



ORIGINAL PAPER

**Factoring Contract – Short Term Financing
Technique**

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Abstract

We aimed in this study an analysis of the factoring contract which, by the advantages it offers, has become a technique of short-term funding becoming more attractive to clients of banks, non banking financial institutions and of commercial companies that have as object of activity factoring operations. Thus, in the last five years, Romanian factoring market grew by over 100%, and in 2015 recorded the highest growth in Europe (35%), reaching 3.65 billion Euros. The factoring market has started to develop since 1993 through specialized departments of banks and in 2006 were established specialized non-banking financial institutions. Currently, on the Romanian factoring market there are 15 players.

Keywords: *adherent, factor, debtor, unnamed contract, Romanian Factoring Association*

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Introduction

Factoring, short-term financing technique appeared two centuries ago as a result of trade between the U.S. and the UK. As noted in a specialized work: “British industrialists who supplied textiles to British emigrants, penetrating even deeper westward, appreciated the need to find guarantors to provide their exports. Undoubtedly, these were the first factors. The process was subsequently spread into the inter-American relations. It was introduced to Europe in 1960 with the establishment of an international network of factors in the UK, and mainland” (Gavalda, 1978: 124). In Romania, according to data from R.F.A., the factoring market has started to develop since 1993 through specialized departments of banks, and in 2006 were established specialized non-banking financial institutions. Currently, on the Romanian factoring market there are 15 players. At international level, there are two main chains of factors, namely Factors Chain International and International Factors Group through which there are held about 90% of the international factoring operations.

The Romanian Factoring Association (R. F. A.)

In order to protect and represent the general interest of the factoring sector and persons engaged in this activity in 2011, it was established the Romanian Factoring Association (R. F. A.) which currently has nine members: Acces Financial Services IFN, Banca Comercială Română S.A., Banca Transilvania SA, BRD- Groupe Société Générale SA, Banca de Export-Import a României EximBank SA and IFN Next Capital Finance SA. Romanian Factoring Association (R. F. A.) signed a cooperation agreement at Pismo Beach on April 12th, 2012 with the International Factoring Association (I. F. A.). It is reported that the International Association of Factoring is the largest association of financing companies in the world and it has as members factoring companies, assets based creditors and other companies specialized in financing receivables. Currently the association has over 375 corporate members. The cooperation agreement is extremely important because it aims to help the members of the two associations by providing information, organizing scientific events on common factoring subjects and by assuring the participation of the two associations’ members in what concerns the membership fee of the related association, by mutual promoting events, the long-term interest being that of building a global network. This agreement will support the Romanian market makers based on the provided information, access to professional training and purchasing power, serving as a resource for this community. Since its establishment, the Romanian Factoring Association performed every year since 2013 and at the middle of the year, a study on the evolution of the main parameters of the factoring market. The performed studies are based on the information provided by association members and other non-bank financial institutions.

Only in the past five years, Romanian factoring market grew by over 100%, and in 2015 recorded the highest growth in Europe (35%), reaching 3.65 billion euros. The construction, energy, information technology and communications, metals, chemicals, recycling, transport domains have risen significantly, the least financed sector being financed through factoring being farma. Thus, in the fields of energy and construction registered a six times increase compared to 2014, the information technology and communications field which registered a tripling compared to 2014, both on internal and on foreign markets, the metals, chemicals and recycling fields increased by 49% and the transportation field increased by 44%. The pharmaceutical sector registered a decrease of

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22% compared to 2014. In terms of export factoring, according to official data provided by the Romanian Factoring Association, significant increases were registered in what concerns the information technology and communications field (166%), construction field (40%) and transportation field (17%). At the same time, members of the Romanian Factoring Association managed trade receivables of over 14.5 billion Euros, thus providing an essential support in what concerns the financing needs of the economy. With reference to the development of the Romanian factoring market, the major role is held by the banks, through their specialized departments. Instead, non-bank financial institutions also have an important contribution in particular by ensuring a diverse market for all profiles of companies. The increasing trend which features the Romanian market currently has a high interest from foreign capital to finance the Romanian factoring sector, in particular by non-bank financial institutions.

Definition

In Romanian law, the factoring contract was defined in article 2 letter b) of the Emergency Ordinance no. 10/1997 on easing the financial deadlock and economic losses as a contract between a party called adherent supplying goods or providing services, and a bank or financial institution specializing called factor, which the latter shall finance tracking receivables and credit risk protection and adherent gives to the factor, by way of sale or pledge, claims arising from the sale of goods or provision of services for third parties. This legal definition confuses the factoring contract with commercial pledge agreement (Smarandache and Dodocioiu, 2008: 99). Also, erroneously in article 2 paragraph (2) of this act, the factoring contract is framed in the category of payment instruments. By payment instrument means cash and cash substitutes, papers, documents, marketable debt denominated in a foreign currency and used in payment transactions (receivables liquidation), the use of cash, the actual currency and gold. Are payment instruments: bills of exchange, promissory note, check, letter of credit, the provision of collection, invoice, shares, bonds, travelers checks, credit cards, debit cards, checks credit card.

This first definition is corrected based on article 146 of the Annex to the Order no. 1418/1997 of the Secretary of State, Minister of Finance and Governor of National Bank of Romania (N.B.R.) on the chart of accounts for banks and the methodological standards for its use. It shows that „the factoring is the operation whereby the client called „adherent” transferring ownership of receivables (bills) to its commercial bank, called „factor”, which has an obligation, under contract, to ensure recovery of receivables of the adherent, assuming their risk of default”. Finally, article 6 of Law no. 469/2002 on certain measures for strengthening the contractual discipline fits correctly the factoring contract, along with the lump sum in the mobilization of domestic receivables category, and defines it as a contract between the Party, called adherent, that is a provider of goods or service supplier, and a bank or a financial specialized institution called factor, whereby the latter shall finance tracking receivables and preservation against credit risks and adherent yield factor, as sales receivables arising from the sale of goods or services to third parties. It should be mentioned that in accordance of this normative act, the factor had to assume three obligations in its relationships with the adherent, without the possibility to opt for one of them: financing, tracking receivables and insurance against credit risks.

Internationally, the factoring contract is governed by the Ottawa UNIDROIT Convention on International Factoring, adopted on 28 May 1988 and the United Nations

Convention on the assignment of receivables in international trade from New York in 2001.

Given the significant role that international factoring had played in the development of the international trade, is recognised the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring, which led to the conclusion of the Ottawa Convention, which states that the “factoring contract” means a contract between one party (the supplier) and another party (the factor), pursuant to which: “(a) The supplier may or will assign to the factor receivables arising from contracts of sale of goods made between the supplier and its customers (debtors) other than those for the sale of goods bought primarily for their personal, family or household use; (b) The factor is to perform at least two of the following functions: finance for the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to receivables; collection of receivables; protection against default in payment by debtors; (c) Notice of the assignment of the receivables is to be given to debtors” (Article 1 of the UNIDROIT Convention on international factoring).

On this subject in the literature earlier showed that “factoring is a contract whereby one party, called the adherent transfer ownership of a certain category of its receivables to another party, called factor, which, for a fee, undertakes adherent to pay their value and acquires its place in its rights receivables against debtors that are assigned to collect” (Ștefănescu and Rucăreanu, 1983: 231). Another theorist who studied the contract of factoring defined as “a commercial contract concluded between two traders, adherent and factor, whereby the factor takes ownership of adhering claims on assigned debtors - resulting from sale of goods or provision of services previously concluded with them - and with receivables accepted he undertakes financing adherent prepay of such receivables, the obligation of collecting from assigned debtors to their payments and the obligation to guarantee against credit risk, respectively against the risk of default at maturity of the claims concerned by assigned debtors” (Vartolomei, 2006: 229).

The factoring mechanism

In the literature, the mechanism for the implementation of factoring operations was summarized as it follows: “Under the factoring contract, the adherent send original invoices or certified copies to the factor thereof with the mention that they were sold and that the payment is to be made to the factor; subrogation of the adherent in the factor’s rights must be notified to the debtor to pay it only by factor; factor pays factors to the adherent at face value, less commission either immediately, therefore before their maturity (*old line factoring*) or at maturity if the contract was concluded in that form (*maturity factoring*); in practice, the system is used as a factor to immediately pay only a percentage of the bills, while the remaining to be regularized after the receivable” (Anghelescu, Deteșan and Hutira, 1983: 155). In most cases, there is a framework factoring contract comprising the promise of the factor to buy and the adherent to sell all claims or those that meet certain criteria, which they determine, and with each transfer of receivables is entered into a factoring contract itself (Mircea, 2000: 121). There should be noted that the adherent may send only partially a receivable and recover the rest on their own behalf.

Specific contractual clauses

The factoring contract includes *an exclusivity clause* which implies that the adherent is obliged to present only to the factor all invoices including receivables on debtors and the factor can accept only those that show a high degree of certainty about

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their payment at maturity by debtors. Also the factoring contract includes *a clause of globality* through which the adherent shall vacate all its claims on debtors to the factor. This prevents failure by adhering only to bad debts, which are difficult to recover and recover certain receivables himself, managing to save the factoring fee. The two clauses are interdependent.

Participants in factoring technique

Factoring is a tripartite operation involving the adherent, the factor and the assigned debtor.

1) *The adherent* is a seller of goods or provider of services with the delivery of goods or services succession. Typically, the adherent is merchant natural or legal person. It is pointed out that for defining traders, the Romanian legislature uses the criterion of matriculation or of registration in the trade register. According to article 6 paragraph (1) of Law no. 71/2011, “in normative acts applicable to the entry into force of the Civil Code, references to merchants shall be deemed to be made to individuals or, where appropriate, legal entities subject to matriculation in the trade register under Article 1 of Law no. 26/1990, republished, as amended and supplemented, as well as those made by this law”. And, according to article 11 of Law no. 71/2011, are required to apply for matriculation or, if applicable, registration with the trade registry: freelancers, individual enterprises, family businesses, companies, national companies and national societies, autonomous administrations, economic interest groups, cooperatives, European societies, European cooperative societies and European economic interest groups with headquarters in Romania, as well as other natural and legal persons under the law (Bratiloveanu, 2015: 54). Along with other authors, we appreciate that the adherent can be a noncommercial legal entity, such as an association or foundation recognized by law as having the ability to conduct business (Stănciulescu and Nemeş, 2013: 613);

2) *The factor* can only be a legal person trader. According to article 11 b) of the Banking Act No. 58/1998, factoring contract is included in the banks' premises activities as a form of credit, along with consumer contracts, mortgages, financing of commercial transactions, discount and forfeiting. Also, the factoring is part of lending activities that can be undertaken by non-banking financial institutions. Factor can become the companies which have the object of factoring operations (NACE 6499 - Other financial n.c.a.).

3) *The assigned debtor* is a trader natural or legal person, as a buyer of goods or recipient of the benefits of traditional service provider to which they owe the equivalent work or services provided (Cernăianu, 1996: 54).

Legal characters of the factoring contract

We note the following legal characters of the factoring contract:

Mutually binding contract, as concluding it generates reciprocal and interdependent obligations borne by both parties. The Factor undertakes to provide financing, monitoring and preservation of receivables against credit risks and the adherent undertakes to submit ownership on receivables arising from the sale of goods or services;

Consensual contract because it arises through the mere agreement of the parties. The written form is a condition required *ad probationem*. In practice no bank will conclude a factoring contract than in writing (Săuleanu, 2005: 158);

Onerous contract as each side aims to achieve a material benefit. Factoring is essentially onerous; without the existence of a price that factor pays for receivables

assigned by the adherent we can not speak of a factoring contract (Pătlăgeanu and Lefter, 2004: 108);

Continuing contract because it runs slowly, over time, referring to a succession of benefits, not on a single one;

Contract with intuitu personae character, according to the doctrine majority, because of the characteristics of adherent ends: professional competence, customer stability, respectability, credibility. Some authors question this character as the decision of the factor to fund is influenced by monetary issues and less of the personal of parties involved in the factoring mechanism. An additional argument is that specific rules of intuitu personae contracts (revocation, death of the parties, disability) does not apply to this contract (Stănciulescu, Nemeș, 2013: 611).

Contract of adhesion: is the factor that imposes contractual terms, in practice it has the ability to select debtors and to deny the assumption of doubtful debts of adherent (Turcu, 1995: 353).

Ancillary contract because its existence is predetermined by the relationship existing between the adherent and debtor arising from receivables assigned in favor of the factor.

Commutative contract because the parties usually know the extent of the obligations from the moment of conclusion. The factoring contract can be *random* in case of the factoring contract without recourse, the factor being the one who bears the risk of insolvency of the debtor (Stănciulescu, Nemeș, 2013: 611).

Unnamed contract: Currently, the law no. 469/2002 is repealed, the factoring contract is an unnamed contract because the legislature did not nominate it as a distinct type of contract (Stănciulescu, 2014: 36).

Complex contract: includes an assignment of debt, a conventional subrogation consenting by the creditor and additional obligations for the factor to a transferee or subrogated staff consisting of: bookkeeping job reviews the records of the transferor, keeping accounts relating to receivables assigned, taking credit risk and financing the adherent.

A *special condition of validity* of the factoring contract consists in the material delivery of invoices by the adherent to the factor.

The functions of the factoring contract

Traditional factoring, classic (*old line factoring*) has the following two functions: *short-term financing tool* as the factor it behaves towards the adherent as a financier, through the payment before maturity of goods supplied or services rendered by adhering to debtors. We emphasize that factoring is accelerating rotation of the capital of a company, thereby, increasing the number of rotations performed over a period of time to achieve a higher turnover; *commercial management tool* as the factor undertakes to record invoices, track debtors are late in paying, receiving the payments, to promote actions in court for non-payment of outstanding debts.

Classification of factoring operations

Depending upon payment of receivables that the factor buys from the adherent and additional services offered to the latter, we distinguish between: *Traditional factoring, classic (old line factoring)*: payment of debts is made when receiving them, so before they reach maturity. In this case, the factor undertakes financing, management and guarantee. In case of traditional factoring, data transfer is itself born of that receivable (or a few days

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later) (Popescu, 1983: 341); *Maturity factoring*: the factor pays claims when due, not on the moment of receiving them. Credit obligation is not predominant, but its guarantee (Ghiță and Calotă-Ponea, 2006: 92). Note that for the factoring maturity date, the assignment date is the date of liability of receivables; *Agent factoring*: the factor buys the receivables of the adherent, paying them in advance and assuming the risk of default by assigned debtors and the adherent undertakes the management of receivables. Therefore, the adherent acts as an agent of the factor which received the payment from the assigned debtors which was not obliged to notify the assignment of the receivables involved (Vartolomei, 2006: 36).

In terms of confidentiality of the transaction, the factoring contract can be: *Closed factoring (confidential invoice discounting)*: provides the ability to maintain confidentiality about the fact that adherent turned to a factor; *Open factoring*: the adherent assigns to the factor all the receivables and notify the debtors on this aspect. Depending on the right of recourse that the bank can exert over adherent, we distinguish between: *Factoring with recourse* is characterized in that if the assigned debtor does not pay at maturity, factor has recourse against adherent; *Non-recourse factoring*: this form of factoring contract assumes that factor can not act against adherent to recover the invoices. According to participants in the factoring operation, we distinguish between: *Internal factoring*: taking place on the territory of a single country, intervening only one factor; *International factoring*: it involves the fact that the adherent and its clients, assigned debtors to be located or domiciled in different States and the intervention of two factors: the import and export. The exporter (adherent) concludes a factoring contract which surrenders all receivables against clients importers from abroad to the export factor. In his turn, the factor of export assigns the receivables to a factor in the country where the goods will be delivered, which is called the import factor that plays a key role in the operation because it is the person who performs the receivables from importers and bears the risk of their insolvency.

Effects of factoring contract

Next will be presented the effects of the factoring contract between the parties (*inter partes*) and to assigned debtors. The effects of the factoring contract between the parties are: The object of obligation to the adherent is transferring existing or future receivables, if at the time of conclusion or their birth they are determinable, relieving parties to negotiate and conclude a new contract every time. Together with the receivables, there will be handed over documents attesting factor consisting of invoices, records and contracts. The assignment of the receivable to the factor can be carried out without the consent of the debtor. Moreover, the UNIDROIT Convention on International Factoring expressly provides in article 6: “1. The divestiture of the transferee receivable by the supplier can be achieved, notwithstanding any agreement between the supplier and the debtor prohibiting such assignment”. The Factor will acquire receivables with all accessories attached to them: real or personal guarantees, privileges, penalties, interests (Stănciulescu and Nemeș, 2013: 615). Another obligation of the Adherent is to guarantee receivables under Article 1585 Civil Code. The Adherent guarantees the existence of a valid receivable in relation to the transfer date. The parties may stipulate expressly in the factoring contract that the adherent is the one who assumes the refusal of payment or insolvency of the assigned debtor. In this case, the factor reserves the right of recourse against the adherent if the debtor has not paid at maturity receivables transferred from any cause. In the absence of an express contractual provision, it operates the assumption that

the receivable was taken with all the risks, including non-payment of the assigned debtor. In this case, if on the maturity date the assigned debtor refuses to pay the receivables, the factor can not act against the adherent to recover the amounts paid.

We support, along with other authors that another obligation incumbent to the adherent is to notify the assigned debtor the assignment of receivables. However, since this is an unnamed contract, the parties are free to stipulate the responsibility of any one of them. Through a notice there might be avoided a payment in good faith to others. According to article 1578 (1) a) Civil Code, the assigned debtor is obliged to pay the assignee from the moment they accept the assignment given in writing with a certified date. The notification of the assigned debtor must be in writing, on paper or in electronic format and will have to specify whom or in whose name it is made, to identify in a reasonable way the assigned receivable and that the debtor is required to pay the factor.

Also, the adherent is obliged to pay a fixed remuneration to the factor. Remuneration is based on the factor obligations under the contract. More generally, the compensation factor includes the factoring fee, commission funding and possibly the agio. Factoring fee covers the costs incurred by the factor with the verification of receivables and the operation of the current account opened for the adherent. Financing commission lies at least as practiced in the banking market interest for short-term loans and apply to amounts paid in advance by the factor. Sometimes, compensation includes an additional factor - "Agio" is a guarantee against the risk of default by borrowers assigned debtors (Vartolomei, 2006: 78).

Finally, the adherent obligation is to communicate to the factor all informations it holds on assigned debtors, that could facilitate to the factor the cashing of invoices.

The main obligation of the factor is to pay to the adherent the invoices accepted for collection, thus becoming funder of the adherent. Without going into details, we show that in practice, the factors open a current account in the name of adherent scored to debit the amount of his remuneration and the credit amount representing the nominal value of receivables transferred by adhering. Payment is by funding the account that will be recorded as a debit and credit adherent factor. Also, the factor must collect debts at maturity and bear the risk of insolvency of debtors as a result of its subrogation in all the rights and obligations of the adherent. In the factoring with recourse, the contract provides expressly that the risk of default and insolvency of the assigned debtor will be assumed by the adherent, where the factor has recourse action against the adherent. As the owner of receivables, the factor has no right of recourse against the adherent. However, in the absence or part of the receivable, he has a repetitive action of undue payments.

In addition, the factor is tasked with keeping track of factoring operations. The adherent remits to the factor, the deadlines set by contract, the invoices accompanied by a schedule containing the following data: receivables assigned with accessory rights and respective actions; statement of transmission of receivables in the property of the factor; the request for payment of bills, in exchange of subrogatory receipts (Pătulea and Turianu, 1999: 129).

The effects of factoring upon the assigned debtor are: The main effect of the factoring contract to the assigned debtor is that, after being notified or accept payment, can pay validly only in the hands of the factor after the receivables become due. The factor that becomes through subrogation the owner of receivables transmitted, can bring an action for payment against the debtor. The debtor may invoke against the factor any exception that is inherent to the receivable, as this was sent with defects affecting and other exceptions if they have been incurred before the subrogation. Thus, the factor may

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exercise any right to compensation against the adherent to the rights or actions against the adherent existing at the date of the notification. Against debtors, the factoring contract is enforceable only when they are notified and in some instances when the factor asks to the debtors to accept the assignment and through the specification on the invoices issued by the adherent to the debtor of the fact that they are assigned in favor of the factor. It is noteworthy that the assigned debtor will retain all rights and defenses that he had against the adherent.

Termination of factoring

In the factoring contract, the parties specify the cases of termination of contract. In the absence of express contractual provisions, there will apply the rules of commercial obligations regarding the termination of contracts.

Conclusions

Surely, in a challenging economic environment, the factoring contract is a solution for companies to develop their specific commercial activities of manufacturing and marketing of goods or supply of services while maintaining liquidity without having to give guarantees. Another advantage of the factoring contract for companies is protection against the risk of insolvency of borrowers, buyers of goods or beneficiaries of provided services. Lastly, the growing interest of companies for the factoring contract is explained by allowing them to benefit from the experience of banks in assessing the creditworthiness of customers, in management and administration of receivables. On the other hand, the factoring is interesting also for the members of the Romanian Factoring Association (R.F.I.) because it allows them to exploit liquidity under a handling fee which is higher than the interest rate applied to the loan in the credit market. Banks and specialized non-bank financial institutions concluding factoring contracts benefit in what concerns the assigned borrowers of all guarantees and privileges that they had accepted with reference to the goods or services providing companies. Lastly, the factoring contract is interesting due to the specific clauses of the agreement: the exclusivity clause and the clause of globality. The factors may accept only those adherent's receivables which they consider safe in terms of their payment at maturity and the adherent is required to assign all its receivables exclusively to one factor.

Among the products addressed to corporate customers of banks and non-banking financial companies, factoring is the product which recorded the most consistent growth. The construction, energy, information technology and communications, metals, chemicals, recycling, transport domains have risen significantly, the least financed sector being financed through factoring being farma. The advantages offered by factoring made it to become a technique of short-term funding becoming more and more attractive for suppliers of goods and Romanian service providers. For the Romanian factoring market, the major role is hold by the banks, through their specialized departments, but non-bank financial institutions also are important in particular by ensuring a diverse market for all profiles of companies. The increasing trend which features the Romanian market has a high interest from foreign capital to finance the Romanian factoring sector, especially through non-bank financial institutions.

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