

# Country legal overview



## GENERAL DESCRIPTION AND LEGISLATIVE BACKGROUND

In Spain factoring contracts are not specifically regulated. Commonly, factoring in Spain is structured as a simple assignment of credits, whereby a portfolio of current and future credits related to one or more debtors is transferred. The aim of the factoring contract is to transfer the credits and all associated rights. Specific civil and commercial legislation regulating transfer of credits shall therefore be applicable.

The Spanish Commercial Code establishes that a creditor, without the debtor's consent, can transfer commercial credits. Although this article does not specifically regulate factoring agreements, it is applicable, as this is a feature of factoring contracts. The Commercial Code also provides that by virtue of the notification, the debtor is obliged to pay the debt to the new creditor. Therefore notifications made to a debtor in the factoring process are usually carried out in accordance with this article. This means that any debtor who pays the former creditor before being informed of the transfer of rights is free from the agreement's obligations.

In addition, the Transferor must guarantee the legitimacy of the credit and the identity of the debtor, but is not obliged to confirm the solvency of the debtor unless this is specifically agreed - as will be the case in recourse factoring.

In Spain, both recourse factoring (where the factor does not bear the risk of the bad debts and is able to reclaim the money from the Transferor if the debtor becomes insolvent and non-recourse factoring (where the factor bears the risk of the bad debt and takes over all the rights to pursue the credit) are possible.

The Parties to the factoring contract are the Factor, the Transferor and the Debtor.

The Factor has the right to approve the operations of the Transferor, to review accounts and documentation and to be remunerated by means of a factoring fee. The Factor is usually obliged to provide management and collection services as agreed, to assume the risk of insolvency of the debtors in the event of non-recourse factoring and to advance funds. The Factor must also inform the Transferor if he intends to pursue a bad debtor through the courts.

The Transferor has the right to receive the credits collected in the event of recourse factoring, and the services and financing as agreed in the contract. The Transferor is obliged to transfer all credits and associated rights to the Factor, respecting the principles of global and exclusive transfer and deliver all the necessary documentation. The Transferor should also notify the debtors of the new payment arrangements and pass on details of debtors to the Factor where agreed. It also guarantees the legitimacy of the credit and the identity of the debtor, pays the agreed remuneration and returns all advances where a debt is not due and legitimate. In addition, in recourse factoring, the Transferor must also guarantee the solvency of the debtor and bear the risk of the Debtor's insolvency.

The Debtor whose credit is transferred does not form part of the contractual relationship. However, they will be affected by the factoring contract. It is important to note that in Spain if a Public Administration is the debtor, a global transfer of credits cannot be carried out and each transfer must be authorised on a case-by-case basis by the Public Administration.

It is possible to transfer credits relating to consumers in a factoring contract, as long as the Transferor is a business. However, pursuant to when the original creditor transfers his rights to a third party, the consumer has the same rights against the new creditor as he had against the original creditor, including (where appropriate) compensation in accordance with Article 1198 CC.

Exclusivity is a common characteristic of Spanish factoring and the Transferor will often transfer all the credits of all of its Debtors, including all associated rights (i.e. securities) to the Factor.

## REGULATORY MATTERS

Factoring has been recognised in Spain since 1977. Factoring activity can be carried out by Financial Credit Institutions, Banks, Saving Banks and ordinary Companies. In Spain it is considered that one of the objectives of financial institutions is to advance funds whilst also taking responsibility for the management and collection of credit. This idea has been further developed and in more recent legislation factoring is specifically mentioned. According to the Regulation of the Legal Regime of Financial Credit Institutions, the rendering of factoring agreements and related activities are specifically considered as Credit activities. Furthermore, the first additional provision of Law 3/1994 (European Community Credit Entities) provides that factoring (recourse and non-recourse) is an activity that may be carried out by financial credit institutions. Notwithstanding the above, factoring is not considered to be an exclusive or reserved activity of such financial institutions.

However, there are benefits associated with carrying out factoring through a Financial Credit Institution - such as the possibility of accessing bad debtors lists, the possibility of getting better rates with the Bank of Spain and benefits from the special insolvency regime for Transferors that only applies to Financial Credit Institutions and Banks' factoring contracts

On the other hand, Financial and Credit Institutions are required to be incorporated with a minimum share capital of 5.2 million euros, together with other requirements, including having to register with the Ministry of Economy and Commerce, having to submit accounts and financial statements to the General Management of Financial Policies and having to establish lists of charges including commission and interest. Foreign Banks and other Credit institutions meanwhile are required to confirm that they are authorised to carry out the proposed factoring activities on a regular basis in Spain under passporting regulations. If the factoring activity is to be carried out in Spain on a one-off basis however, then it is not necessary to conform to such obligations. Finally, a Foreign Credit institution can always incorporate in Spain and start factoring activities, although they will not enjoy the benefits mentioned above if they do.

An important regulatory issue that should be considered is that of Personal Data Regulation. The processing of the personal financial data of Transferor and Debtors - when the Debtors are incorporated entities - is not subject to such legislation. However, if the Transferor's clients include individuals, data protection legislation needs to be taken into consideration, since the Spanish Data Protection Agency (AEPD) is very strict with regards to compliance, both for the Transferor and the Factor. This means that when notifying individual debtors about the factoring of invoices, the Transferor is obliged to inform the Debtor about the assignment of credit rights and associated personal data. Moreover, the Factor must inform Debtors that personal data is registered in a data-file owned by the Factor and of their compliance with obligations set out by the Personal Data Act. In instances where the Factor is expecting to assign the personal data to other companies in its group, it is necessary to inform the Debtor about such assignment and ask its consent before doing so.

## OPERATIVE ISSUES

According to Spanish Law, neither consent nor prior knowledge of the debtor is necessary for the assignment of debts. However, notification is a way of preventing the debtor from paying the Transferor after completion of the transfer and therefore being released from his obligations. Notification does not have to be made by a 'notarial letter' (i.e. a letter certified by a public notary) provided that the debtor acknowledges (or is duly notified by other means) that the credit has been assigned. It is possible to transfer both current credits - existing at the time the factoring contract is executed - and all future credits relating to a particular debtor.

In order to benefit from the special insolvency regime regulating Private Equity Entities and their Managing Company's credits, (Law 1/1999 - see below) can only be transferred if they are related to the business activities of the Transferor. Future transfers need to take place within a year of the completion of the factoring agreement, unless the future debtor is identified in the contract.

With regard to the acknowledgement of assignment, different regimes apply depending upon whether the future credits arise from the same or different sales contracts. Where the contract contains a prohibition on the assignment of the credit however, the credit cannot be transferred.



## INSOLVENCY

Unlike regular insolvency proceedings, factoring agreements entered into by Financial Credit Institutions and banks (not ordinary Companies) are subject to a specific insolvency regulation. The main aim of this law is to ensure the existence and execution of factoring agreements to avoid the retroactive imposition of general insolvency regulations. Therefore, the only way to challenge the validity and execution of a factoring contract is by proving the existence of fraud when the contract was agreed - i.e. the factoring entity was well aware of the imminent insolvency of the client and still entered into the agreement.

In cases of the insolvency of the Transferor, the factoring contract will remain in force until after the official declaration of insolvency, unless the insolvent Transferor or the administrator decides to apply for its termination - this being in the best interests of the insolvent Transferor. Under this scenario, the insolvent Transferor will have to pay compensation for damages to the Factor. This means that the Factor is not allowed to demand the termination of the contract based on the insolvency status of the Transferor, except in cases of breach of contract by the Transferor.

The insolvency of the Debtor should not cause major legal problems with regard to the factoring contract, as only the Transferor and the Factor are party to this agreement. In the case of Debtor insolvency in non-recourse factoring, the Factor will bear the risk of Debtor insolvency and the Factor will only have covered this risk against the Transferor if the transferred credits have been additionally guaranteed in favour of the Factor (i.e. a pledge).

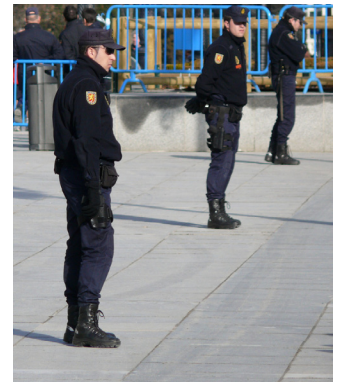
## TYPES OF SECURITY AND GUARANTEE IN SPAIN

In non-recourse factoring, additional guarantees should be granted by the Transferor in favour of the Factor in order to secure its position in the case of non-payment by the Debtor. There are several personal guarantees in Spain, such a 'fianza', First Demand Guarantee, and the 'comfort letter', which can all fulfil this need.

With regard to guarantees over goods, pledges and mortgages are the most usual guarantees.

## TAX

The financial services provided under factoring contract are exempt from VAT. In relation to other services provided, there are tax implications. VAT is chargeable on the factoring fee. The Transferor must pay VAT on the amount payable in relation to the provision of debt collection, management services and the guarantee of debt service (if applicable) provided by the Factor. Payment of VAT is due when the factoring fee is due, or if no fee or payment date have been established in the contract, or if payment is due in more than a year's time, then tax will accrue up to the 31st December each year.



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