

AFREXIMBANK MODEL LAW ON FACTORING



AFREXIMBANK MODEL LAW ON FACTORING

AFREXIMBANK MODEL LAW ON FACTORING

EXP	LANATORY INTRODUCTION	3
1	History of Codification of Factoring Law	3
2	Afreximbank's Model Law for Africa	4
3	What This Model Law Does Not Cover	5
4	Change of Technical Words	8
PAF	RT 1: DEFINITIONS AND INTERPRETATION	11
1	Definitions	11
2	Rules of Interpretation	24
PAF	RT 2: SCOPE OF APPLICATION AND LIMITATIONS	27
3	Scope of Application	27
4	Exclusions and Limitations	27
PAF	RT 3: PARTY AUTONOMY	31
5	Party Autonomy	31
PAF	RT 4: EFFECTS OF ASSIGNMENT	33
6	Effects of Assignment	33
7	Nullification of Prohibitions Against Assignments	34
8	Transfer of Related Rights	35
PAF	RT 5: RIGHTS, OBLIGATIONS AND DEFENCES	39
(A)	As Between Client and Factor	39
9	Rights And Obligations of Client And Factor	39
10	Representations by the Client	39
11	Right to Give Notice of the Assignment	40
12	Right to Payment	41

(B)	Position of Debtor	42
13	Protection for the Debtor	42
14	Notice of the Assignment to the Debtor	43
15	Debtor Discharged by Payment	43
16	Debtor's Defences and Rights of Set-Off	45
17	Agreement not to Raise Defences or Rights	
	of Set-Off	46
18	Modification of the Supply Contract	47
19	Non-Recovery of Payments	48
(C)	Position of Third Parties	48
20	Law Applicable to Competing Rights in a Trade	
	Receivable	48
21	Special Rules on Proceeds	49
22	Subordination	50
23	Form of a Factoring Contract	51
PAF	RT 6: INTERNATIONAL FACTORING	53
24	Relations Between Factors in International	
	Factoring Transactions	53
PAF	RT 7: ENTRY INTO FORCE AND APPLICATION	55
25	Entry into Force and Application	55

Annex Priority Based on Registration

56



EXPLANATORY INTRODUCTION¹ FOR AFREXIMBANK'S GUIDANCE – NOT FOR LEGISLATION.

1 HISTORY OF CODIFICATION OF FACTORING LAW

In 1988 UNIDROIT (Institute for the Unification of Private Law, Rome) finalized the Ottawa Convention on International Factoring which introduced important principles for international factoring transactions. Then UNCITRAL (United Nations Committee on International Trade Law, Vienna) prepared the UN Convention on Assignment of Receivables in International Trade (New York 2001) ("2001 Convention") followed by the UNCITRAL Legislative Guide on Secured Transactions (2007). A Guide on the Implementation of a Security Rights Registry followed in 2014. At present, UNCITRAL is drafting a Model Law on Secured Transactions for release in Summer 2016.

The ideas and most of the wording are taken from the 2001 Convention³. However, its large scope of application has been narrowed to factoring including non-notified

¹ The ideas in this draft are taken from United Nations Law On The Assignment Of Receivables In International Trade, The Ottawa Convention on International Factoring, the General Rules of International Factoring of International Factors Group (IFG) and IFG's Model Factoring Law.

² On February 10, 2016 US, President Obama referred the Convention to the U.S. Senate with a recommendation for its adoption.

³ https://www.uncitral.org/pdf/english/texts/payments/receivables/ctc-assignment-convention-e.pdf.

factoring and other forms of modern factoring, such as reverse factoring and invoice discounting.

2 AFREXIMBANK'S MODEL LAW FOR AFRICA

Based on the ideas developed by international experts and expressed in the documents mentioned above, International Factors Group ("IFG") drafted a Model Law of Factoring in 2014⁴. Afreximbank's Model Law herewith has taken IFG's excellent work which reduced the scope of any proposed legislation to cover only "factoring" transactions, in the widest of this word, including assignments of receivables as a pledge of collateral security where pledge is used as the legal basis for a factoring transaction. Afrexim gratefully acknowledges the excellent assistance that it has received from IFG in being permitted to develop IFG's Model Law.

However it must be emphasised that this is primarily a law about the assignment of receivables. They will be assigned under or pursuant to a contract that has constituent elements that most receivables financiers will recognise. However it will also apply to financiers who would not consider calling themselves "factors", e.g. banks with revolving loans matching the value of receivables secured by assignments. Hence there may have to be changes to some technical words. See the footnotes to "Change of technical Words" below.

In order to create cross-border uniformity in transactions Afreximbank's Model Law is designed for adoption in more than one country, and should not be changed in substance. Thereby, a unification of factoring law can be

⁴ https://fci.nl/about-us/model-factoring-law-cv-140221.pdf.

achieved. When interpreting this Law, regard is to be had to its objectives and to the need to promote uniformity in the application of factoring and the observance of good faith in domestic and international trade.

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

National legislators, with the assistance of specialist advisors, may wish to consider the implementation of the rules hereby suggested into the national law. Some rules may be incompatible with national law as it exists; however, for the benefit of promoting finance and trade, national law should be reconsidered and modernised pursuant to the suggestions in this Afreximbank's Model Law.

States striving to align national law with ideas internationally developed and promoted in connection with factoring are encouraged to adopt this law. This law is presented as a Parliamentary Act in a form familiar to states whose legal systems have historical connections to English law. However it is easily convertible for those which would prefer a civil code or other presentation.

3 WHAT THIS MODEL LAW DOES NOT COVER

(a) Procedure for an assignment

It is important to remember that this draft Act does not attempt to specify in any detail the form of, or procedural requirements for, an "assignment" of a receivable, present or future. It is assumed that national laws already provides for this. If there is no such provision then it this Act will need amendment on a state by state basis. However the important consequences of an assignment have been carefully thought out by us and detailed as they affect the factor, its client, the debtor and interested third parties.

Because of the various legal procedures (including pledge, subrogation, charging, trust declaration and purchase) used in different states to acquire collateral in receivables, they are all deemed to be assignments for the purposes of this law. Whether the assignment supports a purchase arrangement or is part of the security for a loan is immaterial

(b) The constituents of each factoring product

This draft Act does not attempt to define the various factoring products. Product constituents and descriptions will be left entirely to the factoring agreement between the factor and the client. So definitions of each type of product are not considered necessary. These are purely matters of contract law.

(c) Regulation and tax

Likewise this Act does not attempt to deal with:

- (i) the regulation of factoring companies, their management and owners;
- (ii) the regulation of factoring contracts, such as maximum levels of fees, interest or discount charges;

- (iii) the regulation of which organisations may call themselves "factors";
- (iv) any registration requirements for assignments e.g. in order to obtain priority;
- (v) the tax consequences of assignments such as VAT or documentary taxes;
- (vi) the taxation treatment of the factor's fees and charges;
- (vii) a priority system based on a public registry filing system to deal with competing claims to receivables.

However it is always open to national legislators to add any of these matters to the Act when introducing its provisions into their law. It is hoped that the tax consequences will be conducive to the development of factoring.

4 CHANGE OF TECHNICAL WORDS

Certain words and phrases used in the 2001 Convention and IFG's Model Law are considered by Afreximbank to be confusing for those unfamiliar with the legal aspects of factoring words. The following have according been changed in order also to make the Law factoring specific.

Convention Words

"Assignor" "Assignee"

"Contract of Assignment"

"Original Contract"

"Security Rights"
"Notification of Assignment"

Act's Words

"Client"
"Factor⁵"

"Factoring Contract⁶"

"Supply Contract"

"Related Rights"

"Notice of the

Assignment"

As this Act applies to a wider group of receivables financiers than just pure "factors" Afrexim may wish to choose another term such as "receivables manager"," receivables financier", "working capital provider" although a slight amendment to "factoring contract " definition may be needed. Also change the name of the Act accordingly.

⁶ Same issue as last footnote. Consider e.g. "Receivables Management Contract".

FACTORING ASSIGNMENTS ACT 2016

AN ACT to establish principles and to adopt rules relating to the assignment of receivables in order to create certainty and transparency and to promote the modernisation of the law relating to assignments whilst protecting existing assignment practices and facilitating the development of new practices and ensuring adequate protection for the interests of debtors in order promote the availability of capital and credit and to facilitate domestic and international trade.



PART 1: DEFINITIONS AND INTERPRETATION

1 DEFINITIONS

1.1 In this Act, unless the context otherwise requires:

"assignment" means the transfer by agreement from the client to the factor of all or part of or an undivided interest in a receivable payable by a debtor and whether or not notice of the assignment has been given to the debtor. The creation of rights in a receivable as security for indebtedness or other obligation is deemed to be a transfer 7;

"client" (in business sometimes called an "assignor" but not in this Act) means the person who assigns a trade receivable to the factor, whether or not the trade receivable was initially payable to that person;

⁷ The term "assignment" includes a pledge of receivables as collateral security where local law and practice do not recognize assignments of receivables in the form of an outright sale of receivables to be a factoring transaction, and also the pledge of non-purchased accounts (such as ineligible accounts) which are pledged to factors by their clients as collateral for the client's indebtedness and obligations to the factor under the factoring agreement it would also include a mortgage or charge of receivables in those African countries whose law is based upon English common law."

"competing claimant" means:

- (a) a creditor of the client; or
- (b) an insolvency administrator.
- (c) another factor or assignee of the same trade receivable from the same client, including a person who, by operation of law, claims a right in the assigned trade receivable as a result of its rights in other property of the client;

"domestic assignment" means an assignment where the client and the factor are located in the same state at the time that the factoring contract is concluded between the them;

"domestic trade receivable" means a trade receivable where, at the time entering into the supply contract, the client and the debtor are located in the same state when the supply contract is concluded between them;

"existing trade receivable" means a trade receivable that arises upon or before the factoring contract is concluded between the client and the factor;

"factor" (in business sometimes called an "assignee" but not in this Act) means the person to whom a receivable is assigned;

"factoring contract" means a contract concluded between a client and a factor pursuant to which:

- (a) the client assigns or will assign or will offer to assign to the factor trade receivables arising from supply contracts between the client and its debtors; and
- (b) the factor is to perform at least one of the following functions ¹⁰:
 - (i) providing or procuring finance for the client, including loans and advance

⁸ In a reverse factoring situation, additional agreements may be concluded between the debtor and the factor; however, only the supplier (client) being the creditor of the debtor may assign receivables. Typically, in a reverse situation, a debtor will take the initiative to have factored more than one of his suppliers. The definition does not require that trade receivables against more than one debtor of the supplier (client) be assigned.

⁹ The scope should be wide enough to include typical factoring agreements, including invoice discounting and reverse factoring. National legislators are invited to adapt the scope to the specific legal environment, and should ascertain that recourse and non-recourse factoring are included. The industry sees a bulk securitisation as being different from factoring, hence the mentioning of the direct relation of the value and risk assessment of the receivables.

¹⁰ It is up to national legislators to consider the qualifications for a factoring contract. There is an argument that a factor must provide finance, and/or in some jurisdictions, there is a requirement that the factor must provide credit protection, in which cases this definition will need adjusting.

payments that are directly related to the value of each trade receivable and its perceived credit risk at the time the receivable is created or at any time thereafter; or

- (ii) maintenance of accounts (ledgering) relating to the assigned receivables; or
- (iii) collection of assigned receivables and
 - (A) unless otherwise agreed any collection is for its own account and not as agent for the client; but
 - (B) any collection made by the client for the benefit of the factor is deemed to be made by the factor; and
 - (c) protection against default in payment by debtors ¹¹ solely because of their financial inability to pay may or may not be give; and

¹¹ This is not included as one of the functions that a factor may supply as a sole function under subsection (b) even though IFG's model law does so provide. European experience has been that regulators might view this as an insurance product, the provision of which, without a licence is a criminal offence making the factor's fees irrecoverable.

(d) notice of the assignment of the receivables may or may not be given to debtors. 12

"financial contract" means any spot, forward, future, option or swap transaction involving interest rates, commodities, currencies, equities, bonds, indices or any other financial instrument, any repurchase or securities lending transaction, and any other transaction similar to any of these transactions entered into in financial markets and any combination of these;

"financial services 13" means any service of a financial nature, including (but not limited to)—

- (a) transactions on a regulated exchange;
- (b) insurance-related services consisting of—
 - (i) direct life assurance;
 - (ii) direct insurance other than life assurance;
 - (iii) reinsurance and retrocession;

¹² The absence of notice of assignment as in confidential invoice discounting will not of itself stop the transaction being a "factoring" transaction subjecting the factor and the client to this law.

¹³ This a comprehensive definition taking from EU anti-terrorist legislation. It could be reduced in length to just "insurance, banking and financial trading" if legislators so wish.

- (iv) insurance intermediation, such as brokerage and agency;
- (v) services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services;
- (c) banking and other financial services consisting of—
 - (i) accepting deposits and other repayable funds;
 - (ii) lending (including consumer credit, mortgage credit, factoring and financing of commercial transactions);
 - (iii) financial leasing;
 - (iv) payment and money transmission services (including credit, charge and debit cards, travellers' cheques and bankers' drafts);
 - (v) providing guarantees or commitments;
 - (vi) financial trading (as defined in this Act)
 - (vii) participating in issues of any kind of securities (including underwriting and placement as an agent, whether publicly or privately) and providing services related to such issues;

(viii) money brokering;

- (ix) asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (x) inter-bank payment systems, inter-bank payment agreements, settlement and clearing services for financial assets (including securities, derivative products and other negotiable instruments);
- (xi) providing or transferring financial information, and financial data processing or related software (but only by suppliers of other financial (f) services);
- (xii) providing advisory and other auxiliary financial services in respect of any activity listed in sub-paragraphs (i) to (xi) (including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy).

"financial trading" means trading for own account or for account of customers, whether on an investment exchange, in an over-the-counter market or otherwise, in—

- (a) money market instruments (including cheques, bills and certificates of deposit) and other negotiable instruments and financial assets (including bullion);
- (b) foreign exchange;
- (c) derivative products (including futures and options);
- (d) exchange rate and interest rate instruments (including products such as swaps and forward rate agreements);
- (e) transferable securities;

"future trade receivable" means a receivable that arises after the factoring contract is concluded between the factor and the client;

"insolvency administrator" means the person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or liquidation of the client's assets or affairs;

¹⁴ The assignment may relate to receivables that will be created at a later date. Factoring agreements are master agreements that include all receivables arising from the business after the factoring agreement is concluded between the factor and the client. A contractual receivable is created at the time the supply contract is concluded, as determined by national law.

"insolvency proceeding" means a collective judicial or administrative proceeding, including an interim proceeding, in which the assets and affairs of the client are subject to control or supervision by a court or other competent authority or person for the purpose of reorganization or liquidation;

"international assignment" means an assignment of a trade receivable where the client and the factor are located in different states at the time of conclusion of the factoring contract;

"international trade receivable" means a trade receivable where, at the time the supply contract is concluded, the client and the debtor are located in different states;

"netting agreement" means an agreement between two or more parties that provides for one or more of the following:

- (a) the net settlement of payments due in the same currency on the same date whether by novation or otherwise; or
- (b) upon the insolvency or other default by a party, the termination of all outstanding transactions at their replacement or fair market values, conversion of such sums into a single currency and netting into a single payment by one party to the other; or
- (c) the set-off of amounts calculated, as set forth in sub-paragraph (b) immediately above in

this definition, under two or more netting agreements;

"notice of the assignment" means a communication in writing which reasonably identifies the assigned receivable and the factor and states expressly that the receivable has been assigned to the factor;

"priority" means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation, whether the assignment accomplishes a true-sale of all right, title and ownership interest of the assignor in the receivable to the assignee, and whether any requirements necessary to render the right effective against a competing claimant have been satisfied;

"proceeds" means whatever is received in respect of an assigned trade receivable, whether in total or partial payment, discharge or other satisfaction of the receivable; the term includes whatever is received in respect of proceeds; the term does not include returned goods;

"prohibition against assignment 15" means

- (a) that part of any agreement between the initial or any subsequent client and the debtor or any subsequent factor¹⁶ which;
 - prohibits, restricts, or requires the consent of the debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a right or interest in the receivable; or
 - ii. provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of set-off, claim, defence, termination, right of termination, or remedy under the supply contract; and
- (b) any rule of law, statute, order or regulation which, in respect of the assignment of, or the creation, attachment, perfection, or enforcement of a right or interest in the receivable which:

¹⁵ It must be appreciated that in many jurisdictions the assignment of receivables due by a government is prohibited. However nullification of such provisions is covered in the interest of public policy to encourage the use of receivables financing.

¹⁶ Factoring transactions shall not be prevented by prohibition of assignment clauses imposed by the debtor or by law. Nor may the debtor may claim damages from the client or the factor for breach of contract.

- i. prohibits, restricts, or requires the consent of the government, a governmental body or official, or debtor or
- ii provides that the same may give rise to a default, breach, right of set- off, claim, defence, termination, right of termination, or remedy;

"receivable" means a contractual right to payment of a monetary sum;

"related right" means a personal or property right which secures or assists in payment of the assigned receivable and without prejudice to the generality of the foregoing it includes:

- (a) rights of lien and stoppage in transit;
- (b) guarantees and indemnities;
- (c) documents of title;
- (d) credit and other insurances;
- (e) evidence of the amount and existence of a receivable; (f) right to compromise disputes and issues receipts.

"subsequent assignment" means a further assignment of a receivable by the initial or any other factor to another person, including an assignment of a receivable back to the client;

"supply contract" means a contract between the client and the debtor from which an assigned receivable arises,

"trade receivable" means any of the following receivables 17:

- (a) a receivable representing the payment obligation for a credit card transaction; or
- (b) a receivable representing the amount owed to the client upon net settlement of payments due pursuant to a netting agreement involving more than two parties;
- (c) a receivable arising from a supply contract that is:
 - (i) for the supply or lease or licence of goods or services, other than for financial services; or
 - (ii) for a construction; or
 - (iii) for the sale or lease of real property; or

¹⁷ There is an argument that receivables arising from purchases or other supplies for domestic, household or non-business needs should be excluded from the definition of trade receivables and thus from the ambit of the Act. This has been ignored but local legislators may wish to reconsider, bearing in mind that specific reference may be needed to ensure that credit card debts are still covered.

(iv) for the sale, lease or licence of industrial or other intellectual property or of proprietary information or of intangibles;.

But it does not include a receivable arising out of any transactions specifically excluded from the ambit of this Act by sections 4.1 and 4.2 (exclusions and limitations).

"writing" means any form of information that is accessible so as to be usable for subsequent reference and where this Law requires a writing to be signed then that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing 19;

2 RULES OF INTERPRETATION

2.1 A person is located in the state in which it has its place of business. If the client or the factor has a place of business in more than one state, the place of business is that place where the central administration of the client or the factor is

¹⁸ This makes lawful the assignment by electronic means provided that further reference can be made to the transaction (e.g. it is possible to later print out the transaction), or the assignment of electronic invoices

¹⁹ Signature can therefore be made by traditional means as well as by electronic means.

exercised. If the debtor has a place of business in more than one state, the place of business is that which has the closest relationship to the supply contract. If a person does not have a place of business, reference is to be made to the habitual residence of that person In the case of an individual this is his principal residence. In the case of a person registered under law to undertake business this is the place shown in such registration as its address.

- 2.2 Unless the context otherwise provides, the singular includes the plural and vice versa and a reference to any gender includes any other gender;
- 2.3 The headings to any section or part of this Act are for convenience only and are to be ignored in its interpretation;
- 2.4 Any reference to a "person" is to any individual, firm, company, unlimited partnership, limited liability partnership, corporation or partnership, unincorporated body, government, government agency or public authority, as the case may be;
- 2.5 The meaning of general words either introduced or followed by the words "other" or "including" is not to be limited by reference to any preceding word indicating a particular class of acts, matters or things;
- 2.6 Reference to a section or to a part is to the appropriate section or part of this Act.



PART 2: SCOPE OF APPLICATION AND LIMITATIONS

3 SCOPE OF APPLICATION

- 3.1 This Act applies to domestic or international assignments of domestic trade receivables or international trade receivables made under or pursuant to a factoring contract.
- 3.2 This Act also applies to subsequent assignments of the receivables referred to in section 3.1 provided that either:
 - (a) the initial assignment was made under or pursuant to a factoring contract; or
 - (b) any prior assignment is governed by this Act.

4 EXCLUSIONS AND LIMITATIONS

- 4.1 This Act does not apply to assignments made:
 - (a) to an individual for his or her personal, family or household purposes; or
 - (b) as part of the sale or change in the ownership or legal status of the business out of which the assigned receivables arose.
- 4.2 This Act does not apply to assignments of receivables arising under or from:

- (a) transactions on a regulated exchange;
- (b) financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;
- (c) inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments;
- (d) the transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;
- (e) a letter of credit or independent guarantee;
- (f) financial services, including financial trading;
- (g) security interests created by other statutes;
- (h) landlord's liens except as to fixtures;
- (i) receivables arising from the sale or lease of real property;
- (j) transfer of interests in or a claim under a policy of insurance, (k) transfers of claims for wages or compensation by employees, (l) the sale of a business,

- (m) set-off claims;
- (n) claims in court proceedings.
- 4.3 Nothing in this Act affects the rights and obligations of any person under the law governing negotiable instruments.
- 4.4 Nothing in this Act affects the rights and obligations of the client and the debtor under laws governing the protection of parties to transactions made for personal, family or household purposes.

4.5 Nothing in this Act:

- (a) affects the application of the laws of any state in which real property is situated to either:
 - (i) an interest in that real property to the extent that under that law the assignment of a receivable confers such an interest; or
 - (ii) the priority of a right in a receivable to the extent that under that law an interest in the real property confers such a right; or
- (b) makes lawful the acquisition of an interest in real property not permitted under the law of the state in which the real property is situated.



PART 3: PARTY AUTONOMY

5 PARTY AUTONOMY

The client, the factor and the debtor may derogate from or vary by agreement between them any or all provisions of this Act relating to their respective rights and obligations except that the client and the debtor may not derogate from the provisions of sections 7.1 and 7.2 (nullification of prohibitions on assignment) or 8.2 (assignment of rights securing payment). Such an agreement does not affect the rights of any person who is not a party to the agreement.



PART 4: EFFECTS OF ASSIGNMENT

6 EFFECTS OF ASSIGNMENT

- 6.1 Assignments of trade receivables are valid and effective unless stated otherwise in this Act.
- 6.2 An assignment is still effective as between the client and the factor or as against the debtor or as against a competing claimant, and the right of an factor may not be denied priority, on the ground that it is an assignment of more than one receivable, or of future receivables or of parts of a receivable or of an undivided interest in receivables, provided that the receivables are described:
 - (a) individually as receivables to which the assignment relates; or
 - (b) in any other manner, provided that they can be identified as receivables to which the assignment relates either at the time of the assignment or, in the case of future receivables, at the time the supply contract is concluded.
- 6.3 Unless otherwise agreed, an assignment of one or more future trade receivables is effective without

²⁰ This clause allows the assignment of trade receivable before they have come into existence.

- a new act of transfer being required to assign each receivable 21.
- 6.4 This Act does not affect any limitations on assignments arising from any other laws except as stated in section 6.1, sections 7.1 and 7.2 (nullification of prohibitions against assignment) and sections 8.2 and 8.3 (transfer of related rights). 22

7 NULLIFICATION OF PROHIBITIONS AGAINST ASSIGNMENTS

- 7.1 An assignment of a receivable is effective notwithstanding a prohibition against assignment. The debtor may not avoid the supply contract or its payment obligations because the client is in breach such a prohibition ²³.
- 7.2 Neither the client nor the factor shall have any liability to the debtor for breach of a prohibition against assignment nor may the same be raised by

²¹ The assignment of future trade receivables may be agreed on in advance in a factoring master agreement, and no new act of transfer is required when the receivable arises.

²² Some trade receivables are excluded from assignment by other law, e.g. data protection or confidentiality rules relating to specific services such as medical doctors, attorneys or tax advisors, or laws protecting national security, such as military procurement contracts. Such limitations shall not be affected.

²³ Factoring transactions shall not be prevented by a ban on assignment clause imposed by a debtor.

- the debtor as a defence or set-off to any claim for payment of an assigned debt.
- 7.3 Neither the Government, nor any governmental body or official may take any action against the client or the factor for an assignment of a receivable in breach of any prohibition against assignment.

8 TRANSFER OF RELATED RIGHTS

- 8.1 Upon the assignment of a receivable its related rights are also transferred to the factor without any new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the client is obliged to transfer such right and any proceeds to the factor.
- 8.2 A related right is transferred under sub-section 8.1 even though there may be an agreement between the client and the debtor or some other person granting that right which prohibits, limits, makes impossible or imposes a condition or other restriction on the client's right to assign either the receivable or the right securing payment of the assigned receivable.
- 8.3 The client shall have no liability to the debtor or other person referred to in section 8.2 for breach of any agreement referred to in that section. The other party to that agreement may not avoid the supply contract or the assignment contract or the right securing payment on the sole ground of such breach. The debtor may not raise the same as a

- defence or set-off to any claim for payment of an assigned debt.
- 8.4 The transfer of a possessory property right under section 8.1 does not affect any obligations of the client to the debtor or the person granting the property right with respect to the property transferred existing under the law governing that property right.
- 8.5 Section 8.1 does not affect any requirement under rules of law other than this Law relating to the form or registration of the transfer of any rights securing payment and/or evidencing ownership of the assigned receivable.



PART 5: RIGHTS, OBLIGATIONS AND DEFENCES

(A) AS BETWEEN CLIENT AND FACTOR

9 RIGHTS AND OBLIGATIONS OF CLIENT AND FACTOR

The mutual rights and obligations of the client and the factor arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.

10 REPRESENTATIONS²⁴ BY THE CLIENT

- 10.1 Unless otherwise agreed between the client and the factor, the client shall be deemed to represent and warrant to the factor that at the time of conclusion of the factoring contract and in respect of each trade receivable to which the factoring contract applies:
 - (a) the client has and will continue to have the right to assign each existing trade receivable and each future trade receivable free of all encumbrances including prohibitions on the assignment of the receivable and its related rights; and
 - (b) the client has not previously assigned any existing trade receivable or future trade receivable to another person; and

^{24 &}quot;Representation" is a legal term to express a warranty by the party giving the representation.

- (c) the debtor does not and will not have any defences, rights of set-off and of the nature referred to in section 16.1 or counterclaims:
- (d) no prohibition against the assignment of the receivable
- 10.2 Unless otherwise agreed between the client and the factor, the client does not represent that, in respect of any receivable to which the factoring contract applies, the debtor has, or will have, the ability to pay or otherwise discharge any receivable.

11 RIGHT TO GIVE NOTICE OF THE ASSIGNMENT

- 11.1 Unless otherwise agreed between the client and the factor, notice of the assignment and a payment instruction may be sent to the debtor by either the client or the factor or both. However after notice of the assignment has been sent only the factor may send a payment instruction.
- 11.2 Notice of the assignment or a payment instruction sent in breach of any agreement referred to in section 11.1 is still effective for the purposes of section 15 (debtor discharged by payment).
- 11.3 However, nothing in 11.1 or 11.2 affects any obligation or liability of the party in breach of such an agreement for any consequent damages.

12 RIGHT TO PAYMENT

- 12.1 As between the client and the factor, unless otherwise agreed and whether or not notice of the assignment has been sent:²⁵
 - (a) if payment in respect of the assigned receivable is made to the factor, then the factor is entitled to retain the proceeds and any goods returned in respect of the assigned receivable; and
 - (b) if payment in respect of the assigned receivable is made to the client, then the factor is entitled to payment of the proceeds and also to any goods returned to the client in respect of the assigned receivable; and
 - (c) if payment in respect of the assigned receivable is made to another person over whom the factor has priority, then the factor is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable;
 - (d) however the factor may not retain more than the value of its right in the receivable.

As a basic rule, the factor is entitled to the payment, whether made to the factor or to the client. If payment is made to a third party, such as a judgment creditor or the insolvency administrator, the factor can claim the payment if the factor has priority over such third party. Those rules do not exclude the right of the factor to claim payment from the debtor for ignoring a notice of the assignment.

(B) POSITION OF DEBTOR

13 PROTECTION FOR THE DEBTOR

- 13.1 Except as otherwise provided in this Act, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the supply contract. This Act does not affect the rights and obligations of the debtor unless, at the time of conclusion of the Supply Contract, the debtor is located in [.....insert name of country passing this law.] or the law governing the supply contract is that of [....insert name of country passing this law..].
- 13.2 A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change:
 - (a) The currency of payment specified in the supply contract; or
 - (b) The state specified in the supply contract in which payment is to be made to a state other than that in which the debtor is located²⁶.

²⁶ In a 2 Factor transaction, the import factor will collect in the debtor's country, and so the debtor should not claim that payment was agreed to be made to the supplier in the export country

14 NOTICE OF THE ASSIGNMENT TO THE DEBTOR²⁷

- 14.1 Notice of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notice of the assignment or a payment instruction is in the language of the supply contract.
- 14.2 Notice of the assignment or a payment instruction may relate to trade receivables arising after the notice.
- 14.3 Notice of a subsequent assignment shall be deemed to constitute notice of all prior assignments²⁸.

15 DEBTOR DISCHARGED BY PAYMENT

15.1 Until the debtor receives notice of the assignment, the debtor is entitled to discharge a trade

²⁷ The debtor may or may not be notified of the assignment (see definition of "notice of the assignment" in section 1). The debtor should be able to understand the notification (section 14.1), and it may relate to trade receivables arising after the notification (section 14.2). In cases where a trade receivable is assigned in a chain ("subsequent assignments"), notification may relate to the second assignment only. For instance, in a typical international assignment, a trade receivable is assigned from the client (factor 1) to the export factor (factor 1 = client 2) who assigns it to the import factor (factor 2). The notification will only show the end result, i.e. that client 2 is the new creditor to whom payment should be made.

As in international factoring using the two factor system or when receivables are re-factored domestically, by the factor to its refactor.

receivable by paying in accordance with the supply contract

- 15.2 After the debtor receives notice of the assignment then, subject to sections 15.3 to 15.8, the debtor can only discharge the trade receivable by paying the factor. However if there are alternative payment instructions in either the notice of the assignment or in a writing received by the debtor subsequent to the notice of the assignment, then the debtor is discharged by payment in accordance with such instructions.
- 15.3 If the debtor receives more than one payment instruction relating to a single assignment of the same trade receivable by the same client, then the debtor is discharged by paying in accordance with the last payment instruction received from the factor before payment.
- 15.4 If the debtor receives notification of more than one assignment of the same trade receivable made by the same client, then the debtor is discharged by paying in accordance with the first notification received.
- 15.5 If the debtor receives notice of one or more subsequent assignments, then the debtor is discharged by paying in accordance with the notice of the assignment in respect of the last of such subsequent assignments.
- 15.6 If the debtor receives notice of the assignment of a part of or an undivided interest in one or more

trade receivables, then the debtor is discharged by either paying in accordance with such notice or in accordance with the provisions of this section 15 as if the debtor had not received the notice. If the debtor pays in accordance with the notice, then the debtor is discharged only to the extent of the part or undivided interest paid.

- 15.7 If the debtor receives a notice of the assignment from the factor, then the debtor is entitled to request that the factor provide within a reasonable period of time adequate proof of the assignment from the initial client to the initial factor and of any intermediate assignments have been made. Unless the factor does so, the debtor is discharged by paying in accordance with section 19 (non-recovery of payments) as if notice of the assignment from the factor had not been received. Adequate proof of an assignment includes but is not limited to any writing emanating from the client and indicating that the assignment has taken place or authorising payment to the factor.
- 15.8 Sections 15.1 to 15.7 do not affect any other ground upon which payment by the debtor to the person entitled to payment or to a competent judicial or other authority or to a public deposit fund discharges the debtor.

16 DEBTOR'S DEFENCES AND RIGHTS OF SET-OFF

16.1 In a claim by the factor against the debtor for payment of the assigned trade receivable, the debtor may raise against the factor all defences and

rights of set-off arising from the supply contract, or any other contract that was part of or closely connected with the same transaction, of which the debtor could avail itself, as if the assignment had not been made and such claim were made by the client.

16.2 The debtor may raise against the factor any other right of set-off, provided that it was available to the debtor at the time notice of the assignment was received by the debtor.

17 AGREEMENT NOT TO RAISE DEFENCES OR RIGHTS OF SET-OFF

- 17.1 The debtor may agree ²⁹ with the client in a writing signed by the debtor not to raise against the factor any defences and rights of set-off that it could raise pursuant to sections 16.1 and 16.2. Such an agreement precludes the debtor from raising against the factor such defences and rights of set-off. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the factor is determined by section 18.2 *(modification of the supply contract).*
- 17.2 The debtor may not waive defences or rights of set-off:

²⁹ Such waivers are common in reverse factoring (sometimes known as supply chain finance) transactions. The debtor is under the obligation to make payment to the factor, but may recover such payments from the supplier.

- (a) arising from fraudulent acts on the part of the factor; or
- (b) based on the debtor's incapacity.

18 MODIFICATION OF THE SUPPLY CONTRACT

- 18.1 An agreement between the client and the debtor concluded before notice of the assignment is received by the debtor which affects the factor's rights is also effective as against the factor, whose rights are correspondingly affected.
- 18.2 An agreement between the client and the debtor concluded after notice of the assignment is received by the debtor which affects the factor's rights is ineffective as against the factor unless:
 - (a) the factor at any time consents to it; or
 - (b) the trade receivable is not fully earned by performance and either:
 - (i) the modification is provided for in the supply contract; or

- (ii) in the context of the supply contract, a reasonable factor would consent to the modification ³⁰
- 18.3 Sections 18.1 and 18.2 do not affect any rights or obligations of the client or the factor arising from breach of any agreement between them.

19 NON-RECOVERY OF PAYMENTS

Failure of the client to perform the supply contract does not entitle the debtor to recover from the factor a sum paid by the debtor to the client or the factor. However the rights of the debtor against the client in respect of such sum paid are unaffected.

(C) POSITION OF THIRD PARTIES

20 LAW APPLICABLE TO COMPETING RIGHTS IN A TRADE RECEIVABLE

20.1 If more than one assignment is made by the same client of the same trade receivable then priority amongst the factors of their entitlement to the trade receivable will be determined by general rules of law and in the absence thereof then the first factor to give notice to the debtor shall have priority.

³⁰ In cases of the assignment of future trade receivables, the parties of the supply contract may make changes to the supply contract before performance has been fully completed. Factors provide for finance on invoices received or notified only after full performance of the supply contract. After that no change in the supply contract is permitted unless the factor consents.

20.2 With the exception of matters that are settled in section 20.1 and elsewhere in this Act the law of the state in which the client is located governs the priority of the right of a factor in the assigned trade receivable over the right of a competing claimant.³¹

21 SPECIAL RULES ON PROCEEDS

21.1 If proceeds are received by the factor, then the factor is entitled to retain those proceeds to the extent that the factor's right and interest in the assigned trade receivable however arising has

³¹ It is of utmost importance to the factor that his rights are unaffected after assignment by third parties, such as judgment creditors of the client. Likewise, the factor must be in a position to collect even upon the insolvency of the client and the related initiation of an insolvency proceeding with respect to the client. This Model law assumes that domestic law has rules on priority, system. In the absence of such rules, a registry system is suggested (see Annex). Note EU Rome I Convention has not yet solved the problem of third party rights. However, it is likely that the EU Commission will follow recommendations to link the priority issue with the location of the client. In general, priority issues are solved by either the date the assignment was made (e.g. Germany), or the date of the notification (e.g. United Kingdom). Alternatively, a registration requirement to ensure priority over competing claimants may be installed (e.g. U.S.). A registration system based on modern internet platforms might be useful for emerging market economies as the factor can easily ascertain the priority of the assignment without detailed due diligence procedures, and thus the factor is in a position to offer credit at a lower rate. A suggestion as contained in the UN Convention is reproduced as based either on the time of the assignment, or notification given to the debtor, or a registration Annex at the end of the text, and should be used as a guideline by national legislators.

priority over the right of a competing claimant in the assigned trade receivable.

- 21.2 If proceeds are received by the client, then the right of the factor in those proceeds has priority over the right of a competing claimant in those proceeds to the same extent as the factor's right had priority over the right in the assigned trade receivable of that claimant if:
 - (a) the client received the proceeds under instructions from the factor to hold the proceeds for the benefit of the factor; and
 - (b) the proceeds are held by the client for the benefit of the factor separately and are reasonably identifiable and segregated from the other assets of the client, such as in the case of a separate deposit or securities account containing only proceeds consisting of cash or securities.
- 21.3 Nothing in section 21.2 affects the priority of a person having against the proceeds a right of set-off or a right created by agreement and not derived from a right in the trade receivable.

22 SUBORDINATION

A factor entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any existing or future factors.

23 FORM OF A FACTORING CONTRACT

23.1 A factoring contract concluded between persons who are located in the same state is formally valid as between them if it satisfies the requirements of either the law which governs such contract or the law of the state in which it is concluded.

A factoring contract concluded between persons who are located in different states is formally valid as between them if it satisfies the requirements of either the law which governs such contract or the law of one of those states.



PART 6: INTERNATIONAL FACTORING

24 RELATIONS BETWEEN FACTORS IN INTERNATIONAL FACTORING TRANSACTIONS

- 24.1 Relations between factors concerning the assignment between them of international trade receivables in international factoring transactions and which are commonly known as
 - (a) export factoring;
 - (b) import factoring

shall be governed by the rules (if any) of an association established for such purposes of which the factors are both members and in the absence of such rules, by the law agreed to between them. Unless agreed otherwise by the factors involved or regulated by the rules of an association of which the factors are both members, the law set out in Parts 1 to 5 of this Act shall apply accordingly. To the extent that any of the same shall not apply to any aspect of their relationship then the applicable law shall be that of the country in which the factor giving the assignment is located.



PART 7: ENTRY INTO FORCE, APPLICATION AND REPEALS

25	FNTRY	INTO	FORCE		ΔΡΡΙΙ	CATION
ZJ	LIVITION	11410	IUNUL	AIND	AI I LI	CALIUN

25.1	This Act shall come into force on201
25.2	This Act may be cited as the Factoring Assignments Act 201.
25.3	This Law applies only to assignments if the factoring contract is concluded on or after the date when this Law comes into force.
25.4	The enactments and regulations specified in Schedule 1 are repealed or revoked to the extent specified.
SCHEDU	LE 1: REPEALS AND REVOCATIONS
Part 1 Re	peal of Statutes
Short Tit	le
Extent of	Repeal
Part 2 Re	vocation of regulations and Orders
Short Tit	le
Extent of	Revocation

ANNEX PRIORITY BASED ON REGISTRATION

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

A registry system has been recommended by UNCITAL (United Nations Commission on International Trade Law) See UNCITRAL Guide on the Implementation of a Security Rights Registry at http://www.uncitral.org/pdf/english/texts/security/Security-Rights-Registry-Guide-e.pdf



AFRICAN EXPORT-IMPORT BANK BANQUE AFRICAINE D'IMPORT-EXPORT

HEADQUARTERS

72(B) El Maahad El Eshteraky St. Heliopolis, Cairo 11341, Egypt P.O. Box 613 Heliopolis Cairo 11341, Egypt Tel: +20-2-24564100/1/2/3

ABUJA BRANCH OFFICE

No. 2 Gnassingbe Eyadema Street Asokoro Garki, Abuja, Nigeria Tel: +234-9-4620606

HARARE BRANCH OFFICE

Eastgate Building, 3rd Floor Gold Bridge (North Wing) Gold Bridge, 2nd Street Harare, Zimbabwe Tel: +263-4-700904

ABIDJAN BRANCH OFFICE

Angle Boulevard Botreau Roussel -Rue Privée CRRAE-UMOA Immeuble CRRAE-UMOA, 3ème étage 01 BP 5634, Abidjan 01, Côte d'Ivoire Tel: +225-2-0307300

Fax: +225-2-0307348/49

WEBSITE

www.afreximbank.com



AFRICAN EXPORT-IMPORT BANK BANQUE AFRICAINE D'IMPORT-EXPORT

AFREXIMBANK MODEL LAW ON FACTORING