wants to issue court proceedings to collect the debt in its own name. It is also essential to overcome claims upon the client's insolvency by subsequent security holders where no waiver has been obtained.

Where there is a whole turnover agreement of all present and future debts notification to the financier of the existence of debts is not even necessary.

*Are there any other requirements for a valid assignment?*

As stated above, to have a statutory assignment enabling proceedings in the factor's sole name there are three formal requirements under Law of Property Act 1925 (LPA, section 136).

1) The assignment must be absolute, not conditional in any way; it must be of the whole of an existing debt (not be a future debt).

2) It must be in writing and signed on behalf of the assignor

3) Written notice must be given to the debtor

However it is possible to gain an equitable assignment where any of the three statutory requirements outlined with the LPA are not complied with, but then the client strictly needs to be joined in any legal proceedings.

For sole traders and partnerships it is necessary to register a whole turnover agreement at the Bills of Sale Registry to obtain protection under the Insolvency Act 1986 against a trustee in bankruptcy in respect of uncollected debts.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes, whole turnover agreements effectively assign existing debts and all future debts the moment they come into existence, but such an agreement with unincorporated sole traders and unlimited partnerships needs to be registered at the public Bills of Sale Registry within 7 days of the date of the master agreement. Not applicable in Scotland.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

EDI is widely used in practice for the notification to the financier of the existence of debts previously assigned under a whole turnover agreement of future debts. The master financing agreement can also agree that an EDI message can be treated by the parties as a valid offer to sell the specified debts under a "facultative" agreement. Whilst there have been no court cases on the validity of such messages it is believed they are safe. However it must be emphasised to be valid there must first be a written and signed agreement recording the implied terms or wording of any EDI notification or offer for sale. They are a standard part of most factoring/ID Agreements.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

Electronic signatures are not widely used in factoring/ID facilities. Agreements state that the financier can rely on any communication apparently coming from the client. However the effectiveness of such provision has never been tested in court and there remains some doubt about it.

#### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

A VAT position was agreed between the Industry Association (ABFA) and the tax authorities (HMRC) (in Oct 1995) regarding the correct calculation of a financier's VAT input tax recovery because part of the financier's output is VAT exempt. This is called a VAT exemption calculation.

*What is the VAT treatment of factoring commission/ service charge?*

Service charge is subject to VAT output tax at the standard rate of 20%. The extent to which input VAT can be set-off against such output tax is subject to an agreement with Her Majesty's Revenue and Customs (HMRC) known as the partial exemption agreement. This relies on every individual financier agreeing the actual recovery rate with their local tax authority.

*What is the VAT treatment of discount or interest?*

The discount charge is currently exempt from VAT.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No

#### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Ban on assignment within a contract between the clients and his customer would prohibit the assignment of the debt.

A pre-existing charge (usually within a security debenture) would necessitate a waiver.

An unpaid carrier may take a lien on goods in his possession

There are no issues in terms of taxes or social security.

A debt payable by one Government Department or Ministry may be reduced by any taxes due by the client to the Tax Authorities such as corporation tax, VAT and social security tax.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Where a deep (or double) retention of title (ROT) exists the original supplier has the right to claim back to goods (or the arising receivable if the ROT clause so states) from the factor's debtor if the original supplier has not been paid in respect of those goods. This right would require the original supplier to be able to specifically identify the goods in question (i.e. by serial numbers or other identifiers). Goods incorporated into a composite product would not be recoverable. Also if the sub-sale is completed (and the financier paid) the

original supplier would not be able to reclaim the associated goods. There is no difference in terms of product.

*Do these rights have to be registered or notified to be valid?*

No, there is currently no register for ROT although the Government has looked at this from time to time.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?* Yes

*What actions are needed to make the prohibition effective?*

The prohibition merely needs to be stated within the contract for the supply of goods between purchaser and supplier (i.e. the financier's client).

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

Ban on assignment within a contract between the client and his customer would prohibit the assignment of the debt. There is no legal difference in terms of product.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Yes it is possible to take either a fixed or floating charge over receivables only without taking security over any other assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Yes, such charges have to be registered at the Companies Registry within 21 days of creation otherwise they will be invalid against creditors and insolvency practitioners.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):* No
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):* No
- *pledged to collateralize such a financing facility:* No

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 60%

Cheque 38%

Bill of Exchange and Other instruments 2%

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

**Invoice finance** – On the insolvency of the client the rights of the invoice financier under the first three products are only threatened where a ban on assignment exists and no waiver has been obtained. This applies to all products. To further secure his position the financier would normally take whatever steps are necessary to perfect a legal assignment of the debt. This will usually be to give notice to the debtor where a non-disclosed facility exists.

**Structured financing** – An Administrator has the powers to sell assets subject to a floating charge and under certain circumstances to sell assets subject to a fixed charge.

**Direct cross border factoring** - None

**2-factor cross border factoring** – None

## Question 11 Late Payments

Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest  
It is possible to apply late payment interest to overdue debts.

The rate is determined either, by the relevant contract of sale, by the courts, or under the late Payment of Commercial Debts (Interest) Act 1998 which provides for interest at 8% above the Bank of England's rate.

## Question 12 International Conventions

Has your country ratified or does it intend to ratify either:

- the UNIDROIT Convention on International Factoring (1988): No
- United Nations Convention on the Assignment of Receivables in International trade (2001): No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The legal system in the UK, through its flexibility, is supportive of invoice finance. It is not overly complex and where any lacunae exist the law of equity (doing what is fair) comes to the aid of the parties.

This has enabled a wide variety of products and services to be developed over the years. Although there are a number of impediments (ban on assignment, ROT etc) practitioners have been largely successful in finding ways to manage these barriers. As a result, in terms of the value of the debts assigned, the market has grown consistently (with the exception of 2009) for the last 50 years and shows every indication of continuing to do so.

**GR > Greece****-2007 Answers-****Question 1 Legal requirements to operate**

*Are there any legal requirements in your country (e.g. licenses or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Non- recourse, recourse and direct cross border factoring can be operated in Greece only through Banking Institutions and ad hoc established SA companies that do not need to be listed on the stock exchange, but should have at least ¼ of the necessary capital for the registration of banking companies, i.e. at least € 4,500,000 in order to obtain the necessary license from the Bank of Greece. Invoice discounting is offered by the institutions operating in the factoring industry in cases of “with recourse” factoring where the factor can enforce his claims against the assignor with recourse.

**Question 2 Transfers of Receivables**

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

According to Art.1 par.1 of 1905/1990 Law, transfer of ownership of receivables is done through a deed of assignment.

*Please describe the physical process for the assignment of receivables*

Deeds of Assignment and Notification to third parties are the requirements for a legal assignment.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

A written notification is required for a valid legal assignment.

*Are there any other requirements for a valid assignment?*

No further requirements are necessary.

*Is it possible to assign future receivables by a so called “assignment in advance”?*

“Assignment in advance” for future receivables is possible in Greece according to Art.1 par.2 of Law 1905/1990.

**Question 3 EDI**

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Assignments are not usually done through Electronic Data Exchange, but through documents. An exception is made in case of import factoring, where all assignments are effected as electronic data exchange messages through the IF-exchange.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

It is still a matter of controversial discussion whether an electronic signature can replace an original and be equally valid.

#### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

There is no issue in terms of VAT in Greece given the fact that receivables are assigned inclusive of VAT and are financed as such.

*What is the VAT treatment of factoring commission/ service charge?*

VAT is always charged on the factoring commission, as well as on all other types of charges, with the exception of the AFC's (Affiliated Factoring Correspondent) commission, where no VAT is charged.

*What is the VAT treatment of discount or interest?*

VAT is always charged on the interest rate.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

It is not certain whether there are differences in the VAT treatment between a specialised factoring company and a banking institution.

#### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

The third parties have the same rights against the assignee of the receivables as they had against the assignor. Hence, these can affect an assigned receivable.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

The assignee has exactly the same rights and obligations towards the third party creditors as the assignor. Thus the third party creditors retain towards the assignee all the rights that they had against the assignor of the receivables, as long as these rights existed before the notification of the assignment.

*Do these rights have to be registered or notified to be valid?*

No, but they should have existed before the assignment was notified. If these rights arose after the notification, they cannot be validly claimed against the assignee but only against the assignor.

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Contractual prohibition against the assignment of receivables is valid and any assignment made against it is void.

*What actions are needed to make the prohibition effective?*

The contract and the documents proving it are enough to make the prohibition effective.

*Is there any requirement for registration?*

No such requirement exists.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In case of “with recourse” factoring, the factor can enforce his right of recourse towards the assignor of the receivables and invoice discounting offered (funds advanced) will be claimed back, whereas in “without recourse” factoring, this is part of the undertaken risk.

## Question 7 Security Interests

*For this questionnaire a “fixed charge” is a security interest under which the client/ borrower is unable to deal with an asset without the creditor’s consent. A “floating charge” is security interest allowing the client/borrower to deal with the asset without consent until “crystallisation” such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

A fixed or a floating charge is obtained only on receivables and not over all assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

A new service is under establishment in Greece, which is in charge of the publication of the fixed and floating charges.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):*

There is only one form of assignment in Greece, irrespective of the purpose

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):* see above
- *pledged to collateralize such a financing facility:* see above

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 8%

*Cheque* 40%

*Bill of Exchange* 2%

*Other instruments* 50% - cash

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

Banking Institutions have the same rights as all the other creditors in case of a client's insolvency. The only difference is that during the "suspicious period" of the insolvency procedure only Banks can validly charge the client's assets whereas all other creditors cannot validly do so.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Interest is always applied to debt defaulters (and is usually +2.5%).

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments.

## HU > Hungary

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

For each type of mentioned financial instruments it is necessary to have the permission of the Hungarian Financial Supervisory Authority (in Hungarian PSZAF). These activities can be done by registered financial institutions with a minimum share capital of 50 million HUF (200.000 EUR).

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

The basic regulation is the Civil Law on the basis of which the owner of receivables is free to transfer his rights. The debtor has to be informed by the owner about the assignment. Assignment of receivables to a factor is exempt from VAT.

Please describe the physical process for the assignment of receivables

The owner of the receivable (usually together with the factor) sends a letter to the buyer (debtor) about the fact of the assignment. In most of the cases the assignment is reconfirmed by the debtor in writing. The silent assignment is rarely used in Hungary

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Notification only

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called "assignment in advance"? Yes

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message?

Yes, but there is no local legal background yet. To be on the safe side: assignment in advance is in hard copy and sending receivables via EDI.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

(See above).

#### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

No

*What is the VAT treatment of factoring commission/ service charge?*

The regulation has been changed: the assignment of receivables is not subject to VAT as previously. The factoring commissions and service charges – except the interest – are mainly subject to VAT. The charged interest is free of VAT. The clients are obviously able to refund the VAT charged by the factor. Also a factor is entitled to refund the input VAT of the costs if they are fully used in order of income charged with VAT. VAT of general costs can be refunded in proportion of the incomes with and without VAT.

*What is the VAT treatment of discount or interest?* Free of VAT

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* No.

#### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?* None

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No legal experience yet

*Do these rights have to be registered or notified to be valid?* No

#### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

No special legal regulation. Legal practice however indicates that the prohibition of the assignment is invalid for third party (factor), but at the same time it is a break of the contract. The government is planning to implement the practice into the Civil Code

*What actions are needed to make the prohibition effective?* Change in Civil Code

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

(See above)

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Fixed or floating charge on receivables is obtainable, and it is not necessary to have it on all assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Public registration is required

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*  
Yes, it is possible but it will not affect the ownership of the receivable.
- *pledged to collateralize such a financing facility (Same as above)*

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer 99%*

*Cheque %*

*Bill of Exchange 1%*

*Other instruments %*

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In none of the above cases are the assigned receivables are part of the insolvency

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest :*

Yes, interest on late payment

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988):* Yes
- *United Nations Convention on the Assignment of Receivables in International trade (2001):* No

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## IE > Ireland

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing, including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Insofar as invoice discounting is concerned, licences from the Central Bank of Ireland are not required in Ireland for the provision of invoice finance and the industry is not therefore directly regulated. In circumstances, however, where invoice finance facilities are provided by regulated entities (e.g. licensed banks) the activity is, in the context of such financial institutions, indirectly regulated by the Central Bank of Ireland.

There are other legal requirements that may need to be adhered to – for example anti money laundering laws or data protection laws.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

There are no specific laws governing the transfer of ownership of receivables. However, in order for an assignee to be in a position to sue the debtor without joining the assignor, the assignment must comply with the Supreme Court of Judicature Act (Ireland), 1877, such that the assignment:

- must be in writing and signed by the assignor;
- must be for the entire debt (which debt must be for a definite and ascertained amount and must be for a present debt); and
- written notice of it must be given to the relevant debtor.

Where all of the conditions prescribed by the Supreme Court of Judicature Act (Ireland) 1877 are satisfied, any such assignment is deemed to constitute a “*legal assignment*”.

Any other form of assignment (e.g. assignment of a future debt, assignment without notice to debtor etc) constitutes an “*equitable assignment*”, which strictly speaking requires the assignor to join in any court proceedings for collection.

Please describe the physical process for the assignment of receivables

Contracts are signed between the client and the financier outlining the agreement between the two parties. Often these contracts will be “*whole turnover*” agreements that effectively assign all existing debts (or a category of them) and all future debts (or a category of them) as soon as they come into existence. Where a whole turnover agreement exists the notification of the coming into existence of each debt can be achieved electronically or in paper form. Each financier will determine what documentation is necessary depending upon their assessment of any specific client risks involved.

In practice, where a “whole turnover” agreement is entered into between the parties, the assignee’s debtors are not notified of the assignment – although the financier would retain the right to notify and in practice may do so where the client gets into financial difficulty or is the subject of an insolvency procedure.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier’s insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Registration – is not required.

Stamp duty – Stamp duty is not chargeable on a debt factoring agreement (as the term is defined in section 90 of the Stamp Duties Consolidation Act 1999 (as amended))

Notification to debtors is essential if the assignee wants to issue court proceedings to collect the debt in its own name. Although failure to give notice of the assignment to the debtor does not affect the legality of the assignment (i.e. in such circumstances it constitutes an equitable assignment), until such time as the required written notice has been given to the relevant debtor the assignee runs the risk of the assignor entering into a further assignment in respect of the debts with a third party. If the third party notifies the debtors of the subsequent assignment in advance of the original assignee notifying the said debtors, the former gains priority. It is also essential to overcome claims upon the client’s insolvency by subsequent security holders and to defeat any set-off claim which the debtor may wish to rely upon against the assignor.

*Are there any other requirements for a valid assignment?*

As stated above, in order for an assignment to constitute a “legal assignment” the provisions of the Supreme Court of Judicature Act (Ireland), 1877 must be complied with. Where the statutory requirements have not been complied with, the relevant assignment will be equitable in nature.

*Is it possible to assign future receivables by a so called “assignment in advance”?*

Yes, whole turnover agreements effectively assign, in equity, existing debts and all future debts upon their creation.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

EDI is widely used in practise for the notification of debts however there have been no test cases concerning the legal validity of an electronic assignment.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

Electronic signatures are not widely used in factoring/ID facilities. However, generally speaking, the contract between the assignor and the assignee will provide that both parties agree to accept the integrity of all EDI messages and to afford them status that they had been in writing, duly executed on behalf of the sender and physically delivered to the recipient. There will, quite often, also be a provision in the contract which provides that any EDI messages will be treated as satisfying any legal requirement that a communication should be in writing and signed.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

The assignment of debts in the course of the provision of a factoring or invoice discounting activity is disregarded for VAT purposes. The position in Ireland has been agreed with Revenue and confirmed by the publication of Revenue's VAT Information Leaflet: Factoring and Invoice Discounting dated June 2009.

*What is the VAT treatment of factoring commission/ service charge?*

Service charges, administration fees, ledger management fees and other fees or charges in respect of invoice discounting or factoring facilities are subject to VAT at the standard rate, currently 21%.

*What is the VAT treatment of discount or interest?*

Interest charges for advance drawdown etc. which may be termed discounting charges are regarded as VAT exempt charges for the provision of credit provided these are linked to the advance drawdown of funds. The discount element is not of itself liable to VAT or exempt from VAT, merely the relevant fee or charges made.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

An outright prohibition of the assignment of the debt in the contract between the assignor and the debtor, invalidates any proposed assignment of the debt. Although there is no Irish case law on point, it seems that a provision in a debt purchase agreement providing for such unassignable debts to be held on trust for the purchaser would be effective.

A pre-existing charge would necessitate a waiver of the chargeholder's security in advance of the entering into of the assignment.

An unpaid carrier may take a lien on goods in his possession.

In relation to certain industries (e.g. construction, forestry and meat processing) relevant contracts tax may be applicable, depending on the circumstances. It would appear that the obligation to pay relevant contracts tax would override a financier's right/interest in a debt.

The Irish Revenue Commissioners may serve a notice of attachment on a debtor, on receipt of which the relevant debtor may, in absence of the assignment being disclosed to it, legitimately pay the debt to the Irish Revenue Commissioners. Although there is no Irish case law directly on point, it seems that the Irish Revenue Commissioners' claim to any such debtors would not take priority over that of an assignee, even in equity, of the debt pursuant to the debt purchase agreement.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Where a deep (or double) retention of title exists the original supplier has the right to claim back the goods from the assignor's debtor if the original supplier has not been paid in respect of those goods. Although some retention of title clauses provide that they extend to include the proceeds of sale, such clauses, in the case of a body corporate, have been held by the Irish courts to constitute a registrable charge pursuant to section 99 of the Companies Acts 1963. Accordingly, unless the details of the relevant retention of title clause are registered in the Irish Companies Registration Office within the prescribed time period, the clause is unenforceable as against a liquidator of the company or its creditors. In order for an original supplier to be

in a position to rely on the retention of title clause it must be able specifically identify the goods in question (i.e. by serial numbers or other identifiers). Goods incorporated into a composite product would not therefore be recoverable. Also if the sub-sale is completed (and the sub-vendor paid) the original supplier would not be able to reclaim the associated goods. There is no difference in this regard between the different types of product.

*Do these rights have to be registered or notified to be valid?*

No, there is currently no register for retention of title clauses.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country? Yes*

*What actions are needed to make the prohibition effective?*

The prohibition merely needs to be provided for in the contract between debtor and the assignee.

*Is there any requirement for registration? No*

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

An outright prohibition of the assignment of debts in an underlying contract between the assignor and the debtor could invalidate any purported assignment of the debt. As mentioned, it is likely to be capable of being overcome by providing for such debts to be held on trust for the purported assignee.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Yes, it is possible to take either a fixed or floating charge over receivables only. In the case of a fixed charge, however, certain restrictions must be put in place as regards the receivables (i.e. the chargor is not to have the use or benefit of the receivables or their proceeds and they would have to be paid into a blocked account which the chargor would not be able to access) before it would constitute a fixed charge.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Yes, in the case of a body corporate, details of such charges must be registered in the Irish Companies Registration Office within 21 days of creation (where the chargor is incorporated under Irish law or which has an established place of business in the State).

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):*

If the receivables are assigned or charged by way of security, registration in the Irish Companies Registration Office would be required (again where the chargor is incorporated under Irish law or has an established place of business in the State).

- *pledged to collateralize such a financing facility:*

See the previous response. Typically security would be created over receivables under Irish law by assignment or by charge. In the event that a pledge was created, this would also be registerable.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

Bank-Transfer/Electronic Transfers	60%
Cheques and other paper instruments	40%

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

Insofar as invoice discounting is concerned, any liquidator/examiner appointed to a company formed and registered under the Companies Act 1963 or, in certain circumstances, a foreign company (i.e. a foreign entity which is capable of being wound up under the Irish Companies Acts e.g. where it has assets or a place of business in the State) would have to respect the financier's right to the debt under the invoice discounting agreement.

Where a secured financier (i.e. where a loan advanced is secured against assets by way of a charge) has security in respect of the assets of a company to which an examiner has been appointed, there is a prohibition on the secured financier enforcing its security during the period of protection provided for under the Companies (Amendment) Act 1990.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Pursuant to the terms of the European Communities (Late Payments in Commercial Transactions) Regulations 2002, penalty interest will become payable if payments for commercial transactions are not met within 30 days, unless otherwise specified in a contract or agreement.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The legal system in Ireland, through its flexibility, is supportive of invoice finance. It is not overly complex and where any lacunae exist the law of equity (doing what is fair) comes to the aid of the parties. This has enabled a wide variety of products and services to be developed over the years. Although there are a number of impediments (ban on assignment, ROT etc) practitioners have been largely successful in finding ways to manage these barriers.

## IT > Italy

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

The Italian banking and financial regulation is mainly based on the Legislative Decree 385 of 1 September 1993 (Testo Unico Bancario - Consolidated Law on Banking) which has been recently modified and states the requirements necessary for supplying financial activities (factoring included). In particular Art. 106 states that the pursuit on a public basis of granting loans in whatever form (including purchase of credits) shall be restricted to financial intermediaries entered in a specific register kept by the Bank of Italy; entry in the register shall be subject to some conditions (art. 107):

- a) legal form of a public limited company;
- b) registered office and general management office located in Italy
- c) paid-up share capital of not less than that determined by the Bank of Italy in relation to the kind of activity;
- d) presentation of a program of the early on activity and organizational structure, together with the certificate of incorporation and the statute;
- e) owners of holdings and corporate officers satisfying experience, integrity and independence requirements;
- f) no presence, among financial intermediaries or entities of the membership group and other stakeholders, of close ties preventing the effective exercise of supervisory functions
- g) financial activity as unique corporate purpose (for factors, the corporate purpose should include the purchase of credits);

The Bank of Italy may deny approval to conduct activities where, from verification of the indicated conditions, is not ensured the sound and prudent management is not ensured.

The Bank of Italy shall issue legislation concerning capital adequacy and the limitation of risk in its various forms as well as administrative and accounting procedures and internal control mechanisms, as well as disclosure in such areas.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

The main specific law that regulates the transfer of receivables is Law 52/1991. Its contents could be summarized as follows: factoring is a contract between the client (an entrepreneur) and the factor (a financial intermediary) the purpose of which is the assignment, against consideration, of receivables, arising from contract stipulated during the business activity of the enterprise; those credits which do not follow this definition are subject to the general credit assignment discipline contained in the Italian Civil Code (artt. 1260 and following). The factor becomes the owner of the title of credits and obtains all the rights connected to it (presenting it as the subject of mandates, pledges, transfers to third parties or transactions). The assignment can involve future receivables and mass assignment of receivables (or both) too. Unless stated differently in the agreement, the assignment is considered with recourse. The assignment is valid against third parties if there is prepayment by the factor or when the assignment is notified.

The Civil Code (arts. 1260 - 1267) permits the assignment between parties of credits that are not personal in nature, with the effectiveness of the assignment against the debtor and the validity of the operation with respect to third parties, depending on the fact that the assigned debtor is aware of and accepts it, and with the client not being required to guarantee the solvency of the debtor transferred.

For securitization purposes, see the Law 130/1999 on credit securitization, which refers to the Banking Law, art. 58.

*Please describe the physical process for the assignment of receivables*

The contract governs the assignment for consideration of credits that the client (supplier) holds or shall hold against debtors. The client is required to guarantee that the credits exist and are eligible for collection, and that the debtors are solvent, unless the factor waives this last point (non-recourse). The consideration for the assignment is set at an amount equal to the face value of the credits assigned, or whatever different amount is actually owed by the debtor as a result of any reductions tied to the underlying commercial operation (discounts, rebates, returns of merchandise etc.), rather than as a result of any increases on account of delayed payment (contractual penalties or interest on arrears). This consideration may be collected by the client:

- at the moment the credit is collected, if the factor has not waived the guarantee of solvency of the client;
- on or following a term set in the contract, in the case of credits or portions of credits regarding which the factor has waived the guarantee of solvency of the client.

The consideration for the transfers may be paid by the factor in advance of the moment in which it becomes eligible for collection under the contract, in which case it generates interest at a rate agreed between the parties.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

For receivables governed by Law 52/1991, the assignment is valid against the insolvency practitioner of the client and third party creditors if the factor has prepaid all or a share of the amount agreed in the contract. No registration or notification is needed, except for credits against the public sector. According to the general law about credit transfer (Civil Code), the factor could have an assignment which is valid against the debtor if the debtor has accepted the assignment or if the assignment has been notified to him. In case of a multiple assignment, the first one notified to the debtor or the first accepted by the debtor will prevail, provided that there is a bill that certifies the date.

For securitised credits, the registration in the Official Journal is needed.

*Are there any other requirements for a valid assignment?*

To assign credits rising from public contract work and other kinds of credit against public sector, the assignment must be stipulated as a formal contract or a notarized private contract. The assignment must be registered and notified to the debtor (public administrations) and not refused. See Law 109/1994 for details.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

It is possible to assign future receivables (see Law 52/1991, Art.3) even if the contracts from which they will rise are still not stipulated, but will be stipulated within 24 months. It is also necessary to indicate the debtor. Also a mass assignment of future receivables is possible, subject to the same conditions.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

It depends on the contract.

However, in Italy the alone transmission (and not the filing) of invoices in electronic format is possible, but they have to be printed on paper and notified in the fixed terms from the issuer to the receiver.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures. See above*

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

There were some issues concerning VAT treatment of factoring when the Italy's Revenue Agency adopted the Resolution 139/E to explain the VAT treatment of factoring in the light of the judgment of the Court of Justice of the European Communities of the 26th June 2003 (Case C-305/01).

In the resolution, the Revenue Agency clarified that the judgment refers to a specific German case and not certainly to the Italian system.

The Resolution recognized factoring as a financial operation which has mainly financial purpose, without distinguishing between recourse and non recourse factoring. The core reason of a factoring contract usually is the advance financing, which is generally accompanied by the services components; for this reason, the Revenue Agency confirmed that factoring operations are, in the majority of cases, exempt from VAT (art. 10, n. 1, DPR 633/72).

The debt collection operations are, instead, excluded from the exemption.

But the Resolution 139/E did not clarify the VAT treatment of factoring operations which are not debt collection operations but do not provide the advance financing.

A judgment of an Italian Court has clarified that factoring contracts have prevalently a financing nature, even in absence of prepayment; therefore the commission is exempt from VAT.

A new Resolution of Italy's Revenue Agency (n. 32/E of the 11<sup>th</sup> March 2011) has recently clarified that factoring is not debt collection.

Factoring is different from debt collection having regard to the scope of the contract: the first mainly aims at satisfying the financial needs of the client, while the second is finalized at satisfying the creditor's right to obtain the payments of the due amount by its debtors.

Therefore, when the scope of the contract for the client is to obtain the advancing of the amount of the credits, the factoring operation represents a financial operation and then must be VAT exempt. The presence of different clauses (with/without recourse) does not affect the financial nature of the contact but, most likely, only the calculation of the commissions. Therefore factoring must be included among financial operations. This is also supported by the different legal framework in which factors (financial companies) and debt collection suppliers (also non-financial companies) operate.

When a contract, according to the aforementioned principles, is considered a factoring operation, then the revenues of the factor are subjected to the VAT exemption regime. This holds true when revenues are calculated as a unique consideration which includes both commissions and interests as well as when the consideration is split between commissions and interests. On the contrary, if the factor provides the client with other services (i.e. evaluation of the credits portfolio, management of credit other than the ones assigned, etc.) which are supplementary to the assignment of the credit, the latter does not lose its financial scope if for these services a separated consideration is agreed (for these services it is of course necessary to identify, case by case, the applicable VAT regime).

*What is the VAT treatment of factoring commission/ service charge?*

The VAT treatment depends on the type of operation. In general, factoring operation is considered to have financial purpose, and therefore commissions should be VAT-free because they are considered part of a unit income rose by a financial operation.

Financial interests are VAT-free, too.

On the contrary, when the contract explicitly excludes the financial purpose and establishes the alone credits management, the commission should be subject to VAT.

The guarantee commission is not subject to VAT.

*What is the VAT treatment of discount or interest?*

As before, when there is a prepayment, the operation is entirely VAT-free, because the factor's remuneration is considered as a unit financial income (although it is split in interests and commissions). Therefore interests are VAT-free.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No, there are no differences in VAT treatment of factoring operations between banks and non-banks.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

The right to collect the assigned receivable, the right to compensate credits and debts or the property right (in the conditional sales) are some of the third party rights that can affect an assigned receivables. The State or private persons can foreclose the credits if they have promoted a civil proceeding in their favour.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

The reservation of title after the assignment is valid as before: the rights of the third party creditors are the same even after the assignment. So all the third party creditors rights can be valid against the factor.

*Do these rights have to be registered or notified to be valid?*

No, they need not be registered or notified. It is sufficient that they are set in the contract.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

The Italian Civil Code states that the parties can exclude the transferability of the receivables.

*What actions are needed to make the prohibition effective?*

Only for some kinds of credits against public sector, the agreement of the debtor is requested for the assignment to be valid against him. The assignment, however, is valid between the parties.

*Is there any requirement for registration?*

There is no need for registration.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The contractual prohibition is not valid against the factor if it is not proved that it knew of the existence of the prohibition was known at the moment of assignment.

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

N/A

*Does a fixed or floating charge have to be publicly registered to be valid?*

N/A

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*
- *pledged to collateralize such a financing facility*

No important differences. In all the listed operations, the assignor loses the asset's availability.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer 14%*

*Cheque 14%*

*Bill of Exchange 1%*

*Other instruments 72%*

Cash orders 9%; RID and RIA 14%; MAV 1%, Debit card operations 45%.

Source: ABI monthly outlook, July 2007.

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

An important innovation enacted by law no. 52/91 are the provisions stipulated regarding the clause of revocation in the event of bankruptcy of the debtor or the client (the debtor payment to the factor is not subject to revocatory action), as well as the validity of the transfer in dealings with third parties, and especially in the circumstance of bankruptcy of the client.

In general, the bankruptcy law establishes the following rules: When a client fall in status of crisis, he can propose to his financiers an arrangement with creditors (D.L. n. 35/2005 converted in L.n.80/2005) based on a plan proposed by creditors. In particular he can stipulate a debt restructuring agreement with his creditors.

If the client becomes insolvent, the creditor can promote a petition in bankruptcy, and then, if the debtor is declared bankrupt, start the bankruptcy proceeding, and the creditors can create a committee which takes part in the insolvent firm's management.

The bankruptcy trustee can recede from the credit assignments formerly stipulated with the factor by the client only for those credit which have not yet arisen by the date of the bankruptcy declaration, but in that case he has to give him back the consideration paid by the factor for those credits.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

The Legislative Decree no. 231/2002, art. 4 introduced the "automatic" maturity of delay interests starting from the day after the expiry date of the credits, without the need for a constitutional delay as provided for by Article 1282 (Civil code). The same article states the expiry dates for credits where it is not determined in the contract. The interest rate to be used is the one deliberated by the BCE (European Central Bank), increased of seven percentage points.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988)* Yes
- *United Nations Convention on the Assignment of Receivables in International trade (2001)* No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## LT > Lithuania

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

According to the Law of the Republic of Lithuania all above mentioned products except for “Giving guarantees to Third parties for obligation of client” may be provided by financial institutions only and no special licence is required for provision of these services.

For Giving guarantees there is a requirement of banking license granted by the The Central Bank of Lithuania.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

Civil Code of the Republic of Lithuania.

*Please describe the physical process for the assignment of receivables*

The assignment text must be printed on an invoice or the seller may send the buyer a letter informing on the assignment of the future or existing receivables under invoices issued already.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

Notification – The debtor must be notified about the assignment of receivables.

*Are there any other requirements for a valid assignment?*

The assignment shall be valid if the client has the right to assign such receivables and the circumstances, due to which the debtor would have the right not to satisfy the claim, are unknown at the moment of the assignment.

*Is it possible to assign future receivables by a so called “assignment in advance”?*

Yes. According to Civil Code of Republic of Lithuania that by assignment of the future receivables it is recognised that such assignment has passed to financier upon arising of the right to claim from the debtor the amount established in the agreement. If the assignment of receivables is related to a certain event, the assignment shall be recognised as having occurred upon occurrence of such event. In such cases no additional formalisation of the assignment shall be required.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?* No

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

There is no separate law on requirements for separate written agreement governing the procedures. Requirements for electronic signature are defined in Republic of Lithuania Law on Electronics Signature. Though this law came in force on 11<sup>th</sup> of July, 2000, it is still not applicable.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?* No

*What is the VAT treatment of factoring commission/ service charge?*

Factoring commission is subject to 21 per cent VAT.

*What is the VAT treatment of discount or interest?*

Factoring interest income is subject to 21 per cent VAT.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* No

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

No specific third party right can affect an assigned receivable.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

While the only instrument recognised by the law of the Republic of Lithuania is factoring in general, no differences can be identified.

*Do these rights have to be registered or notified to be valid?* No

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?* No

*What actions are needed to make the prohibition effective?*

No specific actions. Prohibition is defined in Civil Code as a rule of law.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* No effect

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

"Fixed charge" and "Floating charge" are contractual provisions and can be defined in the contract only. So it depends on the consensus of the parties.

*Does a fixed or floating charge have to be publicly registered to be valid?* No

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfillment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*

If the financing of the client under the factoring agreement asserts itself in the purchase of the assigned receivable from the client, the financier, having purchased such receivable, shall acquire the right to all the amounts received from the debtor when the latter performs the demand and the client shall be liable against the financier if the latter receives less from the debtor than he has paid to the client for the purchased claim, unless otherwise established in the agreement. Also, a buyer is not allowed to off-set assigned receivables with the seller after he was notified about the assignment. The payment from the buyer to any other party than the factor does not constitute a valid discharge of the debt.

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*

Parties signs contract of pledge. Parties' don't have to register it in any register. The object of the pledge must be transferred to the pledgee. The procedure of collecting from pledged receivables in a case of default is very fast and simple. Though there is a danger that receivables can be pledged by notarial certified bond and then legal dispute is inevitable.

- *pledged to collateralize such a financing facility*

Pledge is made by a notarial certified bond, which must be registered in the public Mortgage Register of the Republic of Lithuania. Transfer of the object of the pledge to the pledgee is optional. The pledgee has a priority right to the pledged receivables and none of the third parties can claim for it without pledgee's permission. The procedure of collecting from pledged receivables in a case of default is quite long and complicated.

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 99%

*Cheque* %

*Bill of Exchange* %

*Other instruments* % - cash

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of client*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

Financier has always a priority right to assigned receivables even in a case of insolvency of the client. There are no major threats and/or pitfalls. According to law of the Republic of Lithuania even in a case of bankruptcy financier has a priority right to assigned receivables.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

It depends on provisions of the contract. For example, in case of late payments debtors can be charged with penalties (approx. 10 per cent per annum) for each overdue date on exceptional cases only.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

N/A

## LU - Luxembourg

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

As a general rule the abovementioned forms of operation do not require specific regulated license in Luxembourg, except if the operation “Protection against third party payment default” means the provision of credit insurance. Credit Insurance as specific operations is specifically regulated in Luxembourg.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Please describe the physical process for the assignment of receivables

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

The factor becomes owner of the accounts receivable by “Subrogation Conventionnelle” in accordance with article 1250 of the Civil Code as applicable in Luxembourg. The respective debtors with regard to the transferred accounts receivable are to be notified.

Are there any other requirements for a valid assignment?

No other specific requirements.

Is it possible to assign future receivables by a so called “assignment in advance”?

This is not legally feasible in Luxembourg due to the use of the Civil Code's Subrogation method.

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message?  
Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures

There are no specific formalities related the practical method by which the accounts receivable are transferred.

Electronic Data Exchange messages can therefore be used between the parties.

## Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

To our knowledge there are no such VAT issues or problems regarding the transfer of accounts receivable.

*What is the VAT treatment of factoring commission/ service charge?*

Same as regular commercial transactions.

*What is the VAT treatment of discount or interest?*

No VAT on discount or interest.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

N/A

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Due to the subrogation the factor has obtained full title with regard to the transferred accounts receivable. Third parties have therefore to respect the legal consequences of such ownership in favour of the factor.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable? Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

*Do these rights have to be registered or notified to be valid?*

The statute of March 31<sup>st</sup> 2000 has introduced the possibility in Luxemburg to apply a retention of title. Such retention of title, if properly effected, is opposable to third parties in case of bankruptcy and composition after bankruptcy, but however not in case of controlled administration.

An "extended" retention of title however is not legally valid in Luxemburg.

Retention of title can only be effected in Luxemburg in the event that the respective goods are still located at the buyers premises and insofar as such goods are still identifiable amongst the other goods located at buyers premises. Therefore retention of title shall not be enforceable against a buyer if the respective goods have (in the meantime) been processed or sold onwards.

There are no formal registration requirements to be met for a valid retention of title on goods.

However it is required that a retention of title is to be agreed upon between the parties in writing, before the respective goods are delivered to the buyer

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country? What actions are needed to make the prohibition effective?*

*Is there any requirement for registration?*

*What is the effect of a prohibition upon factoring or invoice discounting (in each case with or without recourse)?*

There is no formal legislation applicable in Luxembourg instating a formal ban on assignment as a general rule in Luxembourg. However, due to commercial relationships between sellers and buyers, the factor in most cases excludes such accounts receivable from the factoring agreement.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is a security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

*Does a fixed or floating charge have to be publicly registered to be valid?*

Pledge on accounts receivable is legally valid in Luxembourg as a fixed charge.  
For such fixed charge no specific registration is required.  
Luxembourg has no concept of a floating charge.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*
- *assigned to collateralize a financing facility (Structured Finance, Issuing Guarantees)*
- *pledged to collateralize such a financing facility*
- 

Given the abovementioned structure where "subrogation" is used, the abovementioned differences in purpose of the transfer of accounts receivable should – normally – not be an issue in Luxembourg.

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer 96 %*

*Cheque %*

*Bill of Exchange %*

*Other instruments 4 %*

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

As long as the subrogation of the accounts receivable results in the effective transfer of the title to such accounts receivable whereby the respective accounts receivable vest in the factor absolutely, the transfer of the accounts receivable is and remains opposable to the receivership under the bankruptcy procedure.

### Question 11 Late Payments

*Are there any penalties ( and if so of what kind ) applying to debt defaulters? E.g. interest*

In line with European Directive 2000/35/EG a Law against Payment default dd.18/04/2004 exists. It is applicable on all commercial transactions between enterprises, and between enterprises and governmental entities.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *The UNIDROIT Convention on International Factoring (1988)*  
No
- *United Nations Convention on the Assignment of Receivables in International trade (2001)*

Luxemburg has signed this convention on June 12th 2002, but however has thus far not ratified this Convention.

### Question 13 Any other Matters

*Are there any other matters that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## LV > Latvia

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licenses or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

No legal requirements to start factoring operations.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

- 1) Civil law – Chapter 9 Cession
- 2) Commercial law – Chapter 6. Factoring contract
- 3) Law on Commercial pledge Chapter 34. – if debtors are part of third party commercial pledge then Factor should receive written permission from existing creditor to assign.

Please describe the physical process for the assignment of receivables

- 1) Factoring agreement
- 2) Assignment notice on invoice.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

Only a written assignment is needed.

N.B. However if there is “fixed charge” registered on clients receivables from an existing creditor then written permission to assign must be obtained from that creditor.

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called “assignment in advance”? No

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

Both sides exchanging electronic signatures have to acquire electronic signature chips from state.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?* No

*What is the VAT treatment of factoring commission/ service charge?*

VAT 22% is charged on both commission and service charge

*What is the VAT treatment of discount or interest?*

No VAT on interest or discount.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

Banks do not charge VAT on commission and service charge.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

No third party rights, except for cases where a “fixed charge” is applied.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

It shall be considered as dispute under factoring contract and recourse is usually stipulated in such cases.

*Do these rights have to be registered or notified to be valid?* No

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Not if a receivable is assigned to factoring company.

*What actions are needed to make the prohibition effective?*

Such a prohibition is impossible in case a receivable is assigned to a factoring company.

*Is there any requirement for registration?*

No registration.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

There is no effect in case a receivable is assigned to a factoring company.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

It is possible to obtain "fixed charge" and "floating charge"; this depends on the commercial pledge contract conditions.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Yes. A commercial pledge is valid after it is registered in the commercial pledge register.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*
- pledged to collateralize such a financing facility*

If receivables are pledged as commercial pledge then factor is secured lender.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

All companies use Bank-Transfers - 100%

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- Non-Recourse Factoring*
- Recourse Factoring*
- Invoice Discounting (non-disclosed factoring with or without recourse)*
- Structured Financing including Inventory Financing*
- Giving guarantees to Third Parties for obligations of clients*
- Protection against third party payment default*
- Direct cross border factoring*
- 2-Factor Cross-Border Factoring*

The financier should notify the insolvency practitioner about the debt in a time period stipulated by the insolvency law.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Financiers may apply penalties if so stated in a respective factoring contract. If no penalties are stipulated then an interest rate stipulated by Civil law may be applied - 6% p.a.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988)* Yes
- *United Nations Convention on the Assignment of Receivables in International trade (2001):* No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

A good change is that the factoring contract is now finally defined in Commercial law after it was changed in 2010.

## MT > Malta

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

For all the above cases, the activity may only be performed by either a credit institution as defined in the Banking Act (CAP 371 of the Laws of Malta) or a financial institution as defined in the Financial Institutions Act (CAP 376 of the Laws of Malta).

Both financial institutions and credit institutions need to be licensed by the Competent Authority in Malta i.e. the Malta Financial Services Authority and are subject to ongoing supervision by the said Authority.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

Under Maltese Laws factoring is regulated by means of article 1484A of the Civil Code (CAP 16 of the Laws of Malta). The following three factors are required to constitute a factoring arrangement:

- (a) the assignor is a trader;
- (b) the debts being assigned arise out of or in connection with the trade or business being carried out by the trader; and
- (c) the assignee is a person licensed to carry out the business of banking or the business of factoring under the applicable laws of Malta, or the equivalent laws in a jurisdiction recognised by the competent authority appointed in terms of the Banking Act.

*Please describe the physical process for the assignment of receivables.*

The typical process for the assignment of receivables is the following:

1. A factoring agreement should be signed between the Bank/Factor and the seller.
2. An introductory letter is issued on the seller's letterhead notifying the buyers (included in the factoring agreement) that all existing and future receivables have been assigned to the Bank/Factor. The acknowledgment of this letter by the buyer is not mandatory.
3. The goods/services are shipped to the buyers by the seller who must issue the relevant invoices including the notice of assignment on each invoice.
4. The seller assigns the invoices together with other supporting documents that the factor may require (e.g. delivery documents) through the Bank/Factor's trade receivables assignment form. It's common that in parallel with the physical assignment there is an EDI by file transfer or upload through a web access.
5. The process proceeds in accordance to the factoring agreement signed between the parties.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration* - No
- *Stamp duty or other documentary taxes* - No
- *Notification?* - Yes

*Are there any requirements for a valid assignment?*

For an assignment to be enforceable by the assignee (Bank/Factor) against third parties (debtors), the assignee (Bank/Factor) or the assignor must have given notice of such assignment to the debtor.

The notice of the assignment may be evidenced in writing by any means, including by a notice sent to the debtor together with the document evidencing the debt (invoice...) and need not be signed by the assignor or the assignee.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Future debts, or of classes thereof, may also be assigned provided that the debtor and the latest date by which the future shall come into existence be identified in the contract of assignment. In such cases an assignment is at the time of the conclusion of the contract without a new assignment being required when such debts comes into existence.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

An assignment under Maltese law is not valid unless made in writing. Therefore the contract of assignment needs to be in writing and signed by both parties. The law does not include any restrictions on using an electronic data exchange message. As long as either party is confident that in case of dispute it is able to prove that there has been agreement signed by both parties, any means can be used. However it is not practice for such contracts to be signed electronically.

For an assignment under factoring to be valid and enforceable against third parties, the assignee needs to send a notice of an assignment which may be evidenced in writing by any means, including by a notice sent to the debtor together with the document evidencing the debt and need not be signed by the assignor or the assignee. This therefore allows room for such notice to be conveyed by electronic means.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

*What is the VAT treatment of factoring commission/ service charge?*

*What is the VAT treatment of discount or interest?*

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

VAT is applied only over the factoring commission/service charges in the case of recourse facilities provided to resident clients. At the present the VAT rate is 18%. No VAT applies over the interests charged or on commissions regarding non-resident clients.

The treatment of VAT is not dependant on the type of service provider but on the nature of the transaction. Art (3), Part Two of the Fifth Schedule to the VAT Act does not distinguish between the service providers. So it does not make a difference if the provider is a bank or another financial institution.

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

In case of a valid assignment all rights are transferred to the assignee by means of such assignment. In case the receivable was already subject to third party rights then these will be transferred to the assignee i.e. the Bank/Factor in this case. Indeed in the factoring contracts the Client is made to declare that he has not already assigned such rights to third parties. Otherwise no third party rights should affect the receivable.

*What are the rights against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

The title of goods will not affect any rights arising out of the receivable. The assignee may still claim payment for the receivable if it this has been assigned to him.

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No difference.

*Do these rights have to be registered or notified to be valid?*

No.

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes it is valid. There exists nothing in the Civil Code which prohibits a contractual prohibition of an assignment of receivables.

*What actions are needed to make the prohibition effective?*

This would need to be included in the contract to bind the parties. Such contract terms may be contained in any contract signed by the parties including the General Terms and Conditions.

*Is there any requirement for registration?*

No

*What is the effect of a prohibition upon factoring or invoice discounting (in each case with or without recourse)?*

Upon the inclusion of such prohibition in a contract between buyer and seller, the latter cannot assign the receivables. This applies equally for both with recourse and without recourse contracts and any factoring contract ensuing thereafter is ineffective.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is a security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency.*

*Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Fixed charges can be obtained and they do not need to be on all assets.

One can classify a Maltese security under the term floating charge as defined above in the case of a general hypothec. In this case it can only be taken over all the assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

A general hypothec needs to be registered in the public registry to be valid against third parties.

In the case of a fixed charge the requirement of registration depends on the type security. If it is in the form of a hypothec, then it needs to be registered similarly to the general hypothec. This is not always required for all fixed charges though. For example in the case of a pledge this does not need to be registered.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*
- *pledged to collateralize such a financing facility*

In the first scenario the debt is being assigned ('sold') to the Bank/Factor. All rights are transferred including the rights of enforcing such payments by any legal means. Such assignment will serve as the means of repayment. The bank is entitled to request for payment of the receivables in terms of the agreement and this is the way the Bank shall be repaid of its financing.

In the second scenario the debt is also being assigned to the Bank with all rights being transferred. Of course the purpose is to offer security to the Bank in case of default by one of the parties involved. However in theory the Bank is, upon completion of a valid assignment, in the same position as in the first scenario since it has acquired all rights of demanding and enforcing payment. Also in this second case the Bank is empowered to request for payment of receivable to the amount of the receivable, independent of the amount unpaid by the client, whether wholly or partial.

In the third scenario, the legal instrument is a different one. By means of a pledge there is no transfer of ownership and no right of enforcing the pledge unless there is an event of default. Only in case of default by client may the Bank/Factor enforce the pledge to be paid up to the unpaid amount.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

- *Bank-Transfer 15%*
- *Cheque 80%*
- *Bill of Exchange 5%*
- *Other instruments 0%*

Estimated percentages regard the number of payments.

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In the event of insolvency or bankruptcy of the assignor, the assignment of future debts which have not yet come into existence on the date of winding-up or bankruptcy order is made by a Court, may be rescinded by the liquidator or the curator of the assignor.

The right of rescission of the assignment of future debts shall be conditional on the refund of any consideration paid by the assignee to the assignor for such future debts.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

The Civil Code states that in case of an obligation for payment of a determinate sum, the damages arising from the delay in the performance thereof shall only consist in the interests on the sum due at the rate of eight per cent per annum.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *The UNIDROIT Convention on International Factoring (1988): No.*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No.*

## Question 13 Any other Matters

*Are there any other matters that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

As it was mentioned before, factoring falls under the Maltese Law and providers of factoring services must be registered either as a credit institution or a financial institution, which are in turn regulated and supervised by the Malta Financial Services Authority (MFSA).

The strategic location of the Maltese Islands in the heart of the Mediterranean, at the crossroads of Europe, Africa and Middle East, creates a favorable environment for international business. The membership in the EU and the Euro Zone, the multicultural links, the common use of the English language and a comprehensive legal and regulatory framework, as well as an excellent fiscal regime, are important competitive factors.



## NL > The Netherlands

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

There are no licenses etc necessary for the operation of most of the aforementioned activities in the Netherlands. However, the activity “Structured Finance including Inventory Finance” may qualify as a banking activity (license required and subject to supervision), and the activity “Protection against third party payment default” may qualify as an insurance activity (license required and subject to supervision).

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Transfer of ownership is laid down in the Dutch Civil Code. The same goes for pledge, which is the usual legal instrument for Dutch factoring contracts.

Please describe the physical process for the assignment of receivables

The requirements for assignment and pledge are similar:

1. a written deed
2. registration or:
3. notification

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

1. against the debtor: notification
2. against the insolvency practitioner ("curator"): registration or notification
3. against third party creditors: registration or notification

Are there any other requirements for a valid assignment?

the assignee/pledgee must have the ability to dispose over the assets (valid title)

Is it possible to assign future receivables by a so called “assignment in advance”?

1. assignment: yes, only the debtor should be known
2. pledge: yes, provided that there is an existing legal relationship between the debtor and the creditor

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

For the requirements of assignments: see the 2nd box of question 2.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

The Dutch Civil Code recognises under circumstances the same legal force to electronic signatures as to written signatures. For certain types of contracts (insurance, assignment/pledge) a written deed is still mandatory.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?* No

*What is the VAT treatment of factoring commission/ service charge?*

There is a VAT-duty on factoring commission /service charge

*What is the VAT treatment of discount or interest?* Discount or interest is VAT-free

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* No

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Compensation

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Prolonged reservation of title is prohibited by court decision

*Do these rights have to be registered or notified to be valid?* (see above)

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?* Yes

*What actions are needed to make the prohibition effective?* Contractual agreement between buyer and supplier

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* no valid assignment or pledge

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

1. "fixed charge" may be comparable with possessory pledge
2. "floating charge" may be comparable with silent pledge

Does a fixed or floating charge have to be publicly registered to be valid?

see box 2 of question 2

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)

This is mainly used for "guarantee payments" under Debtor Risk Protection and off balance financing

- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)

Is prohibited since 01-01-1992 (no fiduciary transfers allowed)

- pledged to collateralize such a financing facility

Pledge is the usual legal instrument for Dutch factoring-contracts

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 100%

Cheque %

Bill of Exchange %

Other instruments %

Lately we experience an increase in automatic debit transactions. It is very difficult at this moment to find a percentage for these transactions. My feeling is still less than 5%.

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

Pledge of receivables is a very strong legal instrument in the Netherlands, if operated the right way. Pledges and mortgages have a preference above all other creditors, save some legal exemptions.

- right of direct execution
- separatism (which means that a certain type of secured creditor (pledge/mortgagee) of the client can enforce the security vested for its benefit over an asset as if there were no bankruptcy estate, this type of creditor can (so to speak) “bypass” the bankruptcy estate)

exemptions:

- costs made for preservation (which means that a pledgee or a mortgagee has preference over nearly every other creditor of the client when it comes to the distribution of the enforcement proceeds of the assets over which the pledge or the mortgage were vested. One exception to this rule is the (otherwise unsecured) creditor of the client who has an unpaid claim against the client in connection with the preservation of the asset over which the pledge or mortgage was vested. Such a creditor has a claim as a result of a performance which was in the interest of the pledge/mortgage and has subsequently preference to the pledge/mortgagee)
- tax authorities

Possible threats and pitfalls:

1. compensation
2. Actio Pauliana (which means in short and to the extent relevant in the context of the questionnaire the nullification of a pledge/mortgage for fraudulent/unjustified preference reasons. It is included in the Netherlands Insolvency Act (to be instigated by the liquidator), and it can be instigated by a creditor on the basis of the Netherlands Civil Code prior to an insolvency situation. Successful instigation of an Actio Pauliana is subject to a number of conditions)
3. receivables with respect to temporary workers
4. ban on assignment/pledge

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

None. However the creditor is entitled to ask for payment of legal interest or late interest, if possible based on the applicable terms and conditions.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988):* No
- *United Nations Convention on the Assignment of Receivables in International trade (2001):* No

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The legal title for factoring is strong. In combination with the close monitoring procedures of factoring companies, the collect out ratio is high; certainly compared to that of banks.

## PL > Poland

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

None of them entail specific legal requirements.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

No specific law. The transfer is based on the Civil Code.

*Please describe the physical process for the assignment of receivables*

A general or individual written agreement is necessary. If the assignee wants to collect receivables on his own behalf directly from debtor he must notify the debtor. Unless the debtor has been notified, he is entitled to pay to the assignor's account with the effect of release from its debt.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

None of them. A notification only in case the new creditor (the assignee) wants to collect receivables on his own behalf directly from the debtor.

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called "assignment in advance"? Yes

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

There are no requirements, this issue is up to the assignor's and assignee's freedom of (factoring) contracting. There are special clauses in factoring agreements governing form and way of electronic transfer.

## Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

23% VAT is applied to factoring. (as for all services). According to tax experts' interpretations VAT applies only to factor's fees and other service expenses or commissions but not to interest. However there are differences among factors in VAT treatment in this respect since part of them apply VAT for interests as well.

*What is the VAT treatment of factoring commission/ service charge? (See above)*

*What is the VAT treatment of discount or interest? (See above)*

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

Banks' transactions that are based on receivables are VAT free.

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

In case of an assignment conflict (where several assignments of the same receivable have been done), the first assignment in the timeline is generally valid and the later assignments are considered to be void.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

The reservation of title does not affect the rights of an assignee.

*Do these rights have to be registered or notified to be valid?*

The reservation of title has to have a registered date (e.g. in notary office) to be valid against insolvent debtor or its other creditors

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

The contracting parties can agree to prohibit the assignment of receivables.

*What actions are needed to make the prohibition effective?*

A special clause of prohibition has to be included in the agreement.

*Is there any requirement for registration? No*

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The collection of receivables from the debtor is impossible in both cases. The assignment is not valid unless the debtor's consent to the assignment is given.

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

No answer given since fixed or floating charges are not used or are at least not common in Poland.

*Does a fixed or floating charge have to be publicly registered to be valid?*

No.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees): No*
- *pledged to collateralize such a financing facility: No.*

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer %*

*Cheque %*

*Bill of Exchange %*

*Other instruments %*

Unavailable data, but most of the payments are done by bank transfer. Cheques are hardly used. Cash is allowed if the payment amount is not more than 3000 Euro (or equivalent in Zloty or any other currency).

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

The most important aspect is whether the accounts receivables were assigned or not. If not – the factor is a standard creditor of insolvent client. If yes – the factor is a standard creditor of the insolvent client's buyers, so the client's insolvency does not affect accounts receivables sold.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Only interest can be applied as penalty for delayed payments. There can be statutory (13% per year at present) or contractual interests (up to parties agreement). There is a special law (based on EU Late Payments Directive) which regulates:

- that suppliers may not relinquish right to interest for late payments and interest rate cannot be less than the tax interest
- special, fast court proceeding (This law was made to force big buyers to prompt payments)

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988):* No
- *United Nations Convention on the Assignment of Receivables in International trade (2001):* No

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## PT > Portugal

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Yes, for all the operations above.

Only factors, banks and IFIC's (global specialised credit institutions) are authorised by the Bank of Portugal to carry out factoring operations.

Banks and also credit insurance companies are allowed to give guarantees to third parties for obligations of clients and protect against third parties default.

The insurance companies are authorised by the Portuguese Insurance Institute.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

In general, the transfer of receivables is governed by articles 577 to 588 of the Portuguese civil code.

According to these provisions, the transfer of receivables is not subject to the consent of the debtor.

Nevertheless, the transfer is only effective against the debtor after the respective notification to the debtor.

In particular, factoring operations are governed by the Decree-law number 171/95, of 18 July.

This Decree-law rules the activity of the factoring company and the factoring contract. With regard to the factoring contract, the only specific limitations refer to the mandatory written form of the contract and to the types of payment of the credits/receivables to the assignor.

The general and special terms of the factoring contract are also subject to the provisions foreseen in article 577 to article 588 of the Portuguese Civil Code and to standard terms contracts (Decree-law number 446/85, of 25<sup>th</sup> October).

*Please describe the physical process for the assignment of receivables*

Concerning factoring operations, the assignment of receivables should take place under a factoring contract.

The assignments takes place by the acceptance of an assignment proposition.

The assignment of receivables is only effective against the debtors after their notification. Usually, the assignor is responsible for the notification, by reference in the respective invoices that the payment of same should be made to the assignee (the factor).

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

To be effective, the assignments should be notified to the debtors. This is normally done by registered letter.

*Are there any other requirements for a valid assignment?*

The credits/receivables assigned should not be subject to a previous ban on assignment by the debtor or any kind of warranty by another third party.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

According to Portuguese law, the assignment of future receivables against payment is possible in the event that the credits are susceptible of being defined in the moment of the assignment. These future receivables may result from a legal transaction already entered into or not.

The assignment of these credits is considered to be a special type of assignment of credits, subject to special regulation.

The assignment of future receivables is not possible.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message? Yes*

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

N/A

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

No. Nevertheless, in case of the debtors bankruptcy the VAT on the invoices cannot be recovered by the factoring companies.

*What is the VAT treatment of factoring commission/ service charge?*

No VAT applies. In Portugal, both commissions and interests are subject to Stamp duty.

*What is the VAT treatment of discount or interest? No VAT applies.*

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing? No*

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Previous ban on assignment clauses or warrants over the credits or the goods sold. If the supplier has unpaid tax or social security debts, government debtors can retain 25% of their payments.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No difference. Reservation clauses will prevail if they are prior to the assignments.

*Do these rights have to be registered or notified to be valid?*

No. However, as mentioned above, the assignment shall only be enforceable against the debtor if he has been notified.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country? Yes  
What actions are needed to make the prohibition effective?*

This should be part of the supply contract or part of the purchaser general conditions. This can also be established by notification letter to the factoring companies.

*Is there any requirement for registration?*

Usually, the notification is made by registered letter.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The assignments are not effective.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

In accordance with Portuguese law, there are several types of security interest that may be qualified as fixed or floating charge. Nevertheless, its viability in relation to receivables must be analysed on a case by case basis.

*Does a fixed or floating charge have to be publicly registered to be valid?*

Please see our comments above.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No difference.*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees): No difference.*
- *pledged to collateralize such a financing facility: No difference.*

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 50%

*Cheque* 30%

*Bill of Exchange* 10%

*Other instruments* 10% - dated Cheques –

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of;*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

No matter the modality, the credits/receivables are transferred to the factor and this transfers the ownership of the credits/receivables assigned, except in the situations already mentioned.

However, in the event of recourse factoring or of invoice discounting with recourse, the assignee (the factor) does not assume the risk of the insolvency/non payment of the debtor. This risk is assumed by the assignor and, therefore, the credits/receivables are retransferred to the assignor. This situation constitutes an assignment *pro solvendo*.

In case of the debtors bankruptcy the factor is not able to recover the VAT tax included in the invoices.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Interests can be charged in the sales contractual terms or else as stated in the commercial law.

In a non-recourse factoring contract, the factor can report debtors with payment delays to the Bank of Portugal. These will be circulated by the Bank of Portugal (BOP) to all the financial system and so the debtors are penalized on their creditworthiness since their late debts are visible on the BOP responsibilities monthly.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The change in tax law applied to factoring interest and commissions from the present Stamp Tax to the usual VAT Tax applied in the major part (or all) of the EEC is very important.

## RO > Romania

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

The factoring operations in Romania are regulated through incidental legal provisions and some regulations issued by the National Bank in Romania („BNR“) generally in relation to activities performed by commercial banks and non-banking financial institutions. So, a licence from National Bank of Romania („BNR“) is needed. Also, periodic reporting should be filed with BNR.

The applicable legislation issued by the BNR qualifies and includes the factoring operation in the general lending activity which may be performed only by commercial banks and non banking financial institutions IFN without providing a definition of the factoring operations (Law 469/2002 regarding measures for strengthening the contractual discipline, which is now repealed, defined the factoring operations as: „a contract concluded between a party, called adherer, supplier of merchandise or services, and a banking company or a specialized financial institution, called factor, whereby the latter provides the financing, monitoring of claims and safeguarding against credit risks, and the adherer transfers, perceived as sale, to the factor the claims emerged from the sale of goods or provision of services to third parties“).

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

In the absence of specific regulations related to factoring, the legal regime of such operations in Romania is represented by the general rules applicable to the assignment of receivables as a type of sale.

The Civil Code regulates the assignment of receivables under articles 1391-1398 Civil Code, in respect of assignments of receivables with certain obligations, with onerous title.

Creation and enforcement of the assignment of receivables are also regulated by Law 99/1999 regarding some measures for the acceleration of the economic reform – Title VI - dealing with security interests in personal property

*Please describe the physical process for the assignment of receivables*

The Factor enters into an assignment of receivables agreement with the Adherent/assignor, whereby the Adherent/assignor transfers the receivables (receivables are described) against a debtor, to the Factor, the debtor of such receivables becoming the Assigned Debtor. The assignment is notified to the assigned debtor and is registered with the Electronic Archive for Secured Transactions

Under Romanian law there is no legal requirement for a specific wording in order to have a valid assignment or purchase of receivables. It is worth mentioning that according to our practice an express clause („subrogation clause“) is used – consequently the invoices will bear the following clause: *„The receivables resulted from this invoice have been assigned to ....., and as a result, any payment under it shall be performed when due to the collection account no.....“*

In order to take the assets in possession the guarantee contract must include the following typed in capital letters with the dimension of a 12 points (0,5 cm) *„in case of non-performance, the assignee may use its own*

*means to take possession over the secured asset, without requiring the prior notice or authorization of the assignor, or the fulfilment of any judicial or extra judicial formality.*“

To take the assets in possession means that in case when the debtor does not fulfil his obligation, the creditor has the right to satisfy the debt with the assets allotted for the guarantee. For this purpose, the creditor has the right to take in possession, peacefully, the assets allotted to the guarantee or the products resulted from their revaluation, as well as the titles and registrations that discover the debtor's property right on the assets, without a previous authorization or notification being necessary and without paying taxes or tariffs.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

1. Registration:

In order to be opposable against third parties, the assignment of receivables needs to be promptly registered with the Electronic Archive for Secured Transactions, in favour of the assignee. The registration of a notice in this respect shall be valid for a period of 5 years. The assignee in order to preserve the right of priority, must renew the registration with the Electronic Archive for Secured Transactions before its expiry, for a period of another 5 years or for another period. If the registration is not renewed, the archive may erase any registration from the database and consequently the assignee will lose his right of priority.

Stamp-duty or other documentary taxes:

For the registration to the Electronic Archive for Security Transactions, and for any notarized deed some taxes/ stamp duty have to be paid.

2. Notification:

The assigned debtor must be notified in writing, by any means that ensures the receipt of the notice.

The notification may be done either by an act under private signature, through the intermediary of the instance or by an act certified by the public notary. From the moment when the debtor receives the notification, he may be free from obligation only when he effects the payment in the way indicated in the notification. However, if the debtor asks that the assignee presents the proof for the transfer and this is not done within 15 days from the date of the request, the debtor may continue to make the payments to the assignee. The proof of the transfer may be done through a certified copy of the assignment of receivables contract or of the guarantee contract or through a copy of the transfer's registration with the archive.

Nevertheless, between the assignment notified to the debtor or accepted by him and the transfer registered at the archive, according to the Title VI – Law 99/1999 the registered transfer shall have priority. In the case of successive transfers, the assignee who registered his transfer first at the Electronic Archive for Security Transactions shall have priority, no matter if he knows or not about the existence of other transfers.

*Are there any other requirements for a valid assignment?*

The assignment of a receivable is an agreement consequently it must fulfil all the agreement's validity conditions.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Under Romanian law the assignment of future claims is generally possible. However, some requirements are needed for the individualization of the receivables (the future receivables are, or can be determined) so that it is clear to the assignor and assignee which receivables are assigned. A "global assignment" of all existing and future receivables meets this requirement.

The actual transfer of ownership to the assignee will take place ipso jure, the moment the receivable comes in to being in the property of the assignor. Nevertheless the agreement on the assignment can be concluded

before whenever these receivables come into existence, they are automatically assigned to the assignee without the requirement of any further acts.

It worth mentioning that according to the Romanian law, one of the effects of the assignment of receivables between the assignee and assignor is that the assignor needs to represent and warrant for the valid existence of the receivables at the moment of assignment.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Under Romanian law a valid assignment of receivables requires a valid agreement between assignor and assignee. Consequently for a document in electronic form to be assimilated to a document under private signature the following conditions have to be fulfilled. The document in electronic form incorporates an electronic signature attached to or logically associated with it, based on a qualified certificate not suspended or not revoked at that time, and generated using a secure signature – creation device (according with Law on the Electronic Signature no 455/2001) .

In any case, should the written form is required as proof or validity condition of a legal document, a document in electronic form shall satisfy this condition if an extended electronic signature, based on a qualified certificate and created using a secure – signature- creation device was incorporated to, attached to or logically associated with it.

On the other hand, a document in electronic form that includes an electronic signature or has an electronic signature attached to or logically associated with it, acknowledged by the party the respective document is opposed to, has the same effects as an authentic document, between those who signed it and between those who are representing their rights.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

In order to obtain a qualified certificate, an agreement with service providers has to be concluded.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

Factoring and debt collection are subject to VAT. For factoring VAT has to be applied by the bank. VAT will be mentioned on an invoice issued by the bank.

For debt collection the buyer of the receivables has to register, calculate and pay VAT. VAT is not mentioned on an invoice.

Generally for any other assignments of receivables there is not VAT, but it is recommendable that each case is analysed separately.

*What is the VAT treatment of factoring commission/ service charge?*

Factoring commission/ service charge is VAT taxable, according to the applicable fiscal legislation.

*What is the VAT treatment of discount or interest?*

Discount or interest is subject to VAT for factoring services

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

The features of the services are important and not the features of the service provider. Therefore there are no differences between bank and non-banks engaged in receivables financing.

## Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

No third party rights can affect the rights conferred by an assigned receivable if: (i) the assignment of receivables is validly concluded; (ii) all the rules referring to the opposability against third parties and preference are fulfilled,

However, according to Law 99/1999 – Title VI dealing with security interests in personal property, to the third persons, including to the state, a guarantee and the other real duties shall have the rank of priority established in the moment when the guarantee or duties were made public through one of the methods provided by the Law 99/1999 – Title VI .

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

As a rule, the third party is just following the asset and not the receivable. The third party could take back the asset from the ultimate assigned debtor, but this does not relieve the assigned debtor from its obligation to pay the price, i.e. the receivable. The third party could however ask the assignor to pay him damages for being deprived of the supplied goods.

The reclamation, in case of a reservation of title against supplied goods, requires that the goods are still located in kind with the original buyer, meaning that they can be identified or are recognizable, otherwise the new buyer of the goods could invoke the provisions of article 1909 Civil Code and the presumption of good faith under article 1899 Civil code, that he was not aware of the existence of such a clause. When the goods are sold onward (modified or not) the reservation of title becomes valueless. In principle the reservation of title cannot affect the assignee's rights.

*Do these rights have to be registered or notified to be valid?*

The right of a third party over the supplied goods need to be registered with the Electronic Archive for Secured Transactions

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

According to Law 99/1999 regarding some measure for the acceleration of the economic reform – Title VI, any agreement that prohibits the assignment of receivables or requires the assigned debtor's consent as a condition or considers it as a non-fulfilling of the obligation shall be null and void. Nevertheless, such provisions are used in practice.

*What actions are needed to make the prohibition effective?* There are no such actions.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

If the factor was aware of the prohibition, there might be an issue of contractual liability of acting in bad faith, but the assignment will be valid.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

None of the situations mentioned above are regulated expressly under Romanian law, but conventionally the parties can agree in this respect – for either fixed or floating charges over receivables only or over all assets to be imposed.

It is possible to obtain a security interest, a fixed charge on receivables only, by way of a commercial pledge. Anyway, according to the Law 99/1999 – Title VI dealing with security interests in personal property, on the duration of the guarantee contract, the debtor may administer or dispose, in any way, of the assets allotted to the guarantee and of their products, including by renting, constituting other guarantee or selling them. Consequently the acts for disposing of the assets allotted for the guarantee are valid even if the one who acquired the assets knows the contractual provision in the guarantee contract that prohibits the transfer or that declares the transfer as being equivalent with the non-fulfilling of the obligation.

*Does a fixed or floating charge have to be publicly registered to be valid?*

For being valid (enforceable against the assignor) no registration is needed. For being perfected (enforceable against third parties), registration with the Electronic Archive for Secured Transaction is needed.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*

In this case, the assignment will be a true sale of the receivable.

- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*

In this case will be no transfer, but only a security interest (e.g. a pledge) attached to the receivables which become a transfer only after default of the secured obligation.

- *pledged to collateralize such a financing facility*

In this case, there is no transfer, but only a security interest (e.g. a pledge) attached to the receivables which become a transfer only after default of the secured obligation.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer 70%*  
*Cheque 13%*  
*Bill of Exchange 2%*  
*Other instruments 15% -*

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- *Non-Recourse Factoring*
  - *Recourse Factoring*
  - *Invoice Discounting (non-disclosed factoring with or without recourse)*
  - *Structured Financing including Inventory Financing*
  - *Giving guarantees to Third Parties for obligations of clients*
  - *Protection against third party payment default*
  - *Direct cross border factoring*
  - *2-Factor Cross-Border Factoring*
1. In the case of non recourse factoring, (where the factor purchases the receivables without a possibility of recourse against the client) the factor cannot file a claims in the insolvency procedure of the client and cannot register with the creditors' registry at the beginning of the bankruptcy procedure. However, in some specific cases (as mentioned in the factor agreement) the factor shall be entitled to recourse against the client (limited recourse);
  2. In the case of recourse factoring, the factor should register with the creditors' registry at the beginning of the bankruptcy procedure, observing the delays provided by the Romanian Insolvency Law.
  3. It is worth mentioning that under Romanian law (Insolvency Law 85/2006) as from the commencement of the proceedings, all judicial or extra-judicial actions for the realization of the claims against the debtor or his assets shall be suspended.

In all cases, the rights arisen in favour of the factor remain in place and valid. However the administrator or the liquidator may bring actions against the official receiver for the cancellation of fraudulent deeds concluded by the debtor to the detriment of the creditors in the three years prior to the opening of the proceedings.

The administrator or the liquidator may bring actions against the official receiver for cancelling the constitution or conveyance of ownership rights to third persons and for returning the assets conveyed along with the cost of other provisions, carried out by the debtor through the following acts:

(i) commercial transactions where the debtor's contribution manifestly surpasses that of the counterparty, effected in the three years before the commencement of the proceedings;

(ii) acts concluded in the three years before the commencement of the proceedings, with the intention of all parties involved thereto to prevent assets from being pursued by the creditors or to prejudice creditor' rights in any manner;

(iii) acts for the conveyance of property to a creditor to extinguish a previous debt or for the benefit of that creditor, effected in the 120 days before the commencement of the proceedings if the amount that would be achieved by the creditor in the case of the debtor's bankruptcy is less than the value of the conveyance act;

(iv) constituting or perfecting security interest in real property for a former simple-contract debt in the 120 days before the commencement of the proceedings;

(v) advanced payments of debts, effected in the 120 days before the commencement of the proceedings if their maturity was set for a date after the date of the commencement of the proceedings.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Interest: In accordance with the Romanian Commercial Code, the interest is due de jure (operates automatically) as a penalty in case of late payments. According to the law, the parties are free to establish the level of interest in their agreement. If there is no mention in the agreement regarding the level of the interest, the interest is established by law (legal interest) – Government Ordinance no. 9/2000 regarding legal interest.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments



## SE > Sweden

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Financing business including commercial operations with the purpose of (i) accepting repayable funds from the public, directly or indirectly via a closely linked undertaking and (ii) to grant loans, provide guarantees for loans or, for financing purposes, to acquire claims or grant rights of use in personal property (leasing) may only be conducted pursuant to licence. Banking business also requires a licence. In case the aforesaid requirements are not fulfilled then a licence or permit should not be required for the activities set forth above. The Swedish Financial Supervisory Authority exercises supervision over credit institutions.

A foreign credit institution domiciled within the European Economic Area may conduct its business through a (i) branch or (ii) cross border (different requirements applies). In case of cross border activities into Sweden, the Swedish Financial Authority should at least be notified if the transaction (-s) are more than a few. (Non-disclosed factoring is not a product in Sweden.)

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

Some aspects of the transfer of ownership of receivables is governed by the law of promissory notes (*Lag (1936:81) om skuldebrev*).

*Please describe the physical process for the assignment of receivables*

There must be a binding sale agreement between the seller and the purchaser. No formal requirements exist for a sale agreement, but for evidence purposes a written agreement is recommendable. In addition to the sale agreement the sale/purchase must be perfected, which is done by giving notice of the assignment to the debtor. The notice is commonly done on the invoice.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

The debtor of the receivable must be notified of the assignment. The notice shall at least state that the receivables have been transferred and also state the name of the purchaser.

*Are there any other requirements for a valid assignment?*

The assigned receivables must be sufficiently identified either in the sales agreement of receivables or in a deed of assignment executed under the sale and assignment agreement.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes, as long as the sale agreement sufficiently identifies the assigned receivables. The debtor has to be notified of each assigned (identified) receivable.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

As long as a sale agreement exists between the seller and purchaser and the debtor is duly notified of the assignment of the receivable, it should be possible to assign a receivable using an Electronic Data Exchange message. The structure of the assignment should be agreed in writing between the seller and the purchaser.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

N/A

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

There is some uncertainty concerning the interpretation of the decision of the ECJ dated the 26<sup>th</sup> June 2003 *Finanzamt Groß-Gerau versus MKG-Kraftfahrzeuge-Factoring GmbH*.

*What is the VAT treatment of factoring commission/ service charge?*

Fees pertaining to servicing of factoring arrangements (e.g. commissions and service charges) are subject to VAT.

*What is the VAT treatment of discount or interest?*

Discount and interest are normally exempted from VAT. Due to the decision by the ECJ (as stated above) there is, however, some uncertainty concerning the VAT-treatment of factoring transactions.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

No, in general the same VAT rules apply to banks and non-banks.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

N/A

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

In order for a reservation of title to be valid, the purchaser is not entitled to sell or otherwise dispose of the goods in its turn. The scenario set forth in this question should not be an issue in Sweden.

*Do these rights have to be registered or notified to be valid?*

N/A

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes, parties to an agreement may agree on a ban of assignment of receivables.

*What actions are needed to make the prohibition effective?*

The seller and the purchaser shall agree on such a prohibition in their agreement concerning sale of goods.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In case of a bona fide purchaser there should not be a problem after the debtor has been notified of the assignment. In case of a non bona fide purchaser it is, nevertheless, uncertain what the effect is.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

A fixed charge may be taken over receivables only. A floating charge (*företagshypotek/-inteckning*) has to be taken over all assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

A floating charge (*företagshypotek/-inteckning*) has to be registered at a registration authority.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):* No
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):*  
An issue may arise in case of new security provided for old debts.
- *pledged to collateralize such a financing facility:*  
An issue may arise in case of new security provided for old debts.

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 99%

*Cheque* 1%

*Bill of Exchange %*  
*Other instruments %*

There are two giro-systems in Sweden, plusgiro and bankgiro. From these systems the money transfers to a bank account.

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

After initiation of insolvency proceedings against the seller, the seller may no longer dispose of its assets. In case of a duly perfected true sale or pledge of receivables, the purchaser or the pledgee is entitled to exercise its ownership/pledged rights over already purchased/pledged receivables as long as they are separated from the seller's estate.

In case of inventory financing (leasing) the financier is the owner of the financed equipment and therefore the financier should be entitled to take back the leased equipment provided inter alia that the equipment is sufficiently identified in the lease agreement.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

If the seller and purchaser of goods have not agreed on a penalty interest in case of late payment, then under *Räntelagen (1975:635)* a creditor is entitled to a certain level of penalty interest in case of late payment by a debtor. Normally the seller and the purchaser of goods have agreed on a higher penalty interest than set forth in the aforesaid legislation.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

According to Swedish international private law the question whether a sale and purchase of receivables is perfected against any third party, is – most likely – decided by the law of the country in which the debtor is domiciled. Sweden thus applies the *lex rei sitae*-principle. In cross border transactions it can be difficult to fulfil all perfection rules applied in the different countries where the debtors are domiciled.

## SI > Slovenia

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

None of the above mentioned operations entail any special legal requirements.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Transfer of receivables is regulated by Obligacijski zakonik (Code of Obligations), official consolidated version is published in the Official Gazette of the Republic of Slovenia, No. 97/2007.

Please describe the physical process for the assignment of receivables

The receivables are assigned with a written contract between Client and Factor. For a valid assignment the Debtor does not need to be notified about the transfer although he is permitted to validly pay to the primary creditor (the Client) in cases where he is not informed about the transfer. Therefore notification to the debtor is usually necessary.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

In case of an insolvent debtor (Article 57 of Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju - Financial Operations, Insolvency Proceedings, and Compulsory Dissolution Act, Official Gazette of the Republic of Slovenia, No. 126/2007): when a creditor transfers a claim lodged in due time to a new creditor, such new creditor shall obtain the capacity ad processum, and the capacity ad processum of the previous creditor terminates upon a notification of the administrator (insolvency practitioner) by one of the creditors on the transfer, and upon presentation of relevant evidence thereof.

Are there any other requirements for a valid assignment? No.

Is it possible to assign future receivables by a so called "assignment in advance"? Yes.

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

Electronic signatures in Slovenia are governed by Zakon o elektronskem poslovanju in elektronskem podpisu (Electronic Commerce and Electronic Signature Act, published in the Official Gazette of the Republic of Slovenia, No. 57/2000) and no additional agreement is necessary (but not forbidden).

#### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?* No.

*What is the VAT treatment of factoring commission/ service charge?*

VAT is applied to the service charge/commission, unless the Client is a foreign company.

*What is the VAT treatment of discount or interest?*

VAT is also applied for discounts, but not for interest.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* There is no difference.

#### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

Such is possible (e.g. withholding tax).

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

In case that the final buyer acquires title to the sold goods (according to the provisions of Stvarnopravni zakonik – Law of Property Code, published in the Official Gazette of the Republic of Slovenia, No. 87/2002) the third party has no claim against the assignee. In case that the title is not acquired there is a claim.

*Do these rights have to be registered or notified to be valid?*

No, but the buyers signature has to be authenticated by the notary.

#### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?* Yes.

*What actions are needed to make the prohibition effective?*

It should be agreed between the client and the debtor.

*Is there any requirement for registration?* No.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The effect is the same – the claim can still be validly assigned, but the Debtor can still make a valid payment to the primary creditor, even if it was notified about the assignment.

### Question 7 Security Interests

*For this questionnaire a “fixed charge” is a security interest under which the client/ borrower is unable to deal with an asset without the creditor’s consent. A “floating charge” is security interest allowing the client/borrower to deal with the asset without consent until “crystallisation” such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

N/A

*Does a fixed or floating charge have to be publicly registered to be valid?* N/A

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):* No.
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):* No.
- *pledged to collateralize such a financing facility:* No.

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

<i>Bank-Transfer</i>	90%
<i>Cheque</i>	%
<i>Bill of Exchange</i>	10%
<i>Other instruments</i>	%

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

In each case the Factor's claim against the Debtor remains valid. In case of non-recourse factoring the factor cannot file a claim in the insolvency procedure of the client.

In case of non-disclosed invoice discounting the factor's claim against the debtor also remains. The position for structured financing depends on whether reservation of title was agreed on the goods or not. If not, the factor can be paid from the sale of goods.

In case of guarantees the factor must fulfil his obligation and try to obtain a refund from the client. In case of protection against a third party (the debtor?) payment default the factor must fulfil his obligation to the client if the debtor does not fulfil his own obligation.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Yes, there is a legal interest prescribed for late payments by Obligacijski zakonik (Code of Obligations).

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No.*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No.*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## SK > Slovakia -2007 Answers-

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Except for “protection against third party payment default” in the form of insurance, the industry is not regulated in any way. Running an insurance company requires license and supervision. On the other hand, an unregulated factoring company can conclude a non recourse agreement with the client and the effect is very similar to the insurance product.

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

The assignment of receivables is governed by the Civil Code.

The transfer needs to be in the form of a written agreement with sufficient identification of the receivable.

The debtor can ban the assignment in the contract with the seller and in that case, any kind of assignment is not valid.

Please describe the physical process for the assignment of receivables

A written contract on the assignment is required by law; receivables can be assigned without approval of the debtor. The debtor has to be notified about the assignment of a specific receivable without any delay.

After signing the assignment agreement, the supplier is obliged to send a notice to the debtor (separate notice or assignment legend printed on the invoice). The debtor has the right to raise any counterclaims against the supplier (in case they exist at that time) and announce that he will lower the payment. If he does not do this within a reasonable period of time after being informed about the assignment, he is obliged to pay the full amount to the factor.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

Yes, as mentioned, notification is required and this limits the possibilities to offer undisclosed factoring. Any assignment is binding for the debtor after he has been notified about the assignment. You have to be able to prove that the debtor was given notice in written form to be able to sue him.

On the supplier's side, the assignment agreement is enough to achieve a valid assignment.

No registration or stamp duty is required.

Are there any other requirements for a valid assignment?

A written contract over exactly specified receivables is necessary.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

This is only possible if they can be exactly specified at the moment of assignment. Exactly specified means e.g. to state the amount, invoice no., date of issue, due date etc.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

Certified electronic signature (certificates are issued by licensed companies) can be used by both parties to execute an assignment. Such assignment would be considered as legally risky, there are theoretical possibilities to use electronic signature but these processes are only in the starting phase at this moment.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures. (See above)*

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

There are two possibilities for handling factoring transactions from an accounting point of view. There are differences in VAT treatment. The applied approach is not supported by law or any other official guideline but only by recommendation of the Association of Accounters. Re-selling the receivable to a third party will cause the factoring company to lose the possibility of reclaiming VAT.

*What is the VAT treatment of factoring commission/ service charge?*

In both cases VAT has to be applied. There are two VAT rates, the higher one has to be used. The factoring commission or service charge is subject to VAT (19 % in 2007)

*What is the VAT treatment of discount or interest?*

Interest alone is not subject to VAT. In case it is constructed as a part of the factoring fee, it is. For discount, VAT has to be applied. If the contract sufficiently declares the factoring as credit financing, the interest charged is considered to be a financial expense and no VAT is applied.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing? No*

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)? Pledge*

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable? Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

No rights

*Do these rights have to be registered or notified to be valid?*

No

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes, the debtor has the right to ban the assignment

*What actions are needed to make the prohibition effective?*

It needs to be agreed between the creditor and the debtor in the contract.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

The effect is the same in all cases; the assignment of a receivable from a contract where any restriction on assignment was agreed is not effective.

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

There is nothing like a charge over assets in Slovakian law, only pledge. It is possible to pledge receivables.

*Does a fixed or floating charge have to be publicly registered to be valid?*

A pledge needs to be registered through a notary office to be valid.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)?* No
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)?* No
- pledged to collateralize such a financing facility?*

As a creditor with a pledge over the client's receivables you will receive only 70 % of the yield from the receivable, if the client goes bankrupt. Pledges created 2 months before the bankruptcy is declared are not valid. From 2008 the rate of 70 % rate will rise to 100%

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer* 99%

*Cheque* %

*Bill of Exchange* %

*Other instruments* 1%

In domestic transactions nearly 100% are paid by bank transfer, the other instruments are used only in export transactions.

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

As mentioned, there are two accounting schemes and in none of them the factoring company is in the position of a 100% independent creditor. A detailed analysis would require three pages. There are no significant differences between the various types of factoring solutions. In the case of undisclosed factoring, the receivables are not assigned according to the Slovakian legislation. In spite of this the product is offered but should be considered as a pure credit transaction.

A creditor has the best position if he is the owner of an asset (like in factoring). Any solution based on a pledge will cause a loss of the value as the asset is not under full control of the creditor (the yield is determined by the administrator).

In case of a client bankruptcy all receivables will fall due immediately. This also applies to unpaid parts of the purchase price of receivables to a factor. For example if the factor has only paid 80% of the purchase price he is obliged to pay the remaining 20% immediately, even if the receivable in question is not due or has not been paid by the debtor.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Those agreed in the agreement. Otherwise a rate defined by the law can be applied – 7 % above repo rate (9,75 % together).

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): Yes*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

Factoring and other financial instruments related to the assignment of receivables are completely unregulated. The third parties (courts, financial authorities) sometimes do not know how to handle it. There is a latent danger that the applied processes might be negatively influenced by future changes in legislation. The efforts of the factoring community to improve the position were without any results up to now.

A revision of the tax law will take effect during 2008/2009. Only a certain level of financial costs will then be tax effective. This could create very adverse environment for highly leveraged companies from a tax point of view.

# Country details

## Non EU Countries



## CH > Switzerland

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- *Non-Recourse Factoring*
  - *Recourse Factoring*
  - *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
  - *Structured Financing , including Inventory Financing*
  - *Giving guarantees to Third Parties for obligations of clients*
  - *Protection against third party payment default*
  - *Direct cross border factoring*
  - *2-Factor Cross-Border Factoring?*
- a) *Non-Recourse Factoring*: no license or governmental supervision/regulation
- b) *Recourse Factoring*: no license or governmental supervision/regulation
- c) *Invoice Discounting (non-disclosed factoring with / without recourse)*: no license or governmental supervision/regulation
- d) *Structured Financing*: no license or governmental supervision/regulation
- e) *Giving guarantees to 3rd parties for obligations of client*: no license or governmental supervision/regulation
- f) *Protection against third party payment default*:
- 1) *purchase or financing of receivables*: no license or governmental supervision/regulation
  - 2) if acting as an *insurance company*: license necessary and governmental supervision/regulation (Bundesgesetz betreffend die Aufsicht über Versicherungsunternehmen; Verordnung über die Beaufsichtigung von privaten Versicherungsunternehmen; Verordnung der Eidgenössischen Finanzmarktaufsicht über die Beaufsichtigung von privaten Versicherungsunternehmen)
- g) *Direct cross border factoring*: no
- h) *2-Factor Cross-Border Factoring*: no

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Art. 164 – 183 Swiss Code of Obligations (CO)

- Assignment must be in writing
- Contractual prohibition against the assignment of receivables is valid

Please describe the physical process for the assignment of receivables

Art. 164 CO ("A. Assignment of claims, I. Requirements, 1. Voluntary assignment, a. Permissibility "):

1 The obligee may assign a claim to which he is entitled to another without the consent of the obligor, unless the law, an agreement, or the nature of the legal relationship is to the contrary.

2 The obligor cannot raise, against a third party who has acquired the claim in reliance upon a written acknowledgment of indebtedness which does not contain a prohibition of assignment, the defense that the assignment has been precluded by agreement.

Art. 165 CO ("b. Form of contract"):

1 In order to be valid, an assignment must be in writing.

2 The obligation to conclude a contract of assignment may be entered into without requirement as to form.

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:

- registration
- stamp-duty or other documentary taxes
- notification?

a) *Registration*: not necessary

b) *Stamp-duty or other documentary taxes*: no

c) *Notification*: yes; without a notification, the debtor may validly discharge by payment to the assignor

d) *Art. 167 CO ("II. Effect of assignment, 1. Position of the obligor, a. Payment in good faith")*:

If the obligor, before having been notified of the assignment by the assignor or assignee, pays in good faith to the former obligee or, in the case of more than one assignment, to a previous assignee who has ceded his rights, he will be validly discharged.

Are there any other requirements for a valid assignment? No.

Is it possible to assign future receivables by a so called "assignment in advance"?

Yes, this is possible, but the receivables have to be determined or (at least) determinable.

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message?

According to Swiss law, the assignment has to be in written form. Therefore it is necessary to include the assignment into a written agreement.

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.

A written agreement is necessary, according to which the assigned receivables can be determined.

Electronic signatures: new law came into force in 2005 (Bundesgesetz über Zertifizierungsdienste im Bereich der elektronischen Signatur); nevertheless, electronic signatures are not very common yet.

### Question 4 Value Added Tax

Are there any VAT issues or problems in your country concerning the assignment of receivables?

The VAT legislation does not provide a clear guideline of the definition and VAT treatment of factoring services. Moreover the Federal Tax Administration has developed a complex VAT practice regarding the VAT treatment of factoring services without appropriate criteria for the VAT qualification of the respective services in the factoring business.

Since 1 January 2010 the Swiss VAT law contains a special VAT liability rule in case of assignment of receivables and insolvency of the client. Practice rules especially regarding the application in connection with factoring services are still missing.

What is the VAT treatment of factoring commission/ service charge?

Due to the complex rules no generally valid statement can be made. The VAT qualification depends on the factoring product structure in the particular case and is affected by the single service modules provided to the client.

If the factoring services are qualified as taxable with VAT, a VAT rate of 8% applies.

*What is the VAT treatment of discount or interest?*

Interest is in principle VAT exempt. For discount no general statement can be made.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

For pure financing services there are in principle no differences

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

- contractual prohibition against the assignment of receivables
- earlier assignment or pledge

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Retention of title is possible, but neither very common nor very effective.

*Art. 714 Swiss Code Civil ("Retention of title, a. In general"):*

<sup>1</sup> Retention of title with regard to a chattel transferred to an acquirer is only valid if it is entered in a public register kept by the debt enforcement official at his current domicile. [...] Retention of title may cease, if chattel is transformed in good faith.

Swiss law does not recognize a "verlängerter Eigentumsvorbehalt" (retention of title) or something similar; therefore no difference between the three kinds of factoring exists.

*Do these rights have to be registered or notified to be valid?*

The retention of title has to be registered to be valid.

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes, according to art. 164 (1) CO (cf. above).

*What actions are needed to make the prohibition effective?*

Agreement between obligee/creditor and obligor/debtor

*Is there any requirement for registration? No*

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

In all cases: No valid assignment.

## Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

It is possible to obtain a fixed charge on specified receivables or on all assets. The charged assets have to be determined or have to be determinable. From a legal point of view "floating charges" are not possible.

Does a fixed or floating charge have to be publicly registered to be valid? No

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are:

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No

- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees):

No, but fiduciary relationship between assignor and assignee

- pledged to collateralize such a financing facility:

Yes, the pledgee is not owner of the receivables.

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 99%

Cheque 1%

Bill of Exchange %

Other instruments %

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

Given the valid assignment of the claims,

a) all claims created and in existence *prior* the opening of bankruptcy: claims belong to the factor;

b) all claims created on or after that date: receivables belong to the bankruptcy assets.

Regarding the necessity of notification, please see above (cf. no 2).

No special pitfalls.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

1. interest:

*Art. 104 CO ("Penalty interest; a) in general"):*

- 1 If an obligor is in default as to the payment of a financial debt, he shall pay penalty interest at five percent per annum, even if the contract provides for a lower rate.*
- 2 If a higher interest rate than five per cent has been agreed upon in the contract, whether directly or by stipulation of a periodic bank charge, such higher interest may be claimed during the period of the default.*
- 3 As between merchants, if the usual bank discount at the place of payment is higher than five percent, penalty interest may be calculated at such higher rate.*

*Art. 105 CO ("b) In case of interest, pensions, donations"):*

- 1 An obligor who is in default with the payment of interest, or with the payment of pensions, or with the payment of a donated sum, must only pay penalty interest from the day of the demand for enforcement or the institution of a legal action.*
- 2 An agreement to the contrary is to be handled in accordance with the principles regarding liquidated damages.*
- 3 No penalty interest shall be calculated on penalty interest*

2. Further damage *Art. 106 CO ("Further damage"):*

- 1 If the obligee has incurred greater damage than that compensated by the penalty interest, the obligor will be obligated to also compensate such damage unless he proves that no fault is attributable to him.*
- 2 If this additional damage can be estimated in advance, the judge may award it in the judgment regarding the principal claim.*

3. Withdrawal from contract (Art. 107 – 109 CO)

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- the UNIDROIT Convention on International Factoring (1988): No*
- United Nations Convention on the Assignment of Receivables in International trade (2001): No*

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No Comments.



## NO > Norway

### Question 1 Legal requirements to operate

Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (i.e. non-disclosed factoring with or without recourse)
- Structured Financing , including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring?

For Non-Recourse Factoring, Recourse Factoring and Invoice Discounting a license is required. No answer has been received on the other products

### Question 2 Transfers of Receivables

Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?

Notification is necessary

*Please describe the physical process for the assignment of receivables*

Notification (both in letters and on the invoices) and public registration

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

Notification is necessary (see Mortgages and Pledges Act)

*Are there any other requirements for a valid assignment?*

N/A

*Is it possible to assign future receivables by a so called "assignment in advance"?*

N/A

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message? Yes

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures. Notification

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

No issues or problem

*What is the VAT treatment of factoring commission/ service charge?* 25 % VAT is charged

*What is the VAT treatment of discount or interest?* No VAT is charged

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* No

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

You need a "solidar fritak for arb.giver avg og skatt" concerning recruitment agencies

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Disputes

*Do these rights have to be registered or notified to be valid?* N/A

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?* N/A

*What actions are needed to make the prohibition effective?* N/A

*Is there any requirement for registration?* N/A

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?* N/A

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

All assets and then you may sign away some assets.

*Does a fixed or floating charge have to be publicly registered to be valid?*

No, but it is recommended. Notification is the most important.

## Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting): No
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees): No
- pledged to collateralize such a financing facility: No

## Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

Bank-Transfer 100%

Cheque 0%

Bill of Exchange 0%

Other instruments 0%

## Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

If a client becomes insolvent and there are outstanding debts, we have to issue/ notify a contingent demand on the property of the insolvent company.

## Question 11 Late Payments

Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest

Overdue interest

## Question 12 International Conventions

Has your country ratified or does it intend to ratify either:

- the UNIDROIT Convention on International Factoring (1988): No
- United Nations Convention on the Assignment of Receivables in International trade (2001): No

**Question 13 Any other Matters**

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## RU – Russia

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

*Please give details for each product.*

Factoring is not a licensed business in Russia. However, only banks can effectively perform ABL operations, since non-banking institutions can only offer products based on the purchase of receivables. Cross-border factoring operations are subject to currency exchange regulation requirements, which limit the capabilities of non-banking factors. Guarantees can be issued only by banks (banking guarantees) or insurance companies (insurance guarantees). Non-banking institutions can provide sureties (for instance obligation to pay instead of the buyer in case of default of the latter).

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

Civil Code of the Russian Federation (Chapter 43, Financing against assignment of receivables)

*Please describe the physical process for the assignment of receivables*

The seller concludes a factoring agreement with the factor. The buyer must be duly notified. Normally, an introductory letter will be sent by the seller to the buyer. The buyer will be asked to countersign the letter, although there is no direct requirement in this respect in the Civil Code. An assignment note will be also printed on all invoices.

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification?*

Only notification.

*Are there any other requirements for a valid assignment?*

The buyer must be duly notified by the seller .

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message.*

Yes, however there are certain limitations. In order to be effective in court, an electronic invoice has to be signed electronically by both parties, i.e. seller and buyer.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

Yes, a separate written agreement is required.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables? No*

*What is the VAT treatment of factoring commission/ service charge?*

All types of factoring commission and charges are subject to 18% VAT.

*What is the VAT treatment of discount or interest?*

All types of factoring commission and charges are subject to 18% VAT, including interest.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?*

The only difference is that banks do not pay VAT when issuing sureties (protection against buyer's default).

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

No specific third party right can affect an assigned receivable.

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable? Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

There is no concept of prolonged retention of title in Russia.

*Do these rights have to be registered or notified to be valid?*

N/A

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

No

*What actions are needed to make the prohibition effective? N/A*

*Is there any requirement for registration? N/A*

What is the effect of a prohibition upon factoring or invoice discounting (in each case with or without recourse)? N/A

### Question 7 Security Interests

For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is a security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?

Does a fixed or floating charge have to be publicly registered to be valid?

Receivables can be pledged as collateral or assigned to collateralize a financing facility.

### Question 8 Purpose of Assignment

Are there any differences in the legal status if receivables are:

- assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)  
Civil Code Chapter 43 "Financing against assignment of receivables" shall be applied.
- assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)  
Civil Code Chapter 43 "Financing against assignment of receivables" shall be applied.
- pledged to collateralize such a financing facility  
In this case, there will be no transfer, but only a security interest attached to the receivable.

### Question 9 Payments

Please estimate the payment structure for corporate businesses in your country by percentage:

- Bank-Transfer %
- Cheque %
- Bill of Exchange %
- Other instruments %

There is no official data available, but bank transfer and cash (particularly in micro and small business area) are the most used methods of payment. Cheques are not used in Russia.

### Question 10 Client Insolvency

Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting (non-disclosed factoring with or without recourse)
- Structured Financing including Inventory Financing
- Giving guarantees to Third Parties for obligations of clients
- Protection against third party payment default
- Direct cross border factoring
- 2-Factor Cross-Border Factoring

Client's insolvency does not affect receivables, assigned according to Chapter 43 of the Civil Code.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind ) applying to debt defaulters? E.g. interest*

According to Article 395 of the Civil Code, penalty is applied in case of late payment. The penalty is expressed as an interest, equivalent to the base rate of the Central Bank of Russia.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *The UNIDROIT Convention on International Factoring (1988)* No
- *United Nations Convention on the Assignment of Receivables in International trade (2001)* No

### Question 13 Any other Matters

*Are there any other matters that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## TR > Turkey

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licences or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

According to the related legislation, an operating permit in order to execute and perform factoring transactions needs to be given by the Banking Regulation and Supervision Agency to factoring companies.

There is no legal specification or requirement on product base in Turkey. However, under the Turkish legal system, the factoring companies:

- are not allowed to enter into other transactions except those regarding the main activities of the companies
- are not allowed to arrange and deliver letters of guarantee
- are not allowed to collect deposit by compounding allowance etc. except borrowing loans from the international markets within issuance of securities in accordance with the Capital Market Law.
- are not allowed to acquire and undertake collection of receivables that cannot be verified with the invoices or any other related documents that have already arisen or of receivables that would arise from sales of goods or services and that cannot be verified in the way prescribed by the Banking Regulation and Supervision Agency.

In relation with the above-mentioned rules, the factoring companies are not allowed to give guarantees to third parties for obligations of clients or are not allowed to provide protection against third party payment default.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

The provisions relating to the assignment of receivables are contained in the Code of Obligations.

When a factoring agreement is signed by and between the factoring company and the Client, it enables the Factor's Client (Seller) to make use of factoring services by way of assignment, in advance and in a lump sum, to the factor of all his receivables/claims that have already arisen and/or that would arise within the period of agreement from his national/international sales of goods or services in relation to its business.

*Please describe the physical process for the assignment of receivables*

After signing the factoring agreement, the assigned receivables are notified by a Notification and Transfer of Receivables Form (NTR) and the photocopies of the invoices should be enclosed for each assignment by the Factor's Client (Seller).

Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-

- registration
- stamp-duty or other documentary taxes
- notification?

No need for registration of assignment, but notification related to transfer of receivables must be written. There is no stamp duty for the factoring transactions.

Are there any other requirements for a valid assignment? No

Is it possible to assign future receivables by a so called "assignment in advance"?

Yes, the future receivables can be assigned.

### Question 3 EDI

Can a receivable be validly assigned using an Electronic Data Exchange message?

Under the Turkish legal system, there is no way to assign receivables using an Electronic Data Exchange Message.

Please state any requirements e.g. for a separate written agreement governing procedures or electronic signature.

Under the Turkish legal system, the factoring agreement must be signed by both of the parties. Electronic signature is not applicable.

### Question 4 Value Added Tax

Are there any VAT issues or problems in your country concerning the assignment of receivables? No

What is the VAT treatment of factoring commission/ service charge?

There is no VAT but instead BITT (Banking Insurance and Transaction Tax), applied to all kinds of charges, which is 5%. According to the Turkish Law services rendered to Turkish exporters are exempt of any tax.

What is the VAT treatment of discount or interest? No VAT. Only 5% BITT

Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing? There is no VAT.

### Question 5 Third Party Rights

What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?

All kinds of Government receivables have priority over all receivables as per Turkish law.

What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?

Please indicate any difference between

- Non-Recourse Factoring
- Recourse Factoring
- Invoice Discounting

A general answer is not possible. These cases need to be analysed and solved according to different rules and each specific case should be investigated separately

*Do these rights have to be registered or notified to be valid?* No

### Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Yes. Buyer and seller can conclude a contract which prohibits the assignment of receivables.

*What actions are needed to make the prohibition effective?*

If there is a contract between Buyer and Seller which prohibits the assignment of receivables, both buyer and seller should give written permission for each receivable to be assigned. Otherwise the assignment cannot be made.

*Is there any requirement for registration?* No

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

Due to prohibition of assignment, the receivable cannot be transferred to any third party.

### Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

Both are possible. It is up to the company's management decision.

*Does a fixed or floating charge have to be publicly registered to be valid?*

The charge rate is negotiable by both client and the factor there is no need for public registration in order for the charge to be valid.

### Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are:*

- *assigned in fulfilment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting):* No
- *assigned to collateralize a financing facility (Structured Finance, Issuing Guarantees):* No
- *pledged to collateralize such a financing facility:* No

### Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

Bank-Transfer %

Cheque %

Bill of Exchange %

Other instruments %

Exact ratios cannot be given as there is no relevant statistics. However post dated cheques come first and then bank transfer as the most commonly used instruments.

### Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

The factor has the right to start legal procedures for collection of the debt of the client as per Turkish laws and regulations and as per GRIF rules and regulations.

### Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Each financial institution mentions the type of penalties they will use in the agreements made with the client. Most commonly utilized penalty is interest.

### Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988): No*
- *United Nations Convention on the Assignment of Receivables in International trade (2001): No*

### Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

No comments

## US > United States of America

### Question 1 Legal requirements to operate

*Are there any legal requirements in your country (e.g. licenses or continuing government supervision or regulation) necessary for the operation of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting ( i.e. non-disclosed factoring with or without recourse)*
- *Structured Financing , including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring?*

Legal requirements in the United States can be imposed at the federal level or at the State level. With respect to the above-described credit accommodations, there are no federal licenses or government approvals that must be obtained. Similarly, a majority of the states in the United States do not impose any licensing or government approval requirements on providers of the loans and other credit accommodations described above. However, certain states require that a lender or other provider of credit accommodations obtain a license from the state or qualify to do business in that state. Whether these requirements are imposed generally depends, in part, upon the level of activity conducted by, or the presence of, such lender or other provider in the particular state. The standards and requirements vary significantly from state to state.

### Question 2 Transfers of Receivables

*Please provide brief details of any specific laws in your country governing the transfer of ownership of receivables?*

In the United States, both the consensual grant of rights in receivables to secure the payment of a debt or other obligation and the outright assignment of accounts receivable are, in general, governed by the laws of the state of the United States applicable to the transaction, rather than federal law. The laws in a state that apply to such transactions are set forth in Article 9 of the Uniform Commercial Code (the "UCC") as adopted in that state. The Uniform Commercial Code is a model law that was prepared and sponsored by a national commission of state-appointed lawyers, the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), interested in establishing consistency among the laws of the different states in many areas of law. First introduced in 1952 and subsequently substantially revised in 1962, by 1968 the UCC was in effect in 49 of the 50 states. All 50 states have now enacted Article 9 of the UCC based on the 1999 model version that was subsequently developed by NCCUSL, with only minor variations from that model version. This version of Article 9 became effective in most States as of July 1, 2001, and in a few others by October of 2001 or January 1, 2002. All references in this questionnaire to provisions of the UCC are to the model version, and state variations should be consulted in all cases.

For purposes of Article 9 of the UCC, both (i) the grant of a security interest in receivables to secure an obligation and (ii) an outright assignment of receivables fall within the definition of the term "security interest" as used in the statute. (Even though Article 9 deals primarily with security interests, outright assignments of receivables are included because they resemble security interests in receivables in so many respects.) Section 1-201 of the UCC provides in relevant part:

"Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The term also includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Article 9..." (emphasis added).

The term "accounts" as defined in Section 9-102 of the UCC includes "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered, (iii) for a policy of

insurance issued or to be issued, (iv) for a secondary obligations incurred or to be incurred..." and other more specific types of rights to payment. Thus, the UCC uses the term "account" to describe receivables.

There are also certain transactions involving the sale or assignment of receivables that are excluded from Article 9 of the UCC by its terms. These transactions include (i) a sale of receivables as part of a sale of a business out of which they arose, (ii) an assignment of receivables for the purpose of collection only and (iii) an assignment of a single receivable to an assignee in full or partial satisfaction of a pre-existing indebtedness. UCC § 9-109(d). Such transactions are governed by general contract laws of the applicable jurisdiction rather than the UCC.

Article 9 by its terms also does not apply to the extent that: (i) a statute, regulation, or treaty of the United States preempts it; (ii) another statute of the applicable state expressly governs the creation, perfection, priority, or enforcement of a security interest created by the state or a governmental unit of the State; (iii) a statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest, created by the state, country, or governmental unit, or (iv) the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 5-114 of the UCC.

Of course, the rights of the assignee may be affected by other laws beyond Article 9 of the UCC, most notably the United States Bankruptcy Code, which is a federal law. However, in general, federal law does not preempt and will defer to State law for the process of creating a security interest and "perfecting" it (that is, making it effective against third parties).

Whether an assignment is a "true sale" is a complex issue that is often subject to elaborate legal opinions in the securitization context. While there are no hard and fast rules, it is generally thought that, if there is more than nominal recourse to the assignor (i.e. more than 10%), a true sale may not have occurred. When there is sufficient recourse to the seller, then the assignment would be considered a security interest instead of a true sale. In either case, whether an assignment is a true sale or merely a security interest, the assignee must file a UCC financing statement in order for its interest to be effective against third parties.

Some of the other statutes that affect a security interest are discussed below.

*Please describe the physical process for the assignment of receivables*

The physical process for the assignment of receivables involves the due execution and delivery by the assignor/debtor of a "security agreement" (defined below) in favour of the assignee/secured party. The term "debtor" is defined in the UCC to refer to, and as used in these materials means, either a person having an interest in the collateral to secure an obligation or a seller of accounts. The term "secured party" is similarly defined to cover both a person in whose favour a security interest is created or provided under a security agreement and a person to whom accounts have been sold. Unlike the terminology used in many other countries, the term "debtor" is not used to refer to the party obligated to make payment on receivable; under the UCC, the obligor on a receivable is referred to as the "account debtor."

Under the UCC, a "security agreement" is defined as an agreement that creates or provides for a security interest. UCC § 9-203 provides that a security interest is only enforceable against the debtor and third parties with respect to the "collateral" (in this case the assigned accounts) if: (i) value has been given by the assignee/secured party to the assignor/debtor, (ii) the assignor/debtor has rights in the "collateral" or the power to transfer rights in the collateral to the assignee/secured party and (iii) the debtor has "authenticated" a security agreement that provides a description of the collateral.

The term "authenticated" is defined in the UCC to mean to sign or to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record. A "record" is defined as information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in perceivable form.

Consequently, in general, a security agreement covering receivables should:

- (i) be in writing (please note, however, that for certain other types of assets, possession of the collateral by the secured party may be an acceptable alternative under the UCC);

- (ii) be signed or otherwise authenticated by the debtor;
- (iii) use words showing an intent to create a security interest; and
- (iv) include a description of the collateral (that is, the receivables).

Under Section 9-108, a description of the collateral is sufficient for purposes of the requirements for a security agreement if the description "reasonably identifies" the collateral, whether or not the description is specific. See UCC § 9-108(a). Section 9-108 expressly states that a description of collateral reasonably identifies the collateral for purposes of the security agreement if the security agreement identifies the collateral either by a specific listing or by category or by a type of collateral defined in the UCC (e.g. all "accounts"). However it is not sufficient for purposes of the security agreement to describe the collateral as "all of the debtor's assets" or "all of the debtor's personal property" or words of similar import. See also *Maxus v. Kobelco America, Inc.*, 2007 U.S. Dist. LEXIS 13312 (N.D.N.Y. 2007) (explaining that collateral is reasonably identified if its identity is "objectively determinable" even if it includes minor errors); *First National Bank of Lewisville v. Bradley*, Ark. App. 368, 372 (Ariz. Ct. App. 2003) (explaining that the test of sufficiency of a description is whether it makes possible the identification of the thing described; the description need not be such as would enable a stranger to select the property); *In re Bennett Funding Group*, 255 B.R. 616, 636 (Bankr. N.D. NY 2000) (explaining that any description of collateral must enable a third party to distinguish between collateral and other, similar goods that the debtor owns).

*Are any of the following necessary to achieve a legal assignment valid against the account debtor or the supplier's insolvency practitioner or third party creditors:-*

- *registration*
- *stamp-duty or other documentary taxes*
- *notification ?*

The filing of the financing statement is not required to establish the rights of the assignee/secured party as against the assignor/debtor, but filing of a financing statement by the assignee/secured party is necessary to establish its rights against third parties, including a trustee in the event an insolvency proceeding is commenced with respect to the assignor/debtor, and subsequent purchasers. The establishment of such effectiveness and priority is referred to as the "perfection" of the security interest.

Under Section 9-502 of the UCC, a financing statement is sufficient if it:

- (i) provides the name of the assignee/debtor,
- (ii) provides the name of the secured party or a representative of the secured party, and
- (iii) "indicates" the collateral covered by the financing statement.

As contrasted with the requirements for a security agreement, for purposes of the financing statement, only an "indication" of the collateral is required, rather than a "description" of it. Section 9-504 expressly provides that an indication of collateral is sufficient for this purpose if it provides a description pursuant to Section 9-108 (as described above), so that a type or category of asset, or using a defined term from the UCC, such as "accounts," is sufficient) or even a statement that the financing statements covers "all assets" or "all personal property." Such an "indication" is understood to include both existing and future assets of the applicable category or all existing assets, as the case may be.

As noted above, there are also certain transactions involving the sale or assignment of accounts that are excluded from Article 9 of the UCC by its terms and therefore do not require the filing of a financing statement. These transactions include (i) a sale of receivables as part of a sale of a business out of which they arose, (ii) an assignment of receivables for the purpose of collection only and (iii) an assignment of a single receivable to an assignee in full or partial satisfaction of a pre-existing indebtedness.

Each state maintains a registry in which financing statements are recorded that may be searched by the public. Under the UCC, the financing statement naming the assignee/debtor is required to be filed in the UCC registry in the state where the assignee/debtor is deemed "located" in accordance with the rules set out in Section 9-307 of the UCC. For example, if the assignor/debtor is a legal entity organized under the laws of

a state within the United States, then the assignor/debtor is deemed located in the state in which it is organized for purposes of the perfection of the rights of the assignee/secured party.

No stamp duty or other document tax *per se* is required to achieve a legal assignment that is valid against the debtor or third parties. However, a fee is charged for filing a financing statement. The government office in each state which maintains the UCC registry will charge a fixed fee for filing the financing statement. The amount of the filing fee charged by the different states is nominal, and not related to the amounts involved in the underlying transaction (except in Tennessee and Florida, where there are separate "taxes" payable under certain circumstances in connection with the filing of a financing statement).

Notification of the assignment to the account debtor is not necessary for a valid assignment. However, pursuant to Article 9 of the UCC, an account debtor has a right to pay the assignor until the account debtor receives appropriate notification of the assignment of receivables. See UCC § 9-406(a). After receiving appropriate notice of the assignment, the account debtor can only discharge its obligation by paying the assignee/secured party. *Id.* For the notification to be effective under Article 9 of the UCC, the notification must, among other things, reasonably identify the rights assigned. See UCC § 9-406(b).

In addition to the requirements described above, a secured party/assignee may also be required to furnish reasonable proof of the assignment, such as an authenticated writing, if requested to do so by the account debtor. See UCC § 9-406(c). If an assignee fails to comply with any such request, the account debtor may discharge its obligation by paying the borrower/assignor, even if the account debtor has received notice of the assignment. See UCC § 9-406(c).

*Are there any other requirements for a valid assignment?*

The only other requirements are those applicable to any other contract binding upon the parties under applicable contract law.

*Is it possible to assign future receivables by a so called "assignment in advance"?*

Yes. Assignments of receivables may be of both existing and future receivables if so provided in the security agreement. See UCC § 9-204(a). For most purposes, the effectiveness of the assignment or establishing the rights of the assignee/secured party to the receivables as against most other creditors will be the earlier of the date on which the assignment is perfected or the date on which a financing statement is filed.

### Question 3 EDI

*Can a receivable be validly assigned using an Electronic Data Exchange message?*

UCC financing statements evidencing security interests in receivables can be filed electronically in many (but not all) jurisdictions in the United States. For more information on UCC financing statements, see Item 6 below.

*Please state any requirements e.g. for a separate written agreement governing procedures or electronic signatures.*

UCC financing statements do not need to be signed by the debtor or the secured party in order to be effective.

### Question 4 Value Added Tax

*Are there any VAT issues or problems in your country concerning the assignment of receivables?*

No, there is no V.A.T. in the U.S.. However, in certain states a lien for unpaid personal property has priority over a previously perfected security interest.

*What is the VAT treatment of factoring commission/ service charge?* N/A.

*What is the VAT treatment of discount or interest?* N/A.

*Are there any differences in the VAT treatment between banks and non-banks engaged in receivables financing?* N/A.

### Question 5 Third Party Rights

*What third party rights can affect an assigned receivable (e.g. taxes, social security dues or any other official or private rights)?*

An assignee's rights in receivables *vis-à-vis* third parties can be affected by federal and state tax claims as well as various other federal and state statutes. At the federal level, these include the Assignment of Claims Act and the Federal Tax Lien Act. See 31 U.S.C.A. § 3727 (2007); 26 U.S.C. § 6321 (2007).

A federal tax lien will have priority over a security interest in receivables unless one of two exceptions applies. The first exception applies if the receivables are already in existence and subject to a perfected security interest at the time the notice of federal tax lien is filed. Under this exception, a prior perfected security interest in any such "pre-existing" receivables will have priority over a federal tax lien. The second exception applies if (i) the receivables are created by the debtor within 45 days after notice of a federal tax lien is filed (regardless of whether when the grantee/assignee had actual knowledge of the tax lien filing), (ii) the receivables are covered by a security agreement entered into before the notice of the federal tax lien was filed, and (iii) the secured party filed a financing statement with regard to these receivables prior to the filing of the notice of federal tax lien. Under this exception, a security interest has priority over a federal tax lien to the extent the security interest secures advances made before the earlier of (A) 45 days after the notice of federal tax lien is filed and (B) the date on which the grantee/assignee received actual knowledge of the tax lien filing. Advances made after expiration of the 45-day period will be secured (if at all) by a security interest subordinate in priority to the federal tax lien.

In addition to a federal tax lien, a security interest in receivables may be subordinate to the claims of beneficiaries of the statutory trusts established under the Perishable Agricultural Commodities Act ("PACA") and the Packers and Stockyards Act ("PASA"). PACA and PASA provide protection to sellers of fresh fruit and vegetables, and sellers of livestock, respectively, in the form of a statutory constructive trusts. The PACA and PASA statutory trusts consist of, among other assets, accounts receivable generated by the sale of produce and livestock. A trust beneficiary's interest in these receivables can have priority over a prior perfected security interest in the accounts. In *Nickey Gregory Co, LLC et. al. v. AgriCap, LLC*, 2010 US APP LEXIS 4587 (4<sup>th</sup> Cir. March 4, 2010), the Fourth Circuit concluded that factoring arrangement was not a sale based on various factors, including that risk of non-collection was not transferred to the factor because the factor maintained recourse against the company if a receivable remained unpaid, or for other reasons. As a result of the characterization of the arrangements as secured loan, the factor was required to turn over the receivables to satisfy a claim under PACA.

At the state level, there are several possible claims that may adversely impact the priority of a security interest in a receivable. For example, some states grant a priority lien in favor of (i) landlords for unpaid rent or other charges, (ii) processors and repairmen for unpaid expenses such as repairs, shipping, and storage, (iii) the state for unpaid personal property taxes, (iv) the state for unpaid expenses incurred in the clean up of hazardous wastes or other environmental conditions, (v) employees for unpaid wages and (vi) judgment creditors under certain circumstances. See, e.g., N.Y. CLS Lien § 182 (2007) (creating priority lien in favour of owner of self storage facility for unpaid storage costs); Va. Code Ann. § 43-33 (2007) (creating priority lien in favour of unpaid mechanics); N.J. Stat. § 2A:44-157-164 (2007) (creating priority lien in favour of unpaid processors of goods); N.Y. CLS ECL § 15- 0511 (2007) (creating a lien for unpaid environmental cleanup costs); R.I. Gen. Laws § 44-3-1 (2007) (creating a lien for unpaid environmental cleanup costs); Conn. Gen. Stat. § 22a-452a (2007) (creating a lien for unpaid taxes owed to the State of Connecticut); Fla. Stat. § 197.122 (2007) (creating a lien for unpaid taxes owed to the State of Florida).

*What are the rights, against an assignee of a receivable, of third party creditors who have a deep reservation of title against goods supplied to the assignor and then onward sold to create an assigned receivable?*

*Please indicate any difference between*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting*

Retention-of-title rights, which are so prevalent in Europe and other parts of the world, are not enforceable in the United States. U.S. secured transactions law is based on a "unitary" concept tied to function and intent, under which a reservation of title pursuant to which the seller of goods retains title to such goods until the seller receives payment of the purchase price for them will in general be treated as the reservation of a security interest. See UCC § 2-401. Thus, retention-of-title arrangements as such are unenforceable under U.S. law.

Accordingly, the rights of a holder of a security interest in goods resulting from a reservation or retention of title to such goods as against an assignee of a receivable will be governed by, and subject to, Article 9 of the UCC. Such holder will therefore be required in most instances to comply with the rules of Article 9 in order to establish its rights to both the goods and the proceeds of the goods, whether such proceeds are in the form of a receivable or otherwise, as against an assignee of the receivable.

In general, the priority of the rights of a supplier that holds a security interest in the goods that it sells to the assignor/debtor will be determined by the general priority rule under Article 9, which is based on the "first to file or perfect" and therefore requires the supplier to file a financing statement. See UCC § 9-322(a)(1). The filing of the UCC financing statement by the supplier as to the inventory also establishes the time of the priority of the supplier as to the accounts that arise from the sale of the inventory under Section 9-322(b). If the supplier has filed its financing statement prior to the financing statement filed by the assignee/secured party, then the supplier should have priority. See Comment 9 to UCC § 9-324. Conversely, if the assignee/secured party has filed its financing statement prior to the date of the filing of the financing statement by the supplier, the assignee/secured party will have priority.

Article 9 of the UCC establishes special priority rules for "purchase-money security interests," which change the general priority rules under certain circumstances. See UCC § 9-324. Under such circumstances, a purchase-money security interest in (i) inventory or equipment subject to the purchase-money security interest and (ii) certain proceeds of such inventory or equipment, will have priority over a previously perfected security interest in such assets. Section 9-103 of the UCC provides that a security interest in goods will be a purchase-money security interest: (i) to the extent that the goods are "purchase-money collateral" (defined as goods or software that secures a 'purchase money obligation' incurred with respect to that collateral) and (ii) if the security interest is in the inventory that is or was purchase-money collateral, also to the extent that the security interest secures a purchase-money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money-security interest, and (iii) also to the extent that the security interest secures a purchase-money obligation incurred with respect to software in which the secured party holds or held a purchase-money security interest. UCC § 9-103.

A "purchase-money obligation" means an obligation of an obligor incurred as all or part of the price for the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.

Under UCC §§ 9-324, a perfected purchase-money security interest in inventory has priority over (i) a conflicting security interest in the same inventory and (ii) a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper (if so provided in Section 9-330), and also has priority in "identifiable cash proceeds" of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, in each case, only if the holder of the purchase-money security interest takes certain additional steps.

However, as a general matter, the "super-priority" of the holder of a purchase-money security interest in the inventory does not extend to receivables arising from the sale of the goods by the assignor/debtor. See Comment 8 to U.C.C. § 9-324. There are similar rules for purchase-money security interests in goods other than inventory, except that the super-priority of the purchase-money security interest in such goods extends

to all "identifiable proceeds" if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

Accordingly, the rights of third party creditors who have sought to obtain retain a deep reservation of title to supplied to the assignor that by its terms extends to the receivables arising from the sale of such goods as against the assignee/secured party are not affected by whether the assignment is with or without recourse or is structured as invoice discounting or factoring.

As previously noted, there are certain types of creditors who are not subject to the rules of Article 9. In particular, the beneficiaries of a "PACA" or "PSA" trust would have priority over an assignee/secured party as to assets that are subject to the trust established under such federal statutes, regardless of compliance with Article 9 by the assignee/secured party.

*Do these rights have to be registered or notified to be valid?*

As noted above, a supplier that wants to have rights to the accounts arising from the sale of goods that it supplies to a debtor as against an assignee/secured party must file a UCC financing statement with respect to the goods and their proceeds in accordance with Article 9 of the UCC. However, the supplier is not required to notify account debtors of its security interest in order to establish its rights.

As previously noted, Article 9 of the UCC does not apply in all instances. There are specific exceptions for certain transactions. For instance, the beneficiaries of a PACA or PASA trust do not need to register or otherwise file notice before they can claim an interest in the trust assets (which can include accounts receivable). (See discussion above.)

## Question 6 Prohibitions against Assignments

*Is a contractual prohibition against the assignment of receivables valid in your country?*

Under Section 9-406(d) of the UCC, a term in an agreement between an account debtor and an assignor is ineffective to the extent that it (i) prohibits, restricts or requires the consent of the account debtor to the assignment or transfer of, or to the creation, attachment, perfection or enforcement of a security interest in, the receivable or (ii) provides that the assignment or transfer or the creation, attachment, perfection or enforcement of a security interest may give rise to a default, breach, right of recoupment, claim, defence, termination, right of termination, or remedy under the receivable.

Please note, however, that an account debtor may discharge its obligation under a receivable by paying the holder of the receivable until, but not after, the account debtor receives a notification, authenticated by the holder of the receivable or the secured party, that the amount due or to become due has been assigned and that payment is to be made to the secured party. After receipt of the notification, the account debtor may only discharge its obligation by paying the assignee and may not discharge its obligation by paying the assignor. There are, however, limited circumstances in which the notification is not effective against the account debtor.

*What actions are needed to make the prohibition effective?*

Since the prohibition is generally ineffective as a matter of law, there are no steps that can be taken to make it effective.

*Is there any requirement for registration?*

N/A.

*What is the effect of a prohibition upon factoring or Invoice discounting (in each case with or without recourse)?*

There is no effect. (See discussion above.)

## Question 7 Security Interests

*For this questionnaire a "fixed charge" is a security interest under which the client/ borrower is unable to deal with an asset without the creditor's consent. A "floating charge" is security interest allowing the client/borrower to deal with the asset without consent until "crystallisation" such as its insolvency. Is it possible in your country to obtain a fixed or a floating charge on receivables only, or does a fixed or floating charge have to be taken over all assets?*

The secured transaction law in the U.S. does not distinguish between security interests based on whether the client/borrower is able to deal with the asset subject to the security interest. Under Article 9 of the UCC, the type of security interest, whether it might be characterized as a fixed charge or a floating charge, does not affect its validity or priority. Accordingly, security interests are not characterized as one or the other under US law.

It is possible to take a security interest in only receivables. Under Article 9 of the UCC, the parties are free to define the scope and extent of the assets subject to the security interest in such manner as they choose, subject to satisfying the requirements of reasonable identification for purposes of the security agreement.

As previously noted, for purposes of the financing statement to establish the rights of the secured party as against third parties, a UCC financing statement only needs to describe the asset by type or category, although it may be more specific.

*Does a fixed or floating charge have to be publicly registered to be valid?*

A security interest does not have to be publicly registered to be valid as against the assignor/debtor itself, but in general, notice of the security interest pursuant to a financing statement must be filed in the appropriate public registry, as dictated by the rules of Article 9 of the UCC of the applicable state in order to establish the rights of the assignee/secured party as against third parties (as previously noted). Even though the filing of a financing statement may not be required for the security interest to be enforceable against the debtor, in the event the debtor becomes subject to insolvency proceedings, the rights of the secured party may be subject to being avoided (extinguished) by the trustee in the proceedings if the secured party has not filed a financing statement.

Although the filing of a financing statement in the public registry is the most common manner of establishing the rights of a secured party, as to certain categories of assets a secured party may, or may in fact be required under the UCC to, perfect its security interest by taking possession of such assets, or by having "control" over them. "Control" is a term used in a specific way under the UCC in the context of particular types of assets. Most commonly, it is applicable to security interests in deposit accounts, for which control is the only available manner of perfection. For this purpose, Section 9-104 of the UCC states: "A secured party has control of a deposit account if:

- (1) the secured party is the bank with which the deposit account is maintained;
- (2) the debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor; or
- (3) the secured party becomes the bank's customer with respect to the deposit account."

UCC § 9-104.

Section 9-104 also states that a secured party that has satisfied one of the alternatives above has control for this purpose, even if the debtor retains the right to direct the disposition of the funds from the deposit account.

## Question 8 Purpose of Assignment

*Are there any differences in the legal status if receivables are*

- *assigned in fulfillment of a purchase contract of these receivables (Factoring –Non-Recourse or Recourse, Invoice Discounting)*
- *assigned to collateralise a financing facility (Structured Finance, Issuing Guarantees)*
- *pledged to collateralize such a financing facility*

The assignment of receivables will transfer title to the assignee if such assignment is a "true sale." If the assignment is not a true sale, then the assignee will be deemed to have a security interest in the underlying receivables and title will be retained by the assignor. On the other hand, a pledge of receivables as security for obligations under a credit facility will be deemed to be the grant of a security interest to the pledgee, but will not transfer title to the pledgee.

As noted above, whether an assignment is a true sale is a complex issue that is often subject to elaborate legal opinions in the securitization context. While there are no hard and fast rules, it is generally thought that, if there is more than nominal recourse to the assignor (i.e. more than 10%), a true sale may not have occurred. When there is sufficient recourse to the seller, then the assignment would be considered a security interest instead of a true sale. In either case, whether an assignment is a true sale or merely a security interest, the assignee must file a UCC financing statement for its interest to be effective against third parties.

## Question 9 Payments

*Please estimate the payment structure for corporate businesses in your country by percentage:*

*Bank-Transfer %*

*Cheque %*

*Bill of Exchange %*

*Other instruments %*

Unlike certain European countries where electronic wire transfers are predominant, in the United States businesses use a variety of means to make payment on outstanding receivables. Electronic wire transfers are, however, common.

## Question 10 Client Insolvency

*Please describe the rights of a financier following the insolvency of the client and any possible threats and/or pitfalls in respect of:*

- *Non-Recourse Factoring*
- *Recourse Factoring*
- *Invoice Discounting (non-disclosed factoring with or without recourse)*
- *Structured Financing including Inventory Financing*
- *Giving guarantees to Third Parties for obligations of clients*
- *Protection against third party payment default*
- *Direct cross border factoring*
- *2-Factor Cross-Border Factoring*

One of the possible threats to a receivables financier upon the insolvency of the assignor/debtor is a claim by the trustee in bankruptcy that the receivables financier has received a "transfer" from the assignor that constitutes an avoidable "preference" (also known as a "preferential transfer"). If the assignee/receivable financier is found to have received a preferential transfer from the assignor/debtor, then the transfer may be voided and the assignee/secured party will be required to return the property of the assignor/debtor that the

assignee received pursuant to such transfer. Unlike many European jurisdictions, such preference exposure only arises if a case is commenced under the U.S. Bankruptcy Code, regardless of whether the assignor/debtor may have been "insolvent" prior to the commencement of such case. Moreover, a preference claim may only be brought in the context of a bankruptcy case.

There are 6 conditions that must be met under the U.S. Bankruptcy Code for a transaction to qualify as a preference:

- (i) there must be a "transfer" (as defined in Section 101(54) of the Bankruptcy Code) of the debtor's property;
- (ii) to or for the benefit of a creditor;
- (iii) for or on account of an "antecedent debt";
- (iv) while the debtor is "insolvent" (as defined in Section 101(32) of the Bankruptcy Code);
- (v) within 90 days before the commencement of the bankruptcy case under the Bankruptcy Code (assuming that the creditor is not an "insider"); and
- (vi) the transfer must result in the creditor receiving more than it would have had the transfer not been made and the debtor were in a liquidation bankruptcy.

Based on the foregoing elements, the critical period is the 90 days prior to the commencement of the case. If the assignor/secured party is only granted its rights to the receivables within this 90-day "preference period" to secure obligations previously owing to it, the assignor/secured party is at risk that the assignment might be voided under the Bankruptcy Code as a preference. However, for this purpose, the transfer is deemed to occur at the time that the initial grant of the "security interest" in all present and future receivables, not at the time the particular receivables arise, so long as the assignor/secured party perfects its security interest within 30 days after the date of the transfer. Otherwise, the transfer date for preference purposes will be the date on which the security interest is perfected. In addition, as noted above one of the elements of a preference is that the grant of the security interest enables the creditor to receive more than it would in a liquidation. Accordingly, if the value of the collateral subject to the security interest of the assignee/secured party at all times during the 90 day preference period exceeds the amount of the obligations owing by the assignor/debtor to the assignee/secured party, then one of the elements of a preference is not satisfied and any preference claim should fail.

Similarly, a trustee in bankruptcy may not avoid a transfer if such transfer was intended by the debtor and the creditor to be a "contemporaneous exchange for new value given to the debtor" and is in fact a "substantially contemporaneous exchange." Accordingly, to the extent that the assignee makes an advance payment of the purchase price for the receivables at approximately the same time as the receivables were created, the financier should not be deemed to have received a preference.

There are a number of other defences to a preference claim that may be applicable to protect the secured party from having to disgorge payments or collections received during the preference period and to prevent having its lien on collateral granted during the preference period from being avoided.

The question of whether a transfer of receivables constitutes a sale of receivables, or a loan secured by receivables where the financier obtains a security interest in the receivables, is often an issue of concern for financiers after the insolvency of a client. If a bankruptcy court determines that the transfer was a loan and not a true sale, then the transferred receivables are property of the estate under Section 541 of the Bankruptcy Code, and subject to use, sale or lease by the bankruptcy trustee or a debtor-in-possession. If the transaction is a true sale and the seller retains no interest in the receivables, then the receivables remain outside of the bankruptcy estate.

Courts apply a "subjective totality of the circumstances" test in determining whether a transfer is a loan versus a sale. Among the factors courts consider are: the parties' intent (see *In re Grand Union Co.*, 219 F. 353, 360-362 (2nd Cir. 1914)); the contract language and the nature of the transaction (*Id.*); retention of servicing by seller and commingling of proceeds (see *Southern Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 685 (5th Cir. 1983)); and arguably the most significant factor in the majority of the cases, the

purchaser's retention of some recourse against the seller (see *Ratto v. Sims (In re Lendvest Mortgage, Inc.)*, 119 B.R. 199, 200 (B.A.P. 9th Cir. 1990)).

Specifically, when dealing with factoring arrangements, it is possible that a sale of accounts may be recharacterized as a secured transaction. Although factoring is defined as the sale of a seller's accounts to its factor at a discount, courts typically hold that factoring agreements do not give rise to true sales but instead factors have security interests in accounts. For example, in *In re LTV Steel Co., Inc.*, 274 B.R. 278, 285 (Bankr. N.D. Ohio 2001), the bankruptcy court held that the accounts were not actually sold to the factor because the debtor has an ownership interest in the products that it creates with its own labour, as well as the proceeds to be derived from that labour, and therefore the debtor's equitable interest is property of the debtor's estate. Similarly, in *Major's Furniture Mart v. Castle Credit Corp.*, 602 F.2d 538, 546 (3d Cir. 1979), the court reasoned that a factoring arrangement between a furniture retailer and a financier was not a true sale because the accounts were sold with "full recourse" (there was a reserve from the purchase price held back against future non-paying accounts, as well as a requirement that the seller repurchase accounts delinquent after 60 days). As noted above, in *Nickey Gregory Co, LLC et. al. v. AgriCap, LLC*, 2010 US APP LEXIS 4587 (4<sup>th</sup> Cir. March 4, 2010), the Fourth Circuit concluded that factoring arrangement was not a sale based on various factors, including that risk of non-collection was not transferred to the factor because the factor maintained recourse against the company if a receivable remained unpaid, or for other reasons. As a result of the characterization of the arrangements as secured loan, the factor was required to turn over the receivables to satisfy a claim under PACA.

The U.S. Bankruptcy Code, as well as state creditors' rights statutes, include the right of a trustee in bankruptcy (or in the case of State creditors' rights statutes, a creditor) to void transfers of property of the debtor if the transfer is made with actual intent to hinder, delay or defraud creditors or if the debtor does not receive "reasonably equivalent value" in exchange for the transfer and is or is rendered "insolvent" after giving effect to such transfer. Each of these concepts is defined and subject to interpretation under extensive case law.

Of course, the most basic possible threat to the rights of an assignee/secured party is if it has failed to properly perfect its security interest in the assigned receivables in accordance with Article 9 of the UCC, such as by filing against an incorrect name or in the wrong state's registry, or has allowed the effectiveness of its financing statement to lapse. In such cases, the obligations of the debtor to the assignee will be treated as unsecured if the trustee in bankruptcy exercises its right under the U.S. Bankruptcy Code to avoid the security interest as a result of the failure to perfect or maintain perfection.

To the extent a financier executed a guarantee in favour of a third party with regard to the obligations of the client/borrower, the obligations of the financier under the guarantee are unaffected by the Bankruptcy Code.

Similarly, to the extent a third party executed a guarantee in favour of the financier with regard to the obligations of the client/borrower, the obligations of the third party under the guarantee are, except in certain limited circumstances, unaffected by the Bankruptcy Code. As long as the financier perfected its security interest (i.e. filed a financing statement) prior to the commencement of the insolvency proceeding and outside the preference period (described above), the U.S. Bankruptcy Code should have no direct effect on cross-border financing. Regardless of the type of financing involved (as listed in the categories above), the rights of the financier with regard to the collateral will be determined by who is first to file or perfect and whether federal and state laws override Article 9 of the UCC.

## Question 11 Late Payments

*Are there any penalties (and if so of what kind) applying to debt defaulters? E.g. interest*

Any penalties incurred by a company that fails to pay its obligations when due derive from the terms and provisions of the underlying contract. For instance, a common term in a U.S. loan agreement provides the secured lenders with the ability to impose a 2% increase in the interest rate applicable to a secured loan in the event of a payment default or any other event of default under such loan agreement. In addition, judgment rates of interest can apply in the event a judgment has been entered against the debtor that has failed to pay its obligations. These vary from state to state.

## Question 12 International Conventions

*Has your country ratified or does it intend to ratify either:*

- *the UNIDROIT Convention on International Factoring (1988):*

Yes, the United States has signed this convention but has not ratified it

- *United Nations Convention on the Assignment of Receivables in International trade (2001)*

The United States has signed this convention, and we are advised by the US State Department that it is about to begin the ratification process.

## Question 13 Any other Matters

*Are any other issues that you would like to tell us about receivables financing in your country, i.e. matters that make it unnecessarily complex or make it very attractive? Are there any features in other countries that you have come across which you would find useful?*

The adoption of the UCC across every state in the United States (albeit with minimal variations in certain states) has substantially facilitated a lender's ability to obtain a valid and enforceable security interest in most types of personal property, including receivables, of the borrower.

# Summary and Conclusion



## Summary and conclusion

Factoring and other closely related forms of receivables financing can look back on a **long and international history** to call their own. It appears that more than 4000 years ago, the Babylonians were already selling and assigning receivables for financing purposes. From as early as the 12<sup>th</sup> century, the merchants of the Hanseatic League established offices in different countries to facilitate trade all over Europe. Also Portuguese merchants as well as the Fugger-dynasty are said to have practised a kind of factoring in the 15<sup>th</sup> and 16<sup>th</sup> centuries, just as the English and Dutch in their trade with East India in the 17<sup>th</sup> century.

The idea behind the contemporary forms of receivables financing and the modern concept of factoring, however, seems to have originated in the trading and business relationships between Great Britain and the United States of America, particularly towards the end of the 19<sup>th</sup> century: Mercantile agents, also called factors, represented British companies in the USA, sold the imported goods on behalf of their British principals and then forwarded the payments they received to their British principals, less a commission for their services as mercantile agents or factors. With time, these factors would not only forward payments, but also guarantee as well as advance the customers' payments to the British exporting companies, in return for the assignment of the British companies' receivables.

Thereinafter, this idea of receivables financing spread over the world and also throughout Europe and has since undergone a variety of developments, many of these based on the different national legal frameworks applicable to the factor in question and the factoring services provided. It is this variety of national legal frameworks into which the present updated study first and foremost seeks to give an insight. However, the overview contained in this study would not be complete without at least an attempt at finding striking similarities and differences from which conclusions can be drawn.

The most basic and all-encompassing **similarity of the reviewed national legal frameworks** is also the most obvious: Receivables financing is offered and practised in all 27 EU member states as well as in all five important non-EU "benchmark" countries contained in this study (Norway, Russia, Switzerland, Turkey and the USA). However, this is just about as far as the unanimity goes - under which name and how exactly receivables financing is predominantly provided as a financial service differs from country to country: While e.g. in Spain, "confirming" is offered as a special and very popular kind of (reverse) factoring, invoice discounting is predominant in Great Britain; and while in e.g. Sweden and Turkey the agreement on the assignment of receivables does not have to fulfil any formal requirements but only needs to be perfected by notifying the debtor of the assignment, a valid assignment in the Czech Republic requires a written agreement plus the debtor's notification of the assignment. In the case of the Netherlands, not the assignment, but rather a pledge is the usual legal instrument for a factoring contract, which requires not only a written deed to be valid, but also either the pledge's registration or the debtor's notification of the pledge.

These variations regarding some basic traits of factoring and receivables financing show that the legal framework surrounding the factoring companies and the financial services they offer is by no means completely uniform or fully harmonised, neither within nor outside the EU. Nevertheless, certain **widespread parallels and similarities** can be detected, as well as **some noteworthy particularities**.

In more than 90% of all the countries which are included in this updated study, more or less detailed **laws and statutes on factoring and the assignment of receivables** exist. Some of this legislation is specifically on factoring (e.g. the Latvian commercial law which contains a legal definition of factoring since 2010), while other laws deal with this matter in a more general context (e.g. the provisions on the assignment of receivables in the Austrian Civil Code). In some countries such as e.g. in Germany and Italy, a combination of both approaches can be found: For certain

fields of law, such as matters of civil or contract law, a more general rule also covers factoring, whereas in the case of e.g. financial supervisory law, special statutes define and regulate factoring.

The predominant **way of effecting assignments or factoring** is through written contracts – this method is used in over 80% of the countries included in this study. Whereas in some countries such as Greece, Latvia and Portugal it is the law which requires assignments to be in writing, assignment agreements in other countries such as Malta and Sweden are generally also concluded in writing but not because the law requires this – rather, the main reason is to have adequate evidence in case of e.g. subsequent arguments.

With nearly 85% of all the countries included in this study **requiring by law that the debtor be notified** about the transfer of the receivable in question, this requirement reveals another similarity that exists between most of the reviewed national legal frameworks. However, the reasons behind the need to notify the debtor vary: While in some countries like e.g. Norway and Slovakia this is another legal requirement for the assignment to be valid, factoring companies in other countries such as Great Britain, Poland and Portugal need to notify the debtor not to make the assignment legally valid, but only in order to be able to collect the debt in their own names or in order to ensure that the debtor can only pay with discharging effect if he pays the factoring company and not the assignor.

It is also worth noting that a large majority of more than 80% of the countries included in the updated study not only know the **concept of assigning future receivables**, but actually consider **assignments in advance** as valid, even though some legal frameworks (e.g. in France) have established prerequisites to be fulfilled which may seem cumbersome. Most legal frameworks however only require that the receivable and/or the debtor can be determined or specified sufficiently clearly for an assignment in advance to be valid.

The answers contained in this study paint a similar picture of the legal situation regarding **assignments of receivables through Electronic Data Ex- or Interchange (EDI)**: This method of assigning receivables is accepted and considered legally valid in over 87% of the reviewed countries, in contrast to the possibility of using e.g. electronic signatures which exists in less than a third of the reviewed countries. Notwithstanding, some of the received answers concerning EDI (e.g. from the Czech Republic, Hungary and Lithuania) indicate that this method is still quite new and either not widely known or not widely used in some countries, with all the legal risks and uncertainties this can entail.

Regarding EDI and **other electronic and automated services**, it is worth pointing out that Great Britain, Greece, Ireland and Finland can be said to have rather prominent positions in this context, with EDI being widely used between factoring companies and their clients in Great Britain and Ireland and even exclusively for effecting assignments in import factoring in Greece, while the Finnish factoring market shows a high level of automation which has led to decreasing costs and a subsequent increase in popularity for factoring. Therefore, the general trend of working in paperless offices and of working with virtual documents and data seems to be on the advance also in the receivables financing industry, albeit at different speeds in different countries.

Also related to the practical side of the factoring business is the question on **how payments are effected**. Here, bank transfer is clearly the preferred method of payment as it is known and used in all countries included in the study. In fact, in more than 65% of the reviewed countries bank transfers make up 50% or more of the payment structure. Considering this prominent position of bank transfers, which is particularly strong in Europe, the efforts of the EU to harmonise payment processes by introducing (inter alia) the SEPA credit transfer seem very sensible indeed.

Although they are not used as frequently and are the preferred method of payment only in some countries like Cyprus and Malta, cheques come second after bank transfers, followed by other instruments of payment (e.g. direct debits, debit card operations and cash) as well as bills of exchange. Means of cashless payments are therefore clearly preferred by a majority, probably also

because of the aforementioned need for adequate evidence in case of e.g. subsequent arguments and also due to the trend of using IT and online services.

Closely connected to the matter of payment methods is the question whether the reviewed legal systems provide for any **penalties in the case of late payments**. Considering the commercial importance of such penalties, it is hardly surprising that all legal frameworks included in this updated study know and allow for such penalties, but once more, the approaches vary: In some national legal frameworks, there are laws and statutes which explicitly establish and even put a number on certain penalties such as interest rates and damages which have to be paid by the debtor (e.g. in Austria, Bulgaria and Italy) while other legal systems allow for individually developed contractual clauses on penalties for late payments (as in e.g. the Netherlands and Turkey).

Another area with a great amount of similarities, although only in basic principles, lies in **VAT on factoring**: More than 80% of the reviewed countries (within the EU even more than 85% of the member states) charge VAT on the factoring commission and service charge, and roundabout 60% do not charge VAT on the interest and discount charge. To a certain extent, this can be attributed to the EU's legislative contributions to harmonising national VAT-regimes. However, many of the answers received in the study also indicate that different national approaches to the issue of VAT on factoring remain. This is last but not least reflected in the fact that in more than a third of all reviewed countries, VAT-issues regarding the assignment of receivables exist, some of which are based on national particularities (e.g. in Germany and Slovakia), while others are issues connected to EU-legislation and jurisprudence of the European Court of Justice (e.g. in Sweden).

As for **security interests** such as fixed and floating charges, more than 60% of the reviewed countries allow such charges over all assets, while 75% stipulate that they can be made over receivables only instead of over all assets. In fact, 59% of the countries included in this study allow both alternatives in parallel. That approximately 40% of the reviewed countries require some form of registration of the charges goes to show that when it comes to methods and prerequisites for such charges, there is no (majority) agreement amongst the reviewed countries, be it on basic or more advanced issues.

However, the majority agreement of the reviewed countries reappears when considering the **effects the purpose of an assignment or pledge has**: Interestingly, in more than 60% of the countries included in the study, the purpose of an assignment or pledge of a receivable (be it to fulfil a contract of purchase or to serve as collateral) does not alter the legal status of the receivable in question. However, nearly a third of the reviewed legal frameworks do distinguish between assignment and pledge on the one hand and between fulfilling a contract and providing collateral on the other hand.

As for the question of **third party rights affecting either the assignment or the assigned receivable**, in more than 65% of the reviewed countries, rights of third parties such as the factoring client's supplier can affect the assignment or the assigned receivable in one way or another. Notwithstanding, the extent to which these rights affect the factoring company as assignee varies: This depends not only on the kind of right the third party has (e.g. conflict of several assignments over the same receivable, pledges over the assigned receivable or reservations of title), but sometimes also on the type of factoring agreement, thereby differentiating between e.g. non-recourse and recourse factoring.

A similar result can be deduced from the information obtained on **contractual prohibitions of assignments**. In more than half of the countries included in the updated study, contractual prohibitions of assignments are tolerated, possible and legally valid. Once more, however, the effects of such contractual prohibitions on factoring vary and range from the contractual prohibition having no effect whatsoever on the assignment and the factoring relationship (as e.g. in Hungary and Italy) to the contractual prohibition rendering any assignment null and void and therefore making factoring impossible de facto (as e.g. in Spain).

A rather high rate of national variations can also be seen when it comes to more detailed aspects of the **factoring company's rights in case of a client's insolvency**. Here, there are many particularities in national insolvency laws to be considered so that ultimately, only a general tendency to prioritize factoring companies over other creditors in at least 40% of the reviewed legal frameworks can be established.

The existence as well as the absence of **legal prerequisites such as license requirements and of supervision for operations in factoring and receivables financing** is nearly evenly distributed throughout the EU as well as among the five non-EU states included in this study, although there is a slight tendency towards non-regulation. In those countries where supervisory regimes for factoring companies or certain legal requirements exist, these cover a wide range, from factoring companies being required to obtain a license as a financial institution and fulfil some out of a number of regulatory requirements as e.g. in Germany, to being treated like banks as e.g. in France, where factoring companies are subject to the full set of Basel rules on regulatory capital, just as much as credit institutions.

Even though this study focuses mainly on national legal frameworks, **international legal aspects** cannot be totally left aside. As factoring is widely used in international trade relations, **questions on the conflict of laws** and on which law is applicable to e.g. the assignment and the underlying receivable frequently arise. This is where the UNIDROIT Convention on International Factoring from 1988 (also called the **Ottawa convention**) and the United Nations' **UNCITRAL Convention** on the Assignment of Receivables in International trade from 2001 are to provide helpful rules by which all the parties of these conventions are supposed to abide.

However, this updated study as well as the online status reports on the signatures and ratifications of both conventions show that their practical impact is very limited, if not even on the border of non-existent: The Ottawa convention of 1988 has only come into force in 5 EU member states and the UNCITRAL convention of 2001 has not come into force in any of the reviewed countries. For factoring companies from and operating within the EU, the regulation (EC) 593/2008 on the law applicable to contractual obligations (also called the **Rome I-regulation** due to its predecessor, the EU Convention on the Law Applicable to Contractual Obligations signed in Rome in 1980) is currently surely of more use and practical relevance than the two aforementioned international conventions, despite the lacunae and shortcomings of the Rome I-regulation, some of which also affect assignments and hence receivables financing and factoring. Despite this rather prominent position of the Rome I-regulation, it has to be noted that the Ottawa and the UNCITRAL conventions are unique and historic attempts at finding a common approach on a global level and therefore have a distinct level of importance with regard to factoring and receivables financing.

The answers to the final question of the questionnaire this study is based on provide good starting points for a summarizing overview or conclusion. Even though not all reviewed countries submitted answers to the last question contained in the study's questionnaire regarding **others matters idiosyncratic to the national legal framework** and worth pointing out, it is possible to draw the following general conclusions from the "closing remarks" which were given.

In some countries, the industry of factoring and other forms of receivables financing still faces problems: The industry may be considered to have a negative reputation, or legislators and public authorities may not dispose of sufficient knowledge about factoring, or the national legislation and/or authorities such as financial supervisors may not establish standards suitable for and adapted to factoring. However, with most countries that did submit a "closing remark", the focus was on positive aspects such as the rapid growth or high growth potential of the national factoring market in question as well as the supportive role of pertinent laws and legislative changes. Overall, the remarks at the end of the questionnaire therefore depict an industry with a high growth potential, providing financial services which are modern and adapted to the existing legal circumstances, be they considered acceptable or inadequate.

As already mentioned in the introduction, this study brings together important information on the national legal frameworks for factoring in Europe and elsewhere. Nonetheless and more importantly, it also shows that there are **general trends and similarities between a majority and sometimes even all of the reviewed countries**, both within and outside the EU. Despite all the particularities and variations in different national legal systems - even within the EU and its wide radius of legal harmonisation – these parallels and similarities should always be kept in mind. In the end, they form the **basis which enabled the flexible original idea of factoring to spread widely** and become a popular alternative form of financing. Considering the wide geographical and cultural scope of this study, it may even be worthwhile to consider going one step further by asking the following question: Are there possibly certain universal basic truths for the factoring and receivables finance industry which apply to all legal systems throughout the world? This is not only food for thought, but it could also be the starting point for an entirely different kind of study which has yet to be made.

Magdalena Wessel  
Member of EUF Executive Committee/  
Chairwoman of EUF Legal Committee

## Factoring-turnover 2010 per country

In Millions of Euro (non-Euro currencies are converted into Euro at the exchange rate as at 31.12.2010)

Country:	Number of Companies:	Domestic:	International:	Total:
AT	5	6.646	1.661	8.307
BE	6	24.203	8.000	32.203
BU	7	380	95	475
CY	3	3.400	50	3.450
CZ	8	3.482	1.016	4.498
DE	100	99.342	32.938	132.280
DK	6	5.112	3.067	8.179
ES	23	101.796	11.113	112.909
FI	5	10.800	1.600	12.400
FR	11	127.193	26.059	153.252
GB	44	210.745	15.498	226.243
GR	12	13.465	1.250	14.715
HU	22	2.948	306	3.254
IE	8	18.947	1.250	20.197
IT	45	125.777	17.968	143.745
LT	8	590	950	1.540
LU	1	177	144	321
LV	8	235	93	328
MT	2	105	31	136
NL	5	25.347	10.153	35.500
PL	14	12.823	3.387	16.210
PT	14	22.186	2.302	24.488
RO	13	1.300	500	1.800
SE	40	28.899	1.617	30.516
SI	5	550	100	650
SK	6	701	280	981
<b>Non-EU countries</b>				
CH	5	3.500	500	4.000
NO	7	13.150	1.925	15.075
RU	28	12.083	80	12.163
TR	70	34.931	4.057	38.988
US	300	85.000	10.000	95.000

Sources: EUF Federation for the Factoring and Commercial Finance Industry; FCI Factors Chain International

# Breakdown per question



**Question 1 - Legal Requirements to operate**

Y = Legal Requirements N = No Legal Requirements D = see Country Details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>Non-Recourse Factoring</b>	Y	N	Y	N	N	Y	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y	N	N	Y	Y	Y	N	N	N	Y	N	Y	N
<b>Recourse Factoring</b>	Y	N	Y	N	N	Y	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y	N	N	Y	Y	Y	N	N	N	Y	N	Y	N
<b>Invoice Discounting</b>	Y	N	Y	N	N	Y	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y	N	N	Y	Y	Y	N	N	N	Y	N	Y	N
<b>Structured Finance/Inventory Finance</b>	Y	N	Y	Y	N	Y	N	N	Y	Y	Y	N	Y	Y	N	Y	N	N	N	Y	Y	N	Y	Y	Y	N	N	N	*)	N	Y	N
<b>Guarantees to Third Parties</b>	Y	N	Y	Y	N	Y	N	N	Y	Y	Y	N	Y	Y	N	Y	Y	Y	N	Y	N	N	Y	Y	Y	N	N	N	*)	Y	Y	N
<b>Protection against Payment Default</b>	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y	D	Y	Y	N	Y	N	N	N	Y	Y	N	Y	Y	Y	N	Y	Y	*)	Y	Y	N
<b>Direct Cross-Border Factoring</b>	Y	N	Y	N	N	Y	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y	N	N	Y	Y	Y	N	N	N	*)	Y	Y	N
<b>2-Factor Cross-Border Factoring</b>	Y	N	Y	N	N	Y	N	N	N	Y	Y	N	Y	Y	N	Y	N	N	N	Y	N	N	Y	Y	Y	N	N	N	*)	Y	Y	N
See country details	D	D	D		D	D	D		D	D	D	D	D		D	D	D	D	D		D	D	D	D		D	D		D	D	D	

**Question 2 - Transfer of Receivables**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US	
<b>Specific Law for Assignments</b>	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	*)	Y	Y	Y
<b>Physical Process of Assignment</b>																																	
Writing	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
Registration	N	N	N	N	N	N	N	N	N	N	N	D	N	N	N	N	N	N	N	N	Y	N	N	Y	N	N	N	N	N	Y	N	N	N
Verbal	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	Y	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	N
See country details	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	
<b>Requirement for Assignment</b>																																	
Registration	N	N	N	N	N	N	D	N	N	N	N	D	N	N	N	N	N	N	N	N	D	N	N	Y	N	N	N	N	N	Y	N	N	N
Stamp duties or taxes	Y	N	N	N	N	N	D	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	N	N
Notification	D	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	D	Y	Y	Y	Y	D	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	
Any other	D	D	D	D	D	Y	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	N	D	D	D	D
<b>Assignment in Advance</b>																																	
Possible	Y	Y	Y	N	Y	Y	D	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	D	Y	Y	Y	Y	Y	Y	*)	Y	Y	Y
see country details	D	D	D		D	D	D	D		D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	

**Question 3 - EDI**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>EDI possible for assignment</b>	Y	Y	*)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	D	N	Y	Y	D	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
<b>Requirements</b>																																
Written agreement	N	N	*)	N	Y	N	Y	N	*)	Y	Y	Y	Y	Y	Y	D	N	N	Y	Y	Y	N	*)	Y	Y	N	N	Y	N	Y	N	N
Electronic signature	N	N	*)	Y	Y	Y	Y	Y	*)	N	N	N	N	N	N	D	N	N	Y	N	N	N	*)	Y	N	N	Y	Y	N	Y	N	N
<b>see country details</b>	D	D	*)	D	D	D	D	D		D	D	D	D	D	D	D	D	D	D	D	D			D		D	D	D	D	D	D	D

**Question 4 - Value Added Tax**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>VAT issues on Assignment of Receivables</b>	N	*)	N	N	Y	Y	Y	N	N	N	Y	Y	N	N	Y	N	N	N	N	N	N	Y	N	Y	Y	N	Y	Y	N	N	N	N
<b>VAT on Fact. Commission and Service Charge</b>	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	D	Y	Y	Y	Y	D	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	D	Y	Y	Y	*)
<b>VAT on Interest / Discount</b>	N	N	N	*)	D	D	D	N	N	N	D	N	Y	N	N	N	Y	N	N	N	N	N	N	Y	N	D	D	D	N	Y	Y	*)
<b>VAT Difference between Bank/Non-Bank</b>	N	*)	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	*)	Y	N	N	Y	N	N	N	N	N	D	N	D	N	*)
<b>see country details</b>	D	D	D	D	D	D	D			D	D	D	D	D	D	D	D	D	D	D	D		D	D	D	D	D	D	D	D	D	D

**Question 5 - Third Party Rights**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>Can 3rd. Party Rights affect Receivables?</b>	N	Y	Y	Y	Y	Y	Y	Y	D	Y	Y	Y	Y	N	Y	Y	N	N	N	N	Y	Y	Y	D	*)	Y	Y	Y	D	N	Y	Y
<b>Do Rights of Supplier affect Assignee?</b>																																
Non-recourse factoring	D	Y	Y	*)	N	N	N	N	N	Y	Y	Y	Y	D	Y	Y	N	N	D	N	D	N	Y	N	D	Y	N	N	D	N	D	Y
Recourse factoring	D	Y	Y	*)	N	Y	N	N	N	Y	Y	Y	Y	D	Y	Y	N	N	D	N	D	N	Y	N	D	Y	N	N	D	N	D	Y
Invoice discounting	D	Y	Y	*)	N	Y	N	N	N	Y	Y	Y	Y	D	Y	Y	N	N	D	N	D	N	Y	N	D	Y	N	N	D	N	D	Y
<b>Need for registration of rights</b>	N	N	N	Y	N	N	N	Y	*)	N	N	N	N	N	N	N	N	N	N	N	D	Y	N	Y	D	Y	N	Y	*)	*)	N	Y
<b>see country details</b>	D	D	D		D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D

**Question 6 - Prohibitions against Assignment**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US	
<b>Prohibition of Assignment valid</b>	Y	Y	Y	*)	Y	D	Y	N	Y	D	N	Y	Y	D	Y	Y	N	D	N	Y	Y	Y	Y	N	Y	Y	Y	Y	*)	N	Y	N	
<b>Actions to make Prohibition valid</b>				*)																									*)	*)		*)	
Written agreement	D	Y	N		N	Y	Y	N	Y	N		Y	Y	D	Y	Y	N	D	N	Y	Y	Y	Y	N	Y	N	N	N		N	Y		
Oral agreement	N	N	N		N	Y	N	N	Y	N		N	N	D	N	N	N	D	N	N	N	N	N	N	N	N	N	N	N		N	N	
Registration	N	N	N		N	N	N	N	N	N		N	N	D	N	N	N	D	N	N	N	N	N	N	N	N	N	N	N		N	N	
None																																	
<b>Effect of Prohibition</b>			*)	*)														*)											*)	*)		*)	
Factoring possible	Y	D			N	D	D	Y	N	Y		N	N	Y	D	D	Y		Y	N	N	N	N	Y	D	Y	N	N			N		
Invoice discounting possible	Y	D			N	D	D	Y	N	Y		N	N	Y	D	D	Y		Y	N	N	N	N	Y	D	Y	N	N			N		
Assignment for financing possible	Y	D			N	D	D	Y	N	Y		N	N	Y	D	D	Y		Y	N	N	N	N	Y	D	Y	N	N			N		
<b>see country details</b>	D	D	D		D	D	D	D	D	D	D	D		D	D	D	D	D	D	D			D	D	D	D	D	D			D	D	

**Question 7 - Security Interests**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>Is a "Fixed Charge" on Receivables...</b>									*)							*)										*)						
...possible on all assets	Y	N	Y	Y	N	N	N	N		Y	Y	Y	N	Y	Y		Y	Y	Y	Y	Y	N	Y	Y	Y		D	Y	Y	N	Y	Y
...possible on receivables only	Y	Y	Y	Y	Y	N	Y	N		Y	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	N	Y	Y	Y		D	Y	N	Y	Y	Y
<b>Is Registration necessary</b>	N	D	Y	Y	N	N	Y	N	*)	N	N	Y	Y	Y	Y	*)	N	N	Y	D	Y	N	N	Y	Y	*)	Y	N	D	N	N	Y
<b>see country details</b>	D	D	D		D	D				D	D	D	D		D		D	D	D	D	D	D	D	D	D	D	D		D	D		D

**Question 8 - Purpose of Assignment**

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>Diff. in legal status if receivables...</b>									*)																							
...are assigned to fulfill a purchase contract	Y	D	N	N	N	Y	N	N		N	N	N	N	N	N	N	Y	N	N	N	Y	Y	N	N	N	N	N	N	N	N	N	Y
...are assigned to collateralise	Y	D	N	N	N	Y	N	N		N	N	N	N	Y	Y	N	Y	N	N	D	Y	N	N	Y	D	N	N	N	N	N	N	Y
...are pledged to collateralise	Y	D	Y	N	Y	Y	N	Y		N	N	N	N	Y	Y	N	Y	N	N	D	Y	N	N	Y	D	N	Y	Y	N	Y	N	Y
<b>see country details</b>	D	D	D		D	D				D			D		D	D	D	D	D	D	D			D	D		D	D				D

Question 9 - Payments

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US	
<b>Payment Structure in %</b>																																	
Bank transfer	*)	95	90	20	99	*)	99	99	25	100	36	60	8	99	60	14	99	96	100	15	100	*)	50	70	99	90	99	99	99	100	*)	*)	*)
Cheque	*)	*)		75	1	*)	1		10		27	38	40		40	14				80		*)	30	13	1			1		*)	*)	*)	
Bill of exchange	*)	*)	5	3		*)			35		37	2	2	1		1				5		*)	10	2		10				*)	*)	*)	
Other			5	2				1	30				50			72		4					10	15			1						
<b>D = see country details</b>					D	D		D	D				D			D	D		D	D	D	D	D	D			D			D	D	D	

Question 10 - Client Insolvency Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US	
<b>Priority Rights of Financier</b>				*)																													
Non-recourse factoring	Y	D	N		D	Y	Y	Y	Y	D	Y	D	N	Y	*)	Y	Y	Y	D	D	Y	Y	Y	D	D	Y	D	Y	N	D	D	D	
Recourse factoring	Y	D	N		D	N	Y	Y	Y	D	Y	D	N	Y	*)	Y	Y	Y	D	D	Y	Y	N	D	D	Y	D	Y	N	D	D	D	
Invoice discounting	Y	D	N		D	N	Y	Y	Y	D	Y	D	N	Y	Y	Y	Y	Y	D	D	Y	Y	N	D	D	Y	D	Y	N	D	D	D	
Structured financing	Y	D	N		D	N	Y	Y	Y	D	Y	D	N	Y	*)	Y	Y	Y	D	D	Y	Y	*)	D	D	D	D	Y	N	D	D	D	
Guarantees to third Parties	Y	D	N		D	N	Y	*)	*)	D	Y	*)	N	Y	*)	*)	*)	*)	D	D	Y	N	*)	D	D	D	D	Y	N	D	D	D	
Protection against payment default	N	D	N		D	N	Y	*)	*)	D	Y	*)	N	Y	*)	*)	*)	*)	D	D	Y	N	*)	D	D	D	D	Y	N	D	D	D	
Direct cross-border factoring	*)	D	N		D	N	Y	Y	Y	D	Y	Y	N	Y	*)	Y	Y	Y	D	D	Y	Y	Y	D	D	Y	D	Y	N	D	D	D	
2-factor cross-border factoring	*)	D	N		D	N	Y	Y	Y	D	Y	Y	N	Y	*)	Y	Y	Y	D	D	Y	Y	Y	D	D	Y	D	Y	N	D	D	D	
<b>see country details</b>	D	D	D		D	D	D	D	D	D	D	D	D		D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	D	

Question 11 - Late Payments Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US	
<b>Are there penalties for late payments</b>	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	D	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
<b>see country details</b>	D	D	D	D	D	D	D				D	D	D		D	D	D	D	D	D	D	D	D	D	D	D	D	D				D	D

Question 12 - International Conventions

Y = Yes N = No D = see country details \*) no answer given

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>UNIDROIT:</b>																																
<b>Signature</b>	N	Y	N	N	Y	Y	N	N	N	Y	Y	Y	N	N	N	Y	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	Y
<b>Ratification</b>	N	Y	N	N	N	Y	N	N	N	N	Y	N	N	Y	N	Y	N	N	Y	N	N	N	N	N	N	N	N	N	N	N	N	N
<b>Entry into Force</b>	N	N	N	N	N	Y	N	N	N	N	Y	N	N	Y	N	Y	N	N	Y	N	N	N	N	N	N	N	N	N	N	N	N	N
<b>Declaration or Reserves</b>	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	N	N	N	N	N	N
<b>UNICTRAL :</b>																																
<b>Signature</b>	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	N	N	N	N	N	N	Y
<b>Ratification</b>	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
<b>Entry into Force</b>	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N
<b>Declaration or Reserves</b>	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	N	Y	N	N	N	N	N	N	N	N	N	N	N	N	N	N

Unidroit = Unidroit Convention on International Factoring, International Institute for the Unification of Privat Law

Unictreal = United Nations Commission on International Trade Law, UN Convention on the Assignment of Receivables in International Trade

Question 13 - Any other matters

	AT	BE	BU	CY	CZ	DE	DK	EE	ES	FI	FR	GB	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	CH	NO	RU	TK	US
<b>D = see Country Details</b>					D	D	D			D	D	D			D				D	D	D		D		D		D					D
<b>N = no remarks</b>	N	N	N	N				N	N				N	N		N	N	N				N		N		N		N	N	N	N	



# List of Participants



## List of Participants

<b>AT</b> RAe Dr. Themmer, Dr. Karauschek
<b>BE</b> APBF - BBF
<b>BU</b> Unicredit Factoring EAD Bulgaria
<b>CY</b> Hellenic Bank
<b>CZ</b> Czech Leasing and Finance Association (CLFA)
<b>DE</b> Deutscher Factoring-Verband e.V. (DFV)
<b>DK</b> Finans og Leasing (FL)
<b>EE</b> SEB Bank Estonia
<b>ES</b> Asociación Española de Factoring (AEF)
<b>FI</b> SEB Bank Finland
<b>FR</b> Association Française des Sociétés Financières
<b>GB</b> The Asset Based Finance Association (ABFA)
<b>GR</b> Emporiki Bank (2007)
<b>HU</b> Magyar Factor
<b>IE</b> The Asset Based Finance Association (ABFA)
<b>IT</b> Associazione Italiana per il Factoring (ASSIFACT)
<b>LT</b> SEB Bank Lithuania

<b>LU</b> Fortis Commercial Finance Luxemburg
<b>LV</b> LKB Leasing
<b>MT</b> FIMBank
<b>NL</b> Factoring and Asset based financing Ass. (FAAN)
<b>PL</b> Polski Związek Faktorów (PZF)
<b>PT</b> Eurofactor Portugal
<b>RO</b> Raiffeisenbank Romania
<b>SE</b> SEB Bank/Swedish Bankers' Association
<b>SI</b> PRVI Factor
<b>SK</b> CSOB Factoring (2007)

## Non-EU Countries

<b>CH</b> USB Bank, Factoring Solutions
<b>NO</b> Nordea
<b>RU</b> Association of Factoring Companies Russia
<b>TK</b> Garantie Faktoring Hizmetleri
<b>US</b> Lawyers: Goldberg-Kohn; Otterbourg, Steindler, Houston & Rosen



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