THOMSON REUTERS PRACTICAL LAW

Advance Factoring Agreement

USA (National/Federal)

A standard form of advance factoring agreement to be used for a factoring arrangement between a factor and a wholesale business, typically a manufacturer or a distributor. It includes a facility for the factor to make short-term loans to the client. This Standard Document has integrated notes with important explanations and drafting and negotiating tips.

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Factoring is an ongoing arrangement in which a factor purchases the accounts receivable of its client, and is paid a commission by its client for accepting the credit risk on the purchased receivables. The factor is often a bank or other financial institution, although there are many firms whose principal or even sole business is factoring. The client is a business that sells goods or services on open account, which means that its customers might not pay for 30 to 90 days or even longer. The factoring transaction itself is a true sale in which title to the receivables passes from the client to the factor.

An advance factoring agreement is a type of factoring agreement that includes a facility for the factor to make short-term loans, or advances, to the client. The process by which a factor makes these short-term loans is referred to as advance factoring, even though, technically, the process does not involve factoring. Advance factoring is distinct from the factor's purchase of accounts receivable and is actually a form of asset-based lending.

In a factoring arrangement, a factor provides the following services to its client:

- It alleviates the uncertainty of the client's cash flow with a stable, predictable payment schedule.
- It provides its client several important administrative services, relieving the client of the burden and cost of performing these functions itself:
  - it performs credit investigations on all of the client's prospective customers;
  - it takes over the task of collecting the client's accounts receivable;
  - it maintains detailed records of transactions between the client and its customers, including credit memoranda and adjustments to payment terms; and
  - it provides bookkeeping services related to the aging and collection of the client's accounts receivable.
- It assumes the credit risk associated with accounts receivable it approves as creditworthy. That is, if a customer is financially unable to pay, the factor absorbs the loss.
- Sometimes, factors also provide advisory services, including market studies and production counseling.

Accounts receivable typically represent a significant portion of the operating assets of a company. By purchasing the receivables from its client, the factor converts this unproductive asset into cash. For a detailed discussion of factoring, see Practice Note, Fundamentals of Factoring.

There are three principal types of factoring facilities:

- Maturity factoring, or wholesale factoring, in which the factor pays for purchased accounts receivable on a fixed date tied to the average maturity date of all the receivables purchased during the month. In maturity factoring, the client's customers are typically distributors and other companies that operate at the wholesale level of the market. See Practice Note, Fundamentals of Factoring: Maturity Factoring and Standard Document, Maturity Factoring Agreement.

- Collection factoring, or retail factoring, in which the factor pays for purchased accounts receivable only after it collects the receivables. In collection factoring, the client's customers are typically retailers. If an approved receivable remains unpaid after it matures, the factor must pay the client for the receivable after the factor determines that the customer is financially unable to pay. See Practice Note, Fundamentals of Factoring: Collection Factoring and Standard Document, Collection Factoring Agreement.

- Advance factoring, in which the factor provides a short-term credit facility for the client. An advance factoring facility can be provided in connection with both maturity factoring and collection factoring. When the client needs funds before payment is otherwise due from the factor, the factor can advance the funds as a short-term loan, which is then repaid when the factor makes its payment. See Practice Note, Fundamentals of Factoring: Advance Factoring. This Standard Document is an advance factoring agreement.

Assumptions

This Standard Document assumes that:

- The parties wish to enter into a maturity factoring arrangement with an advance factoring facility. The client's customers operate at the wholesale level of the market, meaning they are manufacturers and distributors, not retailers. The factor will pay for all receivables purchased each month in a single payment on a date that is the average maturity date of the receivables.

- In addition to purchasing the client's accounts receivable, the factor also provides short-term financing to the client, with the advances secured by the factor's obligation to pay for the receivables in the future.

- The parties do not intend this to be a collection factoring agreement, in which the client's customers are retailers.

- This is a transaction between a US factor and a US client. Under this Standard Document, if the client sells to customers outside the US and the factor has the necessary resources in the foreign country (including knowledge of the client's customers, access to credit information, and ability to institute legal proceedings against delinquent customers), it can factor the foreign receivables itself. If it does not have these foreign resources, the factor can:

  - exclude the foreign accounts receivable from the factoring agreement's coverage;

  - enter into a correspondent factoring arrangement with a second factor in the foreign country and resell the foreign receivables to the correspondent factor; or

  - purchase export credit insurance to cover the foreign receivables.

  (See Foreign Accounts Receivable.)

Bracketed Items

Bracketed items in ALL CAPS should be completed with the facts of the advance factoring transaction. Bracketed items in sentence case are either optional provisions or include alternative language choices to be selected, added, or deleted at the drafter's discretion.

ADVANCE FACTORING AGREEMENT

This Factoring Agreement (this "**Agreement**"), dated as of [DATE], is entered into between [CLIENT NAME], a [STATE OF ORGANIZATION/TYPE OF ENTITY] ("**Client**"), and [FACTOR NAME], a [STATE OF ORGANIZATION/TYPE OF ENTITY] ("**Factor**").

RECITALS

WHEREAS, Client is engaged in the business of [DESCRIBE BUSINESS] and sells and delivers merchandise to customers on trade credit that generates accounts receivable;

WHEREAS, Client wishes to sell its accounts receivable to obtain operating capital for its business and for other purposes, and wishes to obtain short-term financing; and

WHEREAS, Factor is willing to purchase Client's accounts receivable, and to provide short-term financing, all according to the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Purchase and Sale of Accounts Receivable.**

(a) Client agrees to assign and sell to Factor as absolute owner (i) all of its present and future Accounts Receivable (as defined in Section 1(b)), (ii) all of its interest in the goods represented by the Accounts Receivable, including goods that may be returned by Client's customers ("**Customers**"), and (iii) all of its rights against third parties with respect to the Accounts Receivable. Factor agrees to purchase all of the Accounts Receivable which are Acceptable Receivables (as defined in Section 2(a)(ii)), including Approved Receivables (as defined in Section 2(a)(iii)).

(b) "**Accounts Receivable**" means all accounts (as that term is defined in the Uniform Commercial Code in effect from time to time in the State of [New York/ OTHER STATE] ("**UCC**")), contract rights, documents, notes, drafts, and other obligations owed to or owned by Client arising from the sale of goods or the rendering of services by Client, all general intangibles relating to these obligations, all proceeds of these obligations, all guaranties for these obligations, and all goods and rights represented by these obligations.

(c) Factor agrees to purchase all Approved Receivables from Client without recourse, except as otherwise provided in Sections 2(a)(iii) and 2(b).

(d) Factor's purchase of all Acceptable Receivables which are not Approved Receivables shall be with full recourse.

PURCHASE AND SALE OF ACCOUNTS RECEIVABLE

Although factoring is often referred to as a type of receivables financing, it is not a loan transaction. Instead, the factor purchases the client's accounts receivable in a true sale transaction and retains only limited recourse against the client.

The arrangement between factor and client is exclusive:

- The client agrees to sell all of its accounts receivable to the factor (see Section 1(a)(i)).
- The factor agrees to purchase all of the accounts receivable it deems acceptable (see Sections 1(a), 1(c), and 1(d)).

Once title passes to the factor, it is the factor that collects the receivables from the client's customers. Therefore, the sale encompasses not only the receivable, but all of the client's rights associated with the receivable, including the goods represented by the receivable and rights against third parties.

2. **Factor's Assumption of Credit Risk.**

(a) Client shall submit to Factor for its prior approval the amount, payment terms, manner of delivery, and all other terms of each prospective sale.

(i) Factor shall notify Client in writing if a sale is rejected, and Factor will not purchase the related Account Receivable.

(ii) Accounts Receivable arising from sales other than those rejected in writing by Factor pursuant to Section 2(a)(i) shall be deemed to be "**Acceptable Receivables.**"

(iii) If Factor notifies Client in writing that a sale is approved, the related Account Receivable shall constitute an "**Approved Receivable.**" Factor may withdraw its approval at any time before delivery of the goods or rendering of the services. Factor's approval shall be automatically withdrawn if any sales terms are changed without Factor's approval or if delivery is made more than thirty (30) days after the approved delivery date; *provided*, *however*, if the amount of the sale is increased without Factor's prior written approval, Factor's approval shall be limited to the original amount approved.

(b) With respect to all Approved Receivables, Factor agrees to assume the risk ("**Credit Risk**") of any loss due solely to the inability of Customer to pay the related invoice at maturity, *provided* that Customer has received and accepted the goods or services to which the Approved Receivable relates without Dispute (as defined in Section 2(c)). Upon the occurrence of any Dispute, the Credit Risk on such Account Receivable shall automatically revert to Client. Factor will not assume the Credit Risk of Acceptable Receivables which are not Approved Receivables.

(c) "**Dispute**" means any dispute, deduction, setoff, defense, claim, or counterclaim of any kind by a Customer against Client relating to goods or services giving rise to an Account Receivable.

FACTOR'S ASSUMPTION OF CREDIT RISK

The client must submit the terms of each sale to the factor for its prior approval (see Section 2(a)). This allows the factor to assess not only the creditworthiness of the customer, but also the payment terms of the sale, including any discounts, and the manner of delivery. For example, an invoice might state that it is payable 60 days from delivery, but also offer the customer a discount of three percent (3%) if the invoice is paid within ten days. These payment terms are commonly referred to as trade terms or terms.

After the proposed sales have been submitted to the factor, depending on the factor's response, the related accounts receivable fall into one of three categories:

- **Approved receivables.** These are approved by the factor in writing (see Section 2(a)(iii)). The factor purchases approved receivables and agrees that it has no recourse against the client for them (see Section 1(c)), unless the customer initiates a dispute against the client (see Section 2(c)) or the goods are sold in a manner that falls outside the scope of the factor's approval (see Section 2(a)(iii)). That is, for approved receivables, the factor assumes the credit risk, defined as the risk of "loss due solely to the inability of customer to pay the related invoice at maturity" (see Section 2(b)).

- **Acceptable receivables.** As defined in Section 2(a)(ii)), these have been submitted to the factor; have not been approved by the factor; but the factor has not notified the client in writing that they have been rejected. The factor purchases acceptable receivables and collects them in the ordinary course. However, if the customer fails to pay at maturity, the factor has full recourse against the client for them (see Section 1(d)). The factor exercises this recourse by "charging back" unpaid acceptable receivables to the client under Section 10(e)(ii).

- **Rejected receivables.** As set forth in Section 2(a)(i), these have been submitted to the factor and have been rejected by the factor in writing. If the client proceeds with these sales, the factor does not purchase the related receivables, and bears no credit risk for them.

If an approved receivable becomes the subject of a dispute (defined in Section 2(c)), the factor may charge it back to the client under Section 10(e)(i). This is because in a typical dispute the client, not the factor, is in the best position to address the merits of the customer's claim.

Receivables that have been charged back are referred to as chargebacks (see Section 7(e)). For chargebacks, the client must repay the purchase price paid by the factor, with interest, but collecting the delinquent receivable remains the responsibility of the factor. If the delinquent receivable is ultimately collected, the factor can either credit the client's account or remit the payment to the client.

3. **Sales Giving Rise to Accounts Receivable.**

(a) Client shall mail [or email] invoices to Customers, with a copy to Factor; *provided, however*, at Factor's request, Client shall provide invoices to Factor for mailing [or emailing] to Customers, with postage and other costs for the account of Client. The issuance of the invoice to Customer shall constitute the assignment to Factor of the Account Receivable associated with such invoice.

(b) Each invoice shall state in a manner satisfactory to Factor that the Account Receivable associated with such invoice has been sold and assigned to Factor and is payable in United States dollars only to Factor.

(c) If any Accounts Receivable are paid to Client, Client shall hold such remittances as Factor's property and shall immediately deliver them to Factor in the form in which they were received. Factor shall have the right to endorse Client's name on all such remittances.

(d) Client shall maintain at its office complete and accurate records of all sales to Customers, including copies of invoices and shipping receipts. Such records shall reflect the sale of Accounts Receivable to Factor and Factor's ownership of Accounts Receivable. Such records shall be available for Factor's inspection on reasonable request.

SALES GIVING RISE TO ACCOUNTS RECEIVABLE

In US factoring agreements, the client typically must notify its customers that their accounts receivable have been assigned to the factor. This is accomplished with a legend on the face of the invoice:

- Stating that the account receivable associated with the invoice has been assigned to, and is owned by, the factor.

- Instructing the customer to make payment only to the factor.

In contrast, UK factoring agreements usually do not require the client to notify its customers of the assignment of the accounts receivable.

4. **Factor's Payment for Accounts Receivable.**

(a) The Purchase Price (as defined in Section 4(b)) for Accounts Receivable assigned to Factor during each month shall be calculated as of the last day of such month. Factor shall pay the Purchase Price to Client on the Maturity Date (as defined in Section 4(d)) for such Accounts Receivable.

(b) "**Purchase Price**" means the Net Amount (as defined in Section 4(c)) of such Accounts Receivable, *less*

(i) Factor's Commission (as defined in Section 5(a)) on such Accounts Receivable, calculated as set forth in Section 5(a); and

(ii) the amount of any Advances (as defined in Section 7(a)) then outstanding, together with accrued interest thereon.

(c) "**Net Amount**" means the face amount of the invoice or invoices giving rise to Accounts Receivable *less* (i) all returns and (ii) any discounts, credits, or allowances claimed by, or granted to, Customers. Discounts shall be calculated on the shortest terms granted to Customer.

(d) "**Maturity Date**" means the monthly weighted average due date of such Accounts Receivable, calculated on the shortest terms granted to each Customer, *plus* [ten (10)] days. The Maturity Date shall be adjusted from time to time to compensate for late payment of any Accounts Receivable that (i) are not Approved Receivables, (ii) are Disputed or charged back as set forth in Section 10(e), or (iii) are Foreign Receivables (as defined in Section 9(a)).

FACTOR'S PAYMENT FOR ACCOUNTS RECEIVABLE

The generally accepted formula for the purchase price of an account receivable is the face amount of the invoice giving rise to the receivable **less**:

- All returns by the customer.
- All discounts, credits, or allowances granted to the customer.
- The factor's commission.
- Advances then outstanding, together with interest.

This formula assumes that the customer will take advantage of any discount offered in the invoice (the "shortest terms" referred to in Sections 4(c) and (d)).

In addition, any reserve established by the factor in respect of the invoice (see Sections 6(c) and (d)) has the effect of reducing the amount paid by the factor to the client at the time the purchase price is paid.

In wholesale factoring, it is customary for the factor to pay the purchase price to the client on a single fixed date, determined by the maturities of the accounts receivable assigned to the factor during a given month. Sometimes, this date is simply an average of all the maturities of these receivables. For example, if the client issues three invoices, on April 3, April 10, and April 20, and each is payable in 30 days, the average maturity of the three accounts receivable is May 11.

More frequently (and in this Standard Document), this date is an average maturity weighted according to the dollar amount of each receivable. For example, if the client issues the following invoices:

- Dated April 3, in the amount of $1 million, payable in 30 days.
- Dated April 10, in the amount of $200,000, payable in 30 days.
- Dated April 20, in the amount of $100,000, payable in 30 days.

The weighted average maturity of the three receivables is day 5.41 in May (May 6) because the April 3 invoice is much larger than the other two.

Factoring agreements usually also include an adjustment to the weighted average maturity date. This adjustment is an allowance for:

- The fact that customers often do not pay on time.

- The time it takes for checks to clear.

This adjustment is typically about ten days (the adjustment used in Section 4(d) of this Standard Document), but can be negotiated by factor and client.

The monthly weighted average due date, together with the adjustment, produces the "maturity date" (see Section 4(d)), the date on which the factor agrees to pay the client (see Section 4(a)) for all of the prior month's accounts receivable.

Factoring agreements that do not include a short-term loan facility occasionally include a provision that serves a similar function, making cash available to the client when cash flow is slow. This arrangement, known as discount factoring, was once widely used in factoring agreements but is now relatively rare. Discount factoring allows the factor to prepay the purchase price to the client, at a discount. The factor's payment is not an advance or loan, but a reduction in the purchase price based on how early the purchase price is prepaid. A discount factoring facility is sometimes included in a maturity factoring agreement or a collection factoring agreement, where the client is the borrower under a credit agreement that includes negative covenants forbidding it from incurring indebtedness. Because discount factoring does not involve the making of a loan, it does not breach the negative covenant.

A discount factoring provision is not included in this Standard Document. For an example of a discount factoring provision, see Standard Document, Maturity Factoring Agreement: Section 4(e).

5. **Factoring Commission.**

(a) Client shall pay Factor for all Approved Receivables and Acceptable Receivables purchased by Factor a commission ("**Commission**") equal to a percentage of (x) the face amount of invoices giving rise to such Accounts Receivable *less* (y) discounts included in calculating the Net Amount in Section 4(c). The percent amount of such Commission shall be determined as follows:

(i) for Accounts Receivable payable on terms up to and including [sixty (60)] days, the Commission shall be [NUMBER percent (NUMBER %)]; and

(ii) for Accounts Receivable payable on terms longer than [sixty (60)] days, the Commission shall be increased by one-quarter of one percent (0.25%) for each additional thirty (30) days or part thereof.

(b) The minimum Commission on any invoice shall be [NUMBER] Dollars ($[NUMBER]).

(c) The Commission for all Accounts Receivable assigned to Factor during each month shall be charged to Client's Account (as defined in Section 6(a)) as of the last day of the month.

(d) During each year of this Agreement, Client agrees to pay Factor a minimum aggregate Commission ("**Minimum Annual Commission**") of [NUMBER] Dollars ($[NUMBER]). If, on each Anniversary Date (as defined in Section 12(a)), the aggregate Commissions paid by Client during the prior year shall be less than the Minimum Annual Commission, Client shall pay Factor, or Factor may charge Client's Account, an amount equal to the difference.

FACTORING COMMISSION

The factor is compensated for its services with a factoring commission. It is calculated as a percentage of the face amount of the accounts receivable it purchases, usually between four-tenths of one percent (0.4%) and two-and-one-half percent (2.5%). The size of the commission is negotiable. The commission is calculated at the time the receivable is assigned. Therefore, it includes the amount of any discounts included in calculating the purchase price that the factor pays the client, but does not include the value of returns (see Sections 4(b) and 5(a)).

The commission is usually based on trade terms of 60 days (the number of days within which the invoice is payable). It typically increases in increments of one-quarter of one percent (0.25%) for each additional 30 days, to compensate the factor for the higher risk inherent in longer trade terms.

Most factoring agreements provide for minimum commissions, typically:

- A minimum dollar amount per invoice.
- A minimum aggregate dollar amount for each year, or part year, of the factoring arrangement.

6. **Client's Account; Monthly Statements; Reserves.**

(a) Factor shall maintain on its books and records a record of Factor's transactions with Client and its Customers under this Agreement ("**Client's Account**"). Client's Account shall include, without limitation:

(i) the balance from time to time standing to the credit of Client;

(ii) the Net Amount of Accounts Receivable assigned to Factor;

(iii) Commissions payable to Factor;

(iv) a record of Customer activity in respect of Accounts Receivable, including aging of unpaid Accounts Receivable, payment history, Disputes, returns, and discounts and allowances claimed by, and granted to, Customers;

(v) Chargebacks (as defined in Section 7(e));

(vi) Reserves established and maintained by Factor;

(vii) Advances outstanding from time to time;

(viii) interest charged to Client under this Agreement; and

(ix) all other credits and debits under this Agreement.

(b) No later than the tenth (10th) day of each month, Factor shall deliver to Client a statement of Client's Account as of the last day of the prior month. Such statement shall be binding on Client with respect to the matters covered by it, *except* to the extent Client provides written notice to Factor of any exceptions to such statement within [thirty (30)] days of its receipt of such statement.

(c) From amounts standing to Client's credit from time to time, Factor may establish and maintain such reserves ("**Reserves**") as Factor in its sole discretion deems advisable for the following:

(i) Accounts Receivable which are subject to Dispute;

(ii) Acceptable Receivables that are thirty (30) or more days past due;

(iii) all Acceptable Receivables of a Customer, if [forty] percent ([40]%) or more of such Customer's Accounts Receivable are forty-five (45) or more days past due; and

(iv) Advances made under Section 7(a).

(d) Reserves may be released to Client or credited to Client's Account when Factor deems advisable in its sole discretion.

CLIENT'S ACCOUNT; MONTHLY STATEMENTS; RESERVES

Recordkeeping is an important part of the factor's services under most factoring agreements. Factors can usually perform these services more thoroughly and efficiently than the client, and by doing so relieve the client of an expensive and burdensome task. The factor provides the client a monthly statement of these records, which also includes a statement of any reserves established by the factor to cover potential liabilities of the client to the factor.

Reserves

As with **asset-based lenders**, factors have broad discretion to establish reserves to protect against adversity. In asset-based lending, the reserve reduces the amount the borrower might otherwise be able to borrow against **borrowing base** assets. In factoring, other than advance factoring, the reserve reduces the amount paid by the factor to the client as purchase price on the purchased accounts receivable.

Because advance factoring is a form of asset-based lending, the reserve in advance factoring works much the same as in asset-based lending. For example, if the advance rate for accounts receivable assigned to the factor is 90%, the 10% that the factor does not lend is the reserve, and this is the amount that the factor must reserve under Section 6(c)(iv) and Section 7(a). The difference is that the receivables are owned by the factor, not the client. The reserve (and the advance rate) is measured, not by the face value of the receivables, but by the purchase price the factor will pay for them.

For a discussion of reserves in asset-based lending, see Practice Note, Borrowing Base: Overview: Reserves; for a discussion of reserves in factoring, see Practice Note, Fundamentals of Factoring: Factoring Terminology.

7. **Advances; Interest Rate.**

(a) At Client's request, Factor, in its sole discretion, may make advances ("**Advances**") to Client prior to the Maturity Date in an amount up to [ninety percent (90%)] of the Purchase Price of the related Approved Receivables and Acceptable Receivables, or such lesser percentage thereof as Factor, in its sole discretion, shall determine from time to time.

(i) Advances shall be revolving loans, and shall bear interest at the Interest Rate specified in Section 7(b).

(ii) Advances shall be reflected in Client's Account.

(iii) Factor may retain Reserves in respect of such Advances, and may, in its sole discretion, adjust the amount of such Reserves from time to time.

(b) Interest on Advances and other interest payable under this Agreement shall be computed at a rate (the "**Interest Rate**") equal to the sum of (i) the rate of interest per annum publicly announced from time to time by [NAME OF BANK] as its prime rate in effect at its principal office in [New York City/OTHER LOCATION], and (ii) [NUMBER] percent ([NUMBER]%). Any change in the prime rate shall become effective on the first day of the month following the announcement of such change.

(c) Any Acceptable Receivable (other than an Approved Receivable) that is paid by Customer after maturity shall bear interest at the Interest Rate from such maturity date to the date of payment. Interest shall be debited to Client's Account monthly.

(d) Any Chargeback shall bear interest at the Interest Rate from the date purchased by Factor to the date charged back to Client.

(e) "**Chargeback**" means an Account Receivable charged back to Client as set forth in Section 10(e), including (i) any Acceptable Receivable purchased by Factor that is not paid by Customer at maturity, and (ii) any Approved Receivable purchased by Factor that is the subject of a Dispute.

ADVANCES; INTEREST RATE

Advances

In an advance factoring agreement, advances are short-term loan transactions independent of the factor's purchase of accounts receivable. In periods of slow cash flow, they provide the client access to cash before the date on which the factor ordinarily would make payment for its purchase of accounts receivable. These loans are made on a revolving basis and are repaid when the factor pays the purchase price for the receivables. As new receivables are assigned to the factor, the client acquires new availability under the loan facility. Advances are evidenced, not by promissory notes, but by notations in the factor's records of the client's account.

Factor advances are made using the same formula used by receivables lenders. In receivables financing, the advance rate is typically between 70% and 90% of the face value of the accounts receivable, although for certain kinds of receivables, particularly foreign receivables, the advance rate can be as low as 50%. In advance factoring, the advance rate is not based on the face value of the receivables, but on the purchase price paid by the factor.

Advances are secured by a security interest in the proceeds of the accounts receivable, that is, the factor's own obligation to pay the purchase price. The source of funds to repay the advance is the factor's payment of the purchase price. If the factor's payment exceeds the amount of the advance, the excess belongs to the client.

Interest Rate

Besides advances, certain other provisions in most factoring agreements require the use of an agreed interest rate, to compensate the factor for the client's use of its funds. For example:

- If an account receivable for which the factor does not bear the credit risk is paid late by the customer, the client must pay for the use of the factor's funds from the maturity date to the date on which the customer actually pays (see Section 7(c)).
- When an account receivable is charged back by the factor, the client must compensate the factor for the use of its funds from the date the receivable was purchased until it is charged back (see Section 7(d)).

If the factor is a bank, it is likely to use its own **prime rate** in calculating the interest rate. Other financial institutions may use the **federal funds effective rate** or the **Eurodollar rate**.

8. **Grant of Security Interest.**

(a) To secure the Obligations (as defined in Section 8(b)), Client hereby grants to Factor a security interest in, and right of setoff with respect to, all of the following (collectively, "**Collateral**"):

(i) all Accounts Receivable, whether or not they are Acceptable Receivables or specifically assigned to Factor, and including Accounts Receivable arising after termination of this Agreement;

(ii) all present and future instruments, documents, chattel paper, and general intangibles (as those terms are defined in the UCC);

(iii) the Client's Account, all deposit accounts (as that term is defined in the UCC), and all balances and Reserves standing to Client's credit under this Agreement; and

(iv) all proceeds (as that term is defined in the UCC) of the foregoing.

(b) "**Obligations**" means all of Client's obligations to Factor, fixed or contingent, arising from time to time under this Agreement or any other agreement between the parties, or by operation of law. Obligations shall include, without limitation:

(i) Advances;

(ii) Client's indebtedness for purchases made by Client from other firms whose accounts receivable are assigned to Factor;

(iii) Chargebacks;

(iv) charges arising from Disputes;

(v) costs and expenses, including attorneys' fees, incurred in any proceeding arising under or relating to this Agreement;

(vi) amounts recovered from Factor on account of payments previously made by Customers on Accounts Receivable purchased by Factor; and

(vii) any taxes, penalties, or other charges which Factor is required to pay in connection with this Agreement.

(c) Client irrevocably authorizes Factor at any time to charge the Client's Account, and any amount standing to Client's credit in such account, the amount of any and all Obligations.

(d) Client shall pay Factor on demand any debit balance at any time existing in Client's Account.

(e) Client shall prepare and deliver to Factor such other documents and instruments, including without limitation UCC-1 financing statements covering the Collateral, as Factor may request from time to time. Client hereby authorizes Factor to file such UCC-1 financing statements as Client's attorney-in-fact. Client hereby appoints Factor as its attorney-in-fact. The foregoing grant of authority is a power of attorney coupled with an interest and is irrevocable for the term of this Agreement. Client hereby ratifies all that such attorney shall lawfully do by virtue of such grant of authority.

(f) Client shall not create, nor will it permit to exist, any lien on or security interest in any of the Collateral, except in favor of Factor.

GRANT OF SECURITY INTEREST

Most factoring agreements include a grant of security. The security interest in this Standard Document is broad, covering virtually all financial assets of the client. If the client has, or will have, other secured lenders, the scope of the respective security interests must be established with care, and possibly negotiated, to ensure they do not overlap. Any such arrangements may need to be reflected as exceptions to:

- The grant of a security interest in accounts receivable under Section 8(a)(i).
- The representation and warranty in Section 10(a)(i) that the accounts receivable are free of competing liens.

Occasionally, the security interest in a factoring agreement covers only the accounts receivable that have been assigned to the factor. The better practice for factors is to cover all of the client's accounts receivable, including those that are not acceptable to the factor (see Section 8(a)(i)), as well as the factor's payment obligation to the client (see Section 8(a)(iii)). These provisions strengthen the factor's position against any potential claims of third parties.

The obligations covered by the security interest include any obligations of the client to companies that are themselves clients of the factor (see Section 8(b)(ii)).

For more information on preparing and filing UCC-1 financing statements, see Practice Note, UCC: Preparing and Filing Financing Statements.

9. **Foreign Accounts Receivable.**

(a) For Acceptable Receivables (including Approved Receivables) representing sales to Customers outside the United States ("**Foreign Receivables**"), Client shall pay, and Factor may charge Client's Account for:

(i) all costs associated with Factor's re-assignment of Foreign Receivables to correspondent factors outside the United States, including without limitation, fees and commissions;

(ii) all credit insurance premiums paid by Factor in respect of Foreign Receivables; and

(iii) all costs associated with converting to United States dollars any foreign currency payments in respect of such Foreign Receivables, including foreign exchange fees, exchange rate differentials, and transmission costs.

(b) If Factor re-assigns Foreign Receivables to correspondent factors pursuant to Section 9(a)(i), Factor shall inform Client of the terms and conditions of such re-assignment. Client agrees to assist in complying with such terms and conditions. Each invoice in respect of a Foreign Receivable shall state in a manner satisfactory to Factor that payment of such invoice shall be made to the correspondent factor or as otherwise specified by Factor. If Client fails to comply with the terms and conditions of such re-assignment, the Credit Risk on any affected Foreign Receivable shall automatically revert to Client.

FOREIGN ACCOUNTS RECEIVABLE

If the client exports its goods or services, the factor's operations may extend to some or all of the foreign countries where the client does business. If they do not, the factor has several options:

- Exclude the relevant foreign receivables from the agreement's coverage by notifying the client in writing that they are rejected (see Section 2(a)(i)). If the factor gives this notice to the client, the client may forego the sale altogether or may insist on a secure form of payment from its customer, such as a commercial letter of credit. See Practice Note, Commercial Letters of Credit.
- Enter into a correspondent factoring arrangement with a factor in the foreign country, to cover the relevant foreign receivables (see Section 9(a)(i)).
- Purchase export credit insurance coverage for the relevant foreign receivables (see Section 9(a)(ii)). For a discussion of export credit insurance, see Practice Note, Export Credit Insurance.

Many factoring companies belong to international factoring associations, like Factors Chain International (FCI), a global network of hundreds of factors operating throughout the world. These associations have protocols for cross-border factoring, referred to as correspondent factoring. Under these protocols, the client's factor, referred to as the export factor, assigns the foreign receivables to a factor in the customer's country, referred to as the import factor. The relationship between the two factors is similar to that between client and factor, but is governed by the protocol, instead of a factoring agreement.

10. **Representations, Warranties, and Covenants.** Client represents, warrants, and covenants that:

(a) All Accounts Receivable are and, at the time of assignment to Factor, will be (i) bona fide obligations of Customers arising out of the sale of goods or the rendering of services in the ordinary course of business, free and clear of liens and security interests, (ii) owned by Client, and (iii) without any Dispute.

(b) Client is, and will remain during the term of this Agreement, (i) duly organized, validly existing, and in good standing under the laws of the jurisdiction of its formation, and (ii) duly authorized to carry on its business, to create liens on its properties, and to execute, deliver, and perform its obligations under this Agreement. Client's execution, delivery, and performance of this Agreement does not and will not breach any other agreement to which it is a party, and does not require the consent of any third party.

(c) Client is now solvent, and will remain solvent at all times during the term of this Agreement.

(d) Client shall promptly notify Factor of any Dispute. Client shall settle all Disputes at its own expense, including attorneys' fees. If any Dispute is not settled by Client within sixty (60) days after maturity of the invoice, or within any shorter period specified by Factor, Factor in its sole discretion may litigate such Dispute, or may settle or compromise such Dispute in Client's name and for Client's account on such terms as Factor deems reasonable. Any deficiency between the Net Amount of such invoice and the amount of such settlement or compromise, together with costs and expenses, including attorneys' fees, may be charged to Client's Account.

(e) Any of the following may be deemed to be a Chargeback (as defined in Section 7(e)) and may be charged back to Client by Factor:

(i) any Account Receivable on which a Dispute arises;

(ii) any Acceptable Receivable (other than an Approved Receivable) that is not paid by Customer at maturity;

(iii) any Approved Receivable evidenced by an invoice in an amount less than Fifty Dollars ($50.00) that is not paid by Customer at maturity; and

(iv) any Approved Receivable that is not paid by Customer at maturity due to acts of God or Political Events (as defined in Section 10(g)).

(f) Factor may retain title to all Accounts Receivable charged back to Client until all of the Obligations have been paid in full.

(g) "**Political Event**" means (i) political violence, including war, terrorism, civil unrest, revolution, and insurrection; (ii) government expropriation and confiscation of assets; (iii) frustration of contracts by governmental action and regulatory change, including cancellation of import and export licenses; and (iv) currency inconvertibility and foreign exchange risk (but not devaluation risk).

REPRESENTATIONS, WARRANTIES, AND COVENANTS

The client's representations and warranties in Section 10(a) regarding its accounts receivable are essential from the point of view of the factor, and are found in all factoring agreements. They confirm the validity of the accounts receivable, and the transactions out of which they arise, and they confirm that, before assignment to the factor, they are owned by the client, free and clear of any other claims.

The client's covenants in Section 10(d) give the factor broad authority to act as it sees fit when disputes arise involving the accounts receivable. As the owner of these receivables, it needs the broadest possible scope, including if necessary pursuing litigation. This accomplishes one of the central purposes of a factoring agreement: relieving the client of the administrative burden and cost of collecting the receivables. It also protects the factor, which (even if it does not bear credit risk or charges the receivable back to the client under Section 10(e)) still retains title to all accounts receivable until all of the client's obligations under the factoring agreement have been paid in full (see Section 10(f)).

For a discussion of the risks giving rise to political events referred to in Section 10(g), see Practice Note, Political Risk Insurance: Is it Necessary?

11. **Events of Default and Remedies.**

(a) The occurrence of any of the following events or conditions shall constitute an "**Event of Default**":

(i) Client fails to pay any Obligation when due, and such failure remains unremedied for [NUMBER] days;

(ii) any representation or warranty made or deemed made by Client under this Agreement proves to have been false or misleading in any material respect on or as of the date made or deemed made;

(iii) Client fails to perform or observe any covenant, term, condition, or agreement contained in this Agreement, and such failure continues unremedied for [NUMBER] days after written notice by Factor to Client;

(iv) Client commences any case or proceeding seeking relief under any existing or future bankruptcy law;

(v) there is commenced against Client any case or proceeding under any existing or future bankruptcy law which remains undismissed, undischarged, or unstayed for [30]/[60]/[NUMBER] days;

(vi) Client is unable, or admits in writing its inability, to pay its debts as they become due;

(vii) there occurs a material change in the beneficial ownership of Client resulting in a change of control of Client; or

(viii) Client sells, leases, transfers, or otherwise disposes of all or substantially all of its property or assets, or consolidates with or merges into or with any corporation or other entity.

(b) If an Event of Default occurs and is continuing, then:

(i) Factor may, by notice to Client, declare this Agreement terminated;

(ii) Factor may, by notice to Client, declare all Obligations to be due and payable, whereupon the same shall immediately become due and payable; and

(iii) Factor may exercise all the rights and remedies of a secured party upon default under the UCC.

EVENTS OF DEFAULT AND REMEDIES

Events of default fall into two categories:

- Immediate events of defaults.
- Events that the client has an opportunity to cure. These mature into events of default if not cured after the passage of an agreed number of days. The parties need to agree on appropriate cure periods for the events of default in Sections 11(a)(i), (iii), and (v).

The most important immediate defaults are:

- Material breach of any representation or warranty under Section 11(a)(ii), in particular, the failure of the accounts receivable to be as represented by the client.
- Bankruptcy or insolvency events initiated by the client under Sections 11(a)(iv) and (vi).

If an event of default occurs, the factor may:

- Terminate the factoring agreement.
- Accelerate and demand that the client immediately pay all amounts owing to the factor.
- Exercise the rights and remedies of a secured party under the UCC regarding the collateral specified in Section 8(a).

12. **Term and Termination.**

(a) This Agreement shall be effective as of the date first written above and shall continue in full force and effect until the first anniversary thereof, unless earlier terminated as provided in Section 12(b). This Agreement shall be automatically extended for one-year terms on each anniversary of the effective date (each such anniversary, an "**Anniversary Date**") until terminated as provided in Section 12(b).

(b) This Agreement may be terminated by either party giving written notice to the other, specifying a termination date not less than sixty (60) days from the date of such notice.

(i) If Client terminates, specifying a termination date other than an Anniversary Date, Factor shall be entitled to the unpaid portion, if any, of the Minimum Annual Commission for the then-current year of this Agreement.

(ii) If Factor terminates other than for cause under Section 11(b)(i), specifying a termination date other than an Anniversary Date, Factor shall not be entitled to the unpaid portion of the Minimum Annual Commission for the then-current year of this Agreement.

TERM AND TERMINATION

Most factoring agreements are structured as one-year agreements that renew automatically, unless terminated by either party. The termination provision ensures that, if the agreement is terminated early by the client, the factor is entitled to collect the minimum annual commission agreed to in Section 5(d).

13. **Miscellaneous.**

(a) **Notices.** All notices and other communications under this Agreement shall be in writing and shall be deemed given upon the first to occur of (i) deposit with the United States Postal Service or overnight courier service, properly addressed, and postage prepaid; (ii) transmittal by electronic means, including email, properly addressed; or (iii) actual receipt by an employee or agent of the other party. Notices hereunder shall be sent to the following addresses, or to such other address as such party shall specify in writing:

(i) if to Client:

[ADDRESS]

[NAME OF OFFICER]

[EMAIL ADDRESS]

[FAX NUMBER]

(ii) if to Factor:

[ADDRESS]

[NAME OF OFFICER]

[EMAIL ADDRESS]

[FAX NUMBER]

(b) **Amendments and Waivers.** Neither this Agreement nor any provision hereof may be amended, modified, or waived except in writing signed by both parties. No failure to exercise and no delay in exercising, on the part of Factor, any right or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any right or remedy preclude any other or further exercise thereof.

(c) **Successors and Assigns.** The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

(d) **Counterparts; Integration.** This Agreement and any amendments, waivers, consents, or supplements hereto may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement constitutes the entire contract between the parties with respect to the subject matter hereof and supersedes all previous agreements and understandings, oral or written, with respect to the subject matter hereof.

(e) **Severability.** If any term or provision of this Agreement is invalid, illegal, or unenforceable in any jurisdiction, such invalidity, illegality, or unenforceability shall not affect any other term or provision hereof or invalidate or render unenforceable such term or provision in any other jurisdiction.

(f) **Governing Law; Jurisdiction; Consent to Service of Process.**

(i) This Agreement and any claim, controversy, dispute, or cause of action (whether in contract or tort or otherwise) based upon, arising out of, or relating to this Agreement and the transactions contemplated hereby shall be governed by, and construed in accordance with, the laws of the State of [New York]/[OTHER STATE].

(ii) Each party hereto irrevocably and unconditionally submits to the jurisdiction of the courts of the State of [New York]/[OTHER STATE] sitting in [New York]/[OTHER] County, and of the United States District Court of the [Southern District of New York]/[OTHER DISTRICT

COURT] and agrees that any such action, litigation or proceeding may be brought in any such [New York]/[OTHER STATE] State court or, to the fullest extent permitted by applicable law, in such federal court. Each party hereto agrees that a final judgment in any such action, litigation, or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by law. Nothing herein shall affect any right that Factor may otherwise have to bring any action or proceeding relating to this Agreement against Client or its properties in the courts of any jurisdiction.

(iii) Each party hereto waives personal service of process and irrevocably consents to the service of process by registered or certified mail at the address set forth for notices in Section 13(a).

Note: ***Governing Law; Jurisdiction; Consent to Service of Process***

(g) **Waiver of Jury Trial.** EACH PARTY HERETO HEREBY IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING DIRECTLY OR INDIRECTLY RELATING TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY WHETHER BASED ON CONTRACT, TORT, OR ANY OTHER THEORY.

(h) **Headings.** The headings in this Agreement are for reference only and shall not affect the interpretation of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

[CLIENT NAME]	[FACTOR NAME]
By_________________	By_________________
Name:	Name:
Title:	Title:

PRODUCTS

PLC US Finance, PLC US Law Department