

DOTTORATO DI RICERCA IN DIRITTO ED ECONOMIA

CICLO XXVII

**I nuovi strumenti di intermediazione finanziaria:
qualificazione della causa e valenza economica
dell'operazione di *factoring***

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*The new tools of financial intermediation: qualification of the cause
and economic importance of the factoring operation*

(Abstract)

Factoring is one of the main instruments of the financial market.

Resorting to such economic operations enterprises, particularly those of small and medium size, are able to make the sale of receivables to a specialized body, the *factor*, which upon payment of a fee, the amount of which may vary depending on the services rendered, the amount of the invoices, the scope in which it operates, is responsible for the management of the same, the granting of any advances and risk of insolvency of the transfer debtor.

The early development of the *de qua* operation dates back to ancient civilizations, even if it is only since the fifteenth century, with the colonial expansion of Great Britain, Holland, Spain and France, that the *factor* begins to fully carry out the feature commercial-*factor*, or of commercial intermediary, establishing his residence in the colonies, working on behalf of the producers and merchants of the mother country, on payment of a fee, the management of business relationships with indigenous customers, and providing to guard, market and collect the price of the products that were sent.

It should, however, be pointed out that the term *factor* is used in the proper sense in the seventeenth century, when the first British settlers came to America (Pilgrim Fathers) and gave to some British commission-agents the marketing of fish, meat and timber. These operators in the contracts are named agents and *factors*.

The operational profile of the *factor* begins to change substantially in the early twentieth century when the reassuring dynamics of the market, the greater ease and security of trade, induce producers and merchants to deal personally and independently with the sale and distribution of goods.

The *factor* begins to assume, therefore, the role of a real financial operator, *finance-factor*, gradually abandoning the function of *trade-factor* that had been done till that time, ensuring eventually also the failure of the transfer debtor, operating advances on the price of the goods delivered to them and recognizing the function of guarantee for risks related to the conduct of the activity.

Until 1960 the operation didn't spread to the US, since the companies that operated in the area felt that they could run their business with a certain margin of safety only in their own country, without risking, considering the convenience of the sale. Subsequently, the US *factors*, for commercial reasons, moved towards other markets.

The spread of the transaction in Italy dates back to the sixties. At first its development in our country was opposed by many business operators, who preferred to rely on typical instruments of the Italian economy, such as, the trade discount.

Only after a strong financial crisis that swept the Italian economy, containing the financing demand and, consequently, changing the management of financial resources, traders began to approach this operative technique.

The use of *factoring* has undoubtedly represented a response to the increasing pressures of small and medium companies, who continually requested credit in advance. This operative technique allowed to intensify the relationships between the banking world and finance world and also between the productive and commercial ones, allowing also, for the many

offered services, to attract retail businesses who had sufficient current assets, but these, at first, were not interested in the financial services offered by *factoring* as well as to satisfy their operational needs with the use of other instruments present in the Italian economic system, could not be satisfied *in toto*.

By using this new operating technique, transferring to the *factor* the financial administration and concentrating its activities only on production purposes, it is possible, in fact, to promote the expansion and growth of small and medium companies, and also optimize the allocation of available resources and the realization of real management economies, avoiding that companies represent a temporary and marginal economic reality.

Specialized skills are required to pursue a proper policy management of the enterprise, which is usually related to the credit management function.

The task of *factoring* operation does not end in the simple sale of one or more credits. To the *factor* are entrusted multiple economic functions, in particular the task of monitoring all existing credit reports, dealing with the accounting and administration of it. He is also able to provide information about the market and the customers, allowing companies to make a complete estimation of the risks, such as the solvency of potential customers, making safer operations.

This new operational technique allows companies to implement an effective credit policy, stimulating sales, making stronger relationships with the customers, easing the use of the capital and a easier planning of activities and investments.

Therefore, the risk of credit is transferred to the buyers of "good quality", rationalizing and optimizing the financial structures to support

with the appropriate tools the production and commercial initiatives useful for the development of the company.

As you know, the goal companies are aiming at is to maximize profits, using systems of corporate governance that will contribute to the consolidation of a corporate stability. To satisfy this target, a strategic planning of financial policy is used, taking investment decisions and capital budgeting in order to increase the company's value.

Hence, the company tends to manage its internal activities efficiently, by purchasing the appropriate amount of inputs at the lowest cost possible, producing an optimal level of output and trying to focus and allocate the limited resources available in services and funding instruments that allow to satisfy in the best way their needs.

In this context, the use of the *de qua* economic operation helps improving the production efficiency and management.

User companies, who use and will continue to use *factoring*, are not only those of small and medium size who do not have the tools to finance the business activities, but also companies that, even though they cover a good financial position, are not in the position to obtain loans from banks to promote the store lots not readily converted into cash.

It's appropriate, at this regard, to point out that *factoring* is an indispensable tool for start-up, especially for those who, despite having many customers, with a high financial standing, do not have enough capital to access to traditional financing.

This operational tool, if used optimally, as it has already been pointed out, can offer many benefits, especially in the field of trade and economic policies.

A first and obvious advantage is the fact that you can benefit different but complementary services, with the *factor* as the only point of reference,

with a consequent reduction of costs that are the result of the use of the services offered by many specialized companies. In this way, all activities are concentrated in the hands of the assignee-*factor*, which provides the management, collection and anticipation of receivables, as well as the implementation of the activities of accounting and administration.

The performance of these services, it is important to clarify that the assignee-*factor* can also provide businesses with information and statistical support and carry out, if required, business collaboration and consulting activities.

Furthermore, the prediction of the *pro soluto* assignment of receivables and the consequent guarantee against the insolvency of the client - transfer debtor, is particularly relevant for companies that are not able to select efficiently the credits and don't have enough information about the customers.

It should be pointed out that the use of *factoring* normally involves three orders of apparent-cost: the commission, or the cost from continuing accounting - administrative carried out by the *factor* for the management of the credit and the warranty for the risk of insolvency of the transfer debtor, that can change according to the type of services offered and the amount of the credit transferred; interests, usually in line with market rates, or else, the financial cost arising from the anticipation of the receivable sold before expiration; charges, or out of pocket expenses incurred by the *factor*, such as the costs of handling, investigation, postage, etc.

In order to calculate the real cost of the service provided, or the result of the algebraic sum from the apparent cost and benefits administration, business and management, it is necessary to change the apparent cost in

positive or negative way, taking into account the economies entailed and the heavy cost that do not have any reference in the contract conditions.

As for the exquisite economic – financial aspect, it should be noted that the advances of credit made by the *factor*, delivers immediately cash in the hands of the companies, with a consequent reduction in debt, an improvement of the corporate structure and an increase in the turnover rate of working capital that will enable the financial development of the enterprise. The cost of the anticipation operation can change according to *pro soluto* or *pro solvendo* transfer assignation and has a significantly high value in the first case, as the risk of collection, considering the nature of the assignment, stays in the hands of the *factor* - assignee. Thanks to a more balanced budget and to the ability to fulfill its obligations, companies are able to achieve more credit in front of third parties.

The operation *de qua* makes the future cash flows less uncertain, stimulating the growth and development of companies, enabling them to finance the credits in proportion to its turnover instead of according only to their own direct repayment capacity (asset based transactions), increasing the reliability of the company and the bargaining power with its suppliers.

This economic operation, that was initially viewed with suspicion and opposed later managed to achieve full support from lenders who, once they understood the significant benefits that it could bring, became great promoters of this operational tool through the establishment of *factoring* companies.

By using *factoring* the companies, not only have advances on loans, that are crucial to the company rating, balancing the capital structure (balance sheet and income statement) and influencing the financial dynamics of the company, but also have greater stability and credibility in

the eyes of lenders, with the consequence of being able to get an easier access to the provision of funding, and increasing the expectation of a granted credit recovery for financial intermediaries.

Banks, in fact, driven by the increased robustness of the corporate credit and a more elevated rating, are willing to offer loans to businesses with more ease, allowing them also to benefit from a possible cost reduction.

Therefore It is evident the convenience of using this operating technique which offers companies the opportunity to take advantage of a number of different but complementary services, with a consequent reduction in costs that would result from the relationship with many specialized companies, to invest its resources in activities essential to the corporate life, as well as to acquire a more flexible structure more competitive in the economic environment.

It must be emphasized that the use of such operation, used almost everywhere, both in developed countries and in developing countries, is particularly useful in countries with weak judicial enforcement and imperfect registration and information.

Object of the *factoring* agreement are the commercial loans, that are relative to the supply of goods and services between companies, which possess certain characteristics: the existence, commerciality, title and full availability, transferability and liquidity.

In order to make sure that the transaction meets the specific needs and demands of customers, it is possible to use various types of *factoring*, with different operating modes.

The enterprise loans allows to pursue easily the objectives identified in the *factoring* agreement, even if it has arranged with it an instrumentality relationship and not an identity one, representing the implementation tool

for the negotiation and not the complete discipline and organic schema contract in question; therefore the organization works only as a legal basis of the assets subject of the contract of *factoring*, affecting some economic aspects of the operation.

The classification of the contract, considering the complexity of the operating technique and the multiplicity of legal-economic profiles that characterize it, it cannot operate as a simple reductive identification with a type of contract. Otherwise it would compromise the innovative and original aspects of the contract.

The widespread tendency to bring this new economic operation to the discipline and form of a pre-existing type must be considered absolutely reprehensible, not reconcilable with a contract scheme particularly flexible and elastic, variable depending on the needs and requirements of the contracting parties, that does not allow to be harnessed in existing contractual figures.

Factoring in practice presents a variety of clauses that affect the identification of the cause of the contract and does not allow to contextualize statically the *de qua* transaction.

I think that, in causal terms, it is not possible to consider *factoring* the result of the merger of most typical contracts. Although the contract is characterized by the complexity and multiplicity of benefits strategy used to achieve different results, it is not hard to consider that there are many and different causes: the different elements fit together, with an arrangement of the legal interests and juridical economic-objectives pursued by the bodies, used in order to give life to a single cause.

The operation in question is characterized by its own casual identity and has its own individuality, unity and autonomy, such as not to allow to take back a complex contract.

In my opinion, bringing back the transaction at issue in pre-existing schemes would compromise the dynamic essence and evolutionary potential of the contract, and would put at risk the need of continuous critical review, determined by the incessant changes that undergoes the economy and the market.

Analyzed these circumstances, it is necessary to dwell on the rules applicable to the atypical contract in question.

Although for the operation regulation it is possible to use uniform contractual models (contracts) prepared by the *factoring* company, the best and congenial solution to be considered for to the characteristics of the *de qua* transaction is to use of the analog procedure (*analogy legis*), applying the regulations that belong to legal schemes that are considered to be related to the atypical contract, for their nature and social economic function .

The analogous application is without a doubt the instrument that allows the identification of applicable rules to not regulated institutions of our legal system, favors a process of legislation integration, filling the atypical schema gaps in its evolutionary process, caused by the transformation of the international market. The use of analogy, clearly with the limit set by art. 14 of the provisions of the law in general for the prohibition of analogous application of exceptional rules, it must be considered, in fact, more responsive to the continuous changing process that undergoes the operation in question, which must be able to meet the needs of a dynamic and changing reality, in both economic and commercial aspects.

However, the use of this technique allows the judge the use of even more tools for the extensive integration, the general principles of the order, and the general discipline of the contract, and also allowing only

the partial application to the concrete case of the contractual scheme taken into account.

It also has to be pointed out that the introduction of Law n. 52/1991 has in no way solved the problem of classification of the contract, harnessing the economic operation in a typical scheme. The new legislation has been pursuing the aim to update the rules of the Civil Code regarding the sale of receivables, ensuring adequate protection for economic operators.

The law n. 52 of 1991, composed of seven points, only has innovated the existing legislation, adapting it to the needs of development of *factoring* in Italy, allowing, in particular, the assignment of future receivables and in mass receivables, as long as the contracts are concluded in 24 months and provided by the debtor, providing the assumption of the guarantee by the transferor for the solvency of the debtor, unless the assignee renounces such guarantee, identifying in the payment of the price for the sale a certain date, a new policy to make opposable credit transfer to third parties and finally, introducing a new discipline in the event of failure of the debtor and the trustor, with significant implications in the economical – financial profile.

As for international relations, it should be noted that the need of a uniform regulation has been felt particularly after World War II, as the heterogeneity rules of the national legal systems was an obstacle for the full development of the international trade.

During the eighties of the last century, considerable efforts were made in this direction, facilitating the relations between operators in different countries, reducing the negotiating autonomy with regard to the essential elements of the agreement and focusing the attention on the worthy protection interests.

To meet these requirements, in the course of the Diplomatic Conference of 1988 was approved in Ottawa the UNIDROIT Convention of international *factoring*, which came into force in Italy on 1 May 1996.

It consists of 23 clauses, divided into four chapters related to the sphere of application of the same, to the rights and obligations of the parties, to the discipline of subsequent supplies, to the conclusion of a contract.

The Ottawa Convention governs only some fundamental aspects of international *factoring*, interfering as little as possible in the contractual relationship between the *factors*, leaving the applicable law to determine the conditions of validity of the *factoring* agreement, not dealing with the problem of conflict between the *factor* and the third bodies who claim to own the sold receivables, nor the question of the enforceability of the sale to the failure of the supplier. It is undoubtedly an important regulatory tool for the economic operation development in the international context.

Within the same is contained a very large and elastic definition of the international *factoring*, in order to allow to include all the economic transaction configurations, spread in different countries.

This Convention has undoubtedly contributed to the creation of a uniform, albeit not exhaustive, leaving unresolved some delicate profiles which are used by ordinances to record substantial differences. It represents a first step in the process of harmonization.

Another important supranational legislation source is the UNCITRAL Convention, adopted by the UN General Assembly, with the resolution n. 56/81 of 12 December 2011.

The Convention *de qua*, consists of 47 clauses and an annex that aims to regulate the transfer of monetary claims in the relationship for the

financing using of the instrument of assignment, which also include the operations of *factoring*, securitization, forfaiting and project financing.

In the economic and financial profile, it can be recognized the same function as the movement of capital and goods and services, beyond national boundaries, facilitating the development of international trade and business and also adequately protecting the interests of the debtor.

Having compared the UNIDROIT Convention on International *factoring* and the UNCITRAL Convention it is possible to grasp a relationship of *species a genus*, although the basic principles are specular: while the first discipline is *factoring*, the second refers to all models for the sale of credit.

This Convention, unlike the one of Ottawa, also finds application not only in the presence of international credits, but also if the assigned receivables are national.

However, it must be noted that, from another point of view, even the UNCITRAL Convention has a nature of specialty. Indeed, the provisions contained in the decree law are particularly detailed and face some profiles that are not covered in the UNIDROIT Convention, including the enforceability of the credit assignment to a third party unrelated to it.

Finally it's important to point out that while the rules of the Ottawa Convention, as stated in art. 15, does not prevail over the provisions of any other treaty, Article. 38 of the UNCITRAL Convention provides that "*this convention prevails over the Unidroit Convention on International Factoring.*"

From an economic perspective, applying a uniform, without resorting to the rules of private international law and consequently reducing any source of uncertainty, it is encouraged the development of international trade, with substantial benefits for companies that have relations of

exchange, both in an administratively – accounting profile, and regards to trade policy, financial management and business organization.

There must also be noted that there are some techniques of export financing related to *factoring*, common in the international trade. Lets pay particular attention to forfaiting and confirming.

The first is a contract, particularly widespread internationally, that originates from a similar type of contract, l'escompte a forfait.

Through this technique of financing export receivables, used in the presence of an extended payment in a medium term, an exporter sells to a financial institution, said forfaiter, without the possibility of recourse against the trustor, bills not yet expired, arising from supply of goods or services abroad, giving in exchange anticipation the cash value of the claimed, after deduction of a fixed interest rate.

The confirming is, however, a financial transaction of Anglo-Saxon origin, which financial insurance and purpose that allows exporters to safely grant credit to foreign buyers.

This operation is performed by the Confirming Houses, which can stand for Commercial-confirming-houses and Financial-confirming-houses, depending on the prevalence of an organization of commercial or financial position.

In conclusion, we can say that although companies have largely recourse to the economic transaction *de qua*, however, it would be desirable that *factoring* become a "structural" element of business life.

The Italian companies, mainly represented by small and medium-sized companies, would receive undeniable benefits from a continuous and constant use of the loan agreement, establishing relationships with suppliers based on terms and conditions more favorable trading, lessening

the use of venture capital, and programming more easily activities and investments.

Transferring permanently to *factor* the financial administration and focusing activities exclusively on production purposes, would undoubtedly help the expansion and growth of small and medium-sized companies.

It is therefore of clear evidence of the convenience of using the instructions which offers companies the opportunity to invest their resources in activities essential to the corporate life and acquire a more flexible and competitive structure.

It is necessary, in order to stimulate the development and the steady spread of the *de qua* operation, to identify and define the complex technical compatibility of operating with the consideration of the economic environment and the Italian legal system. In this respect, the development of *factoring* is undeniably influenced by the contribution that will provide companies and their commitment to establish and define the future way of doing business.

It is important to emphasize that, despite the existence of uniform regulations governing certain economic profiles of the operation on an international level, which has not yet been completely overcome the fundamental differences between the various jurisdictions, that often tend to impose their rules, with no intend to give up.

Therefore, considerable efforts will have to be made in order to achieve effective harmonization, though, it is important to highlight the bonds that are to be established between the trustor transferor and the supplier *factoring* firm, as well as the completeness of contracts stipulated, inducing the parties to keep away from any possibility form of conflict.

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