



## LEGAL DESCRIPTION OF THE FACTORING CONTRACT

Assistant Lecturer Sura Mohammed Hobi Mahdi

College of Nursing, University of Baghdad

Email, [sura.h@colaw.uobaghdad.edu.iq](mailto:sura.h@colaw.uobaghdad.edu.iq)

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<b>Received:</b> 20 <sup>th</sup> October 2024 <b>Accepted:</b> 11 <sup>th</sup> November 2024	In our title article, we set out the legal description of the factoring contract and examined the main theories describing this contract; the theory of transfer of rights and the theory of contractual subrogation, in order to find out what similarities and differences exist between them and the factoring contract. The position of some legislations was clarified to show the areas of integration or deficiencies that affect the description of this contract, and we opted for the descriptive approach - analytical - comparative, through which it became clear that the factoring contract is undefined in the Iraqi legal system, there is no specific legislation, that regulates its provisions and determines its essential elements and legal description as well as the reluctance of Iraqi banks for the practical and actual practice of the factoring contract, which calls for drawing attention to this contract in order to keep pace with economic and legal developments.

**Keywords:** Factoring, Transfer of right, Agreement solutions, Commercial rights, Creditor customer.

### INTRODUCTION

The factoring contract is one of the modern and complex contracts that preceded legislation and took place to achieve the interests that traditional contracts cannot achieve, when commercial and economic institutions try to obtain the necessary funds to improve their projects and increase and expand the volume of production, which prompted human thinking to find legal relationships or contract templates developed by combining several decades, resulting in the emergence of a contract that has its own characteristics, in order to keep up with the pace of economic development, a correlation between economic development and legal development must be achieved. Factoring is a contract in which the creditor customer is obliged to submit to the factoring company all the invoices that prove its commercial rights and that have been incurred by its debtors, so that the factoring company selects the invoices that it considers collectible or that, depending on the debtor's commercial reputation or financial situation, do not present a risk of non-collection. When factoring accepts all or part of these rights, it accelerates the value of the receivable to the creditor customer before the due date in exchange for the factoring company's acquisition of these rights and ensures that it does not revert to the creditor if it does not collect, as well as providing some administrative and legal services in the interest of the customer-creditor.

**The problem of the study:** The problem lies in the variety and diversity of the description of the factoring contract, as numerous theories have emerged trying to find the appropriate legal framework for this contract by trying to fit it into one of the so-called traditional contracts. These divergences and differences also extended to the comparative legislation, whereby the legislators of some countries intervened to define the legal description of the factoring contract through specific provisions, while the legislators of other countries ignored this, including the Iraqi legislator who was content to mention the factoring contract in passing in Article (27/b) of the Banking Law, which was amended by Decree No. 94 in 2004 within the framework of banking activities, and the Central Bank of Iraq failed to develop regulations to ensure the regulation of the provisions of the factoring contract as a banking activity.

**Methodology of the study:** we have preferred to adopt the analytical-descriptive-comparative approach through the analysis of legal texts and legal opinions, clarifying the position of comparative legislation in relation to the legal description of the factoring contract with reference to the main judicial applications related to the subject of the study, in order to enrich the practical side and strengthen the various legal aspects.

**Structure of the study:** the nature of the article required dividing the study to the introduction and two sections in an attempt to cover the aspects of the subject, therefore, we devoted the first section to study the concept of factoring contract and divided the study to three requirements, which dealt in the first definition of factoring contract and presented in the second requirement for its importance, while the third requirement through which has studied the characteristics of this contract.

The second section has come to the explanation of the legal description of the factoring contract and dividing it to three requirements has been presented the main theories in the description of this contract, so we devoted the first

requirement to the theory of transfer of right, while in the second requirement we have presented the theory of contractual subrogation either the third requirement has been shown by the theory probable in the description of the factoring contract and ended the study with a conclusion that presents a series of results and proposals in the hope of taking them.

**The first section: the concept of factoring contract:**

To take note of the factoring concept, we need to define it in the first requirement, present its meaning in the second requirement and the main characteristics of the factoring contract in the third requirement.

**The first requirement: The definition of the factoring contract:** The definition of the factoring contract requires that the definition of linguistic first and then the legislative definition secondly will be explained jurisprudential definition third, as follows:

**First: The linguistic definition of the factoring contract:** There is no in the Arabic language corresponding to the word (factoring) which it is referred to by the same term (factoring), but by referring to the dictionaries of the language, we find that the origin of the word is (factor) as it is translated into Arabic in the sense of (element, employee, agent, institution buys or deducts the debts of traders) and from this origin came the word (factoring) buying or discounting debts ((Mohammed D., Contract for the Purchase of Commercial Debt Invoices, 2010, p. 18). It is noted that the original name of the factoring contract is an Anglo-American designation, used in England and the United States of America at the end of the nineteenth century and the beginning of the twentieth century and later moved to Europe in the second half of the same century (Tawfik, 1987, p. 18).

French jurisprudence did not try to exert itself much in the search for a French translation of the origin of the word (factoring) because it expresses the nature of the contract and the obligations arising from it and then remained institutions buying invoices in France retained the term Anglo-Saxon until a special decree was issued in France in 1973 as he used the term (affacturage) and that derivation of the word (facture) invoice to denote the factoring contract (Mohammed T., 2010, p. 21).

On the other hand, the Ottawa Convention held in 1988 called the factoring contract the name (contract for the purchase of commercial rights), but at the level of the Arab countries, many names were given to the factoring contract, including the contract of transfer of invoice, factoring, marketing agency, agency for the collection and guarantee of commercial rights, commercial debt collection contract, debt discount contract, contract for the purchase of commercial rights.

Despite the multiplicity and different names given to the contract in article, we see that they be lacking of taking note of all aspects of the contract, so we decided to adopt the name (factoring contract) being the original designation, which expresses the nature of the contract and the obligations arising from it with all honesty and sincerity.

**Second: Legislative definition of the factoring contract:** The French legislator defined the factoring contract in the regulation list on the definition of economic and financial terms issued on 29/11/1973 as (the contract under which the process of financial management of the accounts of project customers, by owning these rights, and collecting them for the account of the private collector, and bear the potential losses if this dealing with insolvent customers and this service allows the projects that resort to it to enjoy cash liquidity and reduce their administrative expenses in exchange for giving the collector a commission, for providing this service (Shafi, Factoring Contract, 2005, p. 35).

The Algerian legislator defined the factoring contract in Legislative Decree No. (93/08) of 1993 complements and amends the commercial law under the name of the invoice transfer contract, where Article (543) repeated 14 stipulates that (a contract under which a specialized company called (Intermediary) replaces its client named (belonging) when it immediately pays to the latter the full amount for a specific term resulting from the contract and undertakes the responsibility of payment in return for a fee).

It should be noted that the Algerian legislator has followed the pace of development by issuing Law No. (23-09) in order to enable the monetary and banking sector to play its real role in the Algerian economy to face the technical and technological challenges in the banking field (Mokhtar, 2023, p. 281).

The Egyptian legislator also defined the factoring contract under the name of factoring under the second paragraph of the first article of the Law Regulating Financial Leasing and Factoring Activities No. 176 of 2018, where it stipulated that (the purchase of current and future financial rights arising from sales and the provision of services).

As for the Iraqi law, the factoring is an indefinite contract, as the legislator did not assign it to a specific name and did not set the rules governing its provisions, but only referred to Article (27/b) of the Iraqi Banking Law issued by Order No. 94 of 2004 within the banking activities, as it stipulated:

(b) The granting of credits (whether secured, unsecured or privileged), including but not limited to: consumer credits, mortgages, sale of accounts due with or without recourse discount, financing of commercial transactions, including the right of recourse, purchase of negotiable instruments with a discount without recourse...).

At the level of international legislation, the second paragraph of Article I of the Ottawa Convention in 1988 defined the factoring contract under the name of the contract for the purchase of commercial rights as (the contract decided between one aspect (merchant or commercial enterprise) and another aspect (the institution of the purchase of commercial rights), under which:

- a. The merchant can or must assign to the commercial rights purchase institution debts arising from contracts for the sale of goods decided between the merchant and his customers (debtors), with the exception of debts arising from the trader's personal or family transactions or domestic use, or that are not related to his trade.
- b. The Commercial Rights Purchase Corporation shall undertake to perform at least two of the following functions:
  - Financing for the trader, including the provision of loans or bank credits and prepaid amounts.
  - Holding the merchant's accounts related to his invoices.
  - Collection of merchant debts.
  - Protection of the merchant from the risk of default of the debtor.
- c. Notify the debtors of the transfer of right from the merchant to the institution of purchasing commercial rights.

**Third: the jurisprudential definition of the factoring contract:** There are many definitions given by jurisprudence for the factoring contract, and despite their convergence, it is not possible to reach a unified definition of this contract.

Anglo-Saxon jurisprudence believes that the factoring contract is the fact that the factoring company in agreement with a trader to exempt him from the financial troubles of the export activity, especially the collection of the price from the buyer in other countries, so that the merchant waives to that institution the right to collect his commercial debts in exchange for interest or commission or deduction of aspect of the price to be agreed upon between the aspects (Shafi, 2005, p. 36).

It is taken on this definition that although it is suitable for the definition of the international factoring contract, specifically related to debts arising from export operations, but it is not suitable for the definition of the local factoring contract, and perhaps this is due to the roots and origin of this contract, because it was born to finance British exports in the United States of America.

At the level of Latin jurisprudence, aspect of the French jurisprudence went to define the factoring contract as the merchant transferring his commercial rights that are owed by his customers to the professional intermediary for this activity, which accelerates the value of these rights to the merchant in exchange for obtaining a commission from the latter, including the interest of acceleration and the guarantee commission (Al-Hafeedh, 2012, p. 25).

It is taken into account that this definition has omitted to refer to the obligation of the professional intermediary (the factoring company) to collect the customer's commercial rights owed by his debtor as well as its obligation to guarantee the risk of non-payment at maturity arising from the debtor's incapacity.

The factoring contract is also defined as the contract under which the ownership rights of the merchant or producer is transferred to one of the banks or financial institutions allowed to engage in this activity with the latter's guarantee of payment of the value of debts and not to return to the merchant or producer with anything if he fails to achieve these rights, and the merchant is obligated under the contract to provide the necessary facilities to the bank or institution to achieve the main objective of this contract, which is collection (Radwan, 1986, p. 12).

It is taken on this definition that it has made a guarantee of fulfillment of (Factoring company) for the value of debts and non-recourse to the merchant or producer when failing to achieve the rights at all, while the guarantee is absent whether the transferred debt is null and void, as well as that the merchant's obligation towards the factoring company to pay the acceleration interest and the guarantee commission because of the factoring contract is not a donation contract.

Aspect of the jurisprudence went on to define the factoring contract as a contract under which a professional person of activity, whether a bank or a financial institution, pays the value of invoices to the merchant (supplier) in exchange for the latter transferring his rights owed by his customers (Abdel-Al, 1994, p. 318). It is noted that this definition has made the effects of the factoring contract limited to the obligation of the bank or financial institution to pay the value of the invoices to the merchant in exchange for the latter transferring his commercial rights owed by his customers, ignoring the other obligations arising from this contract.

We suggest that the factoring contract be defined as follows:

A contract whereby the customer undertakes the creditor to submit all his invoices and bonds evidencing his commercial rights in the hands of his debtors to the factoring company to select invoices and bonds that can accelerate their value to the customer and bear the risks of non-fulfillment as well as providing administrative, accounting and organizational services in return for the customer's obligation to transfer fixed ownership rights in invoices and accepted bonds to the factoring company and pay it for the benefit of acceleration, guarantee commission and expenses determined by the agreement of the parties in the contract.

Among the most prominent features of the proposed definition:

1. Identify the parties to the factoring contract, namely both the credit customer and the factoring company.
2. Highlighting the place of the factoring contract, which it focuses on the commercial rights of the creditor customer in the debtors and fixed in invoices and bonds written against them without his civil rights.
3. Reflect the generality of the agreement or the so-called principle of collectivism, which obliges the creditor customer to submit all his invoices and bonds proving his commercial rights in the hands of his debtors to the factoring company with which he contracted to prevent him from entrusting it with potential debts collected and retaining debts confirmed collection.

4. Showing the effects of the factoring contract through a statement of rights and obligations arising from the contract.

**The second requirement: The importance of the factoring contract:** The importance of the factor contract is evident through the multiplicity of functions performed by this contract, which emanates from the justifications that led to its creation, which requires that these functions be presented as follows:

**First: A financing instrument:** The factoring contract is an effective and innovative financing instrument that secures cash liquidity for traders and businesses (Legeais, 2002, p. 3).

The essence of the factoring contract is to convert commercial rights into cash, mean that accelerating the debts of merchants and facilitating their access to the financing necessary to stabilize the work of their commercial companies, although it performs other important functions (Khalil and Kahla, 2022, p. 6).

The importance of the factoring contract increases as a panacea for financing small and medium enterprises, because it enables to address the problem of its inability to collect its commercial rights from debtors for several reasons, including that these rights are associated with a suspense term so that the creditor cannot lawsuit his right before the maturity of the debt, or the collection of these rights may require experience or take procedures that take a long period of time, which requires the use of the factoring company (Al-Saadi, 2020, p. 459). To secure the necessary financing for creditors who have undue debts or debts that faces some collection obstacles through the liquidation of frozen debts (Karkabi, 2002, p. 372).

The factoring contract is a instrument for financing traders and commercial institutions that are in need of cash liquidity despite their possession of rights arising from their business, so the factoring companies do not hesitate to grant financing or provide material assistance through the factoring contract because of the guarantees it achieves for them, which it transfers to them the commercial ownership rights, which are strong guarantees.

**Second: Fulfillment instrument:** The factoring contract is a legal fulfillment instrument, where the factoring company, after the commercial rights are transferred to it, pays their value to the customer creditor, either immediately or at the maturity date as agreed, and this may be by entering the current account opened in the name of the creditor customer with the factoring company (Al-Jourani, 2015, p. 22). Although the factoring contract performs its function of being a payment instrument for the customer creditor, it leads to obliging the debtor to pay the debt incurred by the factoring company at maturity and demanding that the company pay it (Khalil and Kahla, 2022, p. 37). This may have led some to argue that the fulfillment of the creditor by the factoring company does not place any kind of obligation on the latter unless there is fraud or bad confidence (Jahloul, 2003, p. 27). Therefore, we see that this opinion is under consideration, the factoring contract is one of contracts binding on both sides and then arranges corresponding obligations in the liability of the contractors, if the creditor customer is not obligated to refund what he has fulfilled of the value of his rights in the debtors to the factoring company, because it has no recourse to the creditor customer when it fails to collect unless it arises from fraud or bad confidence, but there are many obligations that the factoring contract entails on the customer creditor, the most important of which are commitment to transfer the ownership rights subject to the contract to the factoring company and ensure its existence, as well as the payment of commission and interest to the factoring company. It should be noted that aspect of the jurisprudence holds that the factoring contract is a fulfillment by the creditor and a transfer of right by the debtor (Al-Khuwayldi, 1997, p. 41).

Although we support the advanced opinion in that the factoring contract is a fulfillment on the aspect of the creditor, but we believe that it transfers the right to the factoring company, and this makes it a means of payment of a special nature and distinguishes it from other means of payment.

**Third: An instrument for guarantee:** The importance of the factoring contract is not limited to being an instrument for financing and an instrument for fulfillment, but goes beyond that to be an instrument for guarantee, because it imposes an obligation on the factoring company to prevent it from recourse to its customer in the event of failure to collect rights from the customer's debtor and this obligation is the essence of the contract and its special characteristics, which is unique to other contracts (Jahloul, 2003, p. 82).

The guarantee covers the debtor's failure to pay arising from his financial deficit, and the factoring company bears all risks that arise in the future until the time of payment, and therefore any change or shift in the real value of the amount of the debt falls within these risks to ensure the good end of the factoring process (Jahloul, 2003, p. 41). The guarantee achieved by the factoring contract has a dual nature, it is not limited to guaranteeing the rights of the customer creditor, but extends to include the guarantee of the rights of the factoring company, so it transfers the fixed ownership rights in the bonds and invoices from the liability of the creditor customer to the liability of the factoring company to have the status of the original creditor who has the lawsuit to the right and fulfill it on the due date without intervention by the customer.

It is noted that the transfer of ownership rights to the factoring company does not perform the function of security in the traditional sense of insurance, which is based on the priority of progress and tracking, as in in-kind insurances or the subordination of the guarantor's obligation to the debtor's guaranteed obligation, as in personal insurances, but aims to eliminate and reduce the risks to which the factoring company is exposed (Dowidar, 1991, p. 206).

**Fourth: A credit instrument:** The factoring contract arose in the commercial environment in order for the creditor customer to receive an accelerated price in exchange for selling his deferred right in favor of the factoring company (Al-Saadi, 2020, p. 468). Hence, the credit function is essential to the factoring contract, but it is part of its legal



nature, because the contract focuses on debts due after a certain period, so the factoring contract removes the credit burden on the creditor customer and transfers it to the factoring company (Youssef and Mahmoud, 2020, p. 14). The credit function in the factoring contract is based on the elements of grant and redemption, because of the credit is granted by agreement of the creditor customer with the factoring company, where the latter accelerates the value of the rights of the original creditor on his debtors in exchange for owning these rights with its obligation to ensure irreversibility in the event of default of debtors (Fadhli, 1997, p. 8).

As for the second element, which is the element of recovery, the creditor customer is not committed to it, but the debtor of the latter in the face of the factoring company, and this is what distinguishes the factoring contract from other credit contracts, because of credit is granted to the creditor customer while it is recovered from the debtor of the recipient of the credit, and this makes the factoring contract based on risk and probability (Al-Hafeedh, 2012, p. 52). Therefore, the factoring contract will have no real value unless it focuses on the total commercial debts owed to the creditor customer with his debtors, which is known as the principle of collectivism, as well as limiting dealing with the factoring company that the agreement was decided to collect all these debts, which is known as the reduced condition (Al-Razzaq, 2010, p. 48).

From this, it is clear that the reduced condition emerges from the principle of collectivism and complements it in order to find a kind of balance between risks and guarantees and to achieve the greatest possible protection for the factoring company (Jahloul, 2003, p. 65).

**The third requirement: the characteristics of the factoring contract:** After the definition of the contract of factoring and the statement of its importance, we must present the most important legal characteristics that made it refuse to enter under any of the traditional forms of contracts and these characteristics can be summarized as follows:

**First: A relatively newly established contract:** The eighteenth century witnessed the birth of the factoring contract in England and then originated and grew up in the United States of America when it was a British colony. The factoring contract began to appear in its currently known form through the provision of financing, guarantee and administrative services (Shafi, 2005, p. 14).

However, the official appearance of the factoring contract in France dates back to 1965. It was used after the francization of it, as is the case in contracts of Anglo-Saxon origin to harmonize the legal rules of the Latin system, and French traders began to resort to the factoring contract to support the export of French products (Shafi, 2005, p. 15), therefore factoring contract became spread globally as a modern means of financing creativity of American thought.

**Second: A binding contract for both sides:** The factoring contract is one of the contracts binding on both sides, it is a reciprocal contract that establishes since its conclusion corresponding obligations in the liability of its contractors so that each of them is a creditor and a debtor to the other, therefore the factoring company entails many obligations, the most important of which is a positive obligation to accelerate the value of the rights of the creditor customer before the due date, as well as to provide information related to foreign financial markets, negative obligation whereby the factoring company does not have recourse against the creditor when it fails to collect rights from debtors (Fadhli, 1997, p. 154).

The factoring contract also entails many obligations on the creditor customer, the most important of which is the obligation to ensure the existence of the right and transfer its ownership to the factoring company, commitment to the principle of collectivity and the reduced condition, as well as the payment of the value of the commission and interest to the factoring company.

The obligations entailed by the factoring contract are not limited to its parties, but extend to the customer's creditor debtor, who commits himself to satisfying to the factoring company the debt incurred upon the date of payment and the company's demand for him to pay (Khalil and Kahla, 2022, p. 37). This may have led some to believe that the factoring tripartite contract was based on the inclusion of the customer's debtor creditor as a party to the contract (Bourdeaux, 1998, p. 9). However, this opinion is due to it, the factoring contract is determined between two people, the customer (the former creditor) and the factoring company (the new creditor), but the debtor of the customer is obligated to fulfill the factoring company in execution of a contract was not a party to which the embodiment of the idea of extending the binding effect of the contract and an exception to the principle of proportionality of the impact of contracts in terms of persons.

**Third: Consent Contract:** The factoring contract shall be entered into the consensual contracts service, sufficient for it to be contracted by the parties (the creditor customer and the factoring company), so the contract does not depend on the holding of the factoring contract and the validity of its existence legally on the need to empty it in a certain form such as writing. Although the factoring contract is not considered a formal contract because there is no explicit text that imposes the observance of the form as a support of its convening and there is no penalty resulting from the failure to write, custom has settled on the need to write the factoring contract and record all its multiple and precise conditions clearly and explicitly (Shafi, 2005, p. 43).

It should be noted that limiting the practice of factoring activity to some financial institutions called for their adoption of form contracts, mean that the financial institution issues a form for the factoring contract that includes its general and special conditions to be decided at the beginning of the relationship between the two parties and is prepared to

contain and regulate other relations within its scope (Awadh, 1988, p. 121) to reflect the consent of the parties to the contract and determine their rights and obligations, which should not be left in memory (Shafi, 2005, p. 44).

**Fourth: Netting contract:** The contract is characterized as one of the netting contracts, when each contractor takes a return for what he gives, the contract with compensation achieves the interest of all contractors by obtaining conceptually equivalent benefits. The interest of the factoring company is achieved through the profits obtained or expected to be obtained from the process of purchasing the debts subject to the contract of the factoring, and those profits are the result of the difference between the value that it accelerates for the creditor customer and the value that it gathers from the debtor when collected for debt (Shafi, 2005, p. 178).

The factoring contract also achieves the interest of the creditor customer, who obtains an important part of the value of the debt before the due date and disposes of facing the problem of collection and the possibility of non-payment of the debtor, and then the creditor customer benefits from the commitment of the factoring company to fulfill the value of his commercial rights and guarantee them against the commission he pays to the factoring company (Noha, 2020, p. 16).

**Fifth: Compound contract:** The contract is characterized by the nature of the composite, it is an accurate and integrated combination of several civil and commercial contracts such as contractual subrogation or transfer of right, agency, current account and other contracts (Verny, M. 1982, p. 334) while remaining independent of them since it cannot be placed under any of those contracts, so it is called the framework agreement (Al-Hafeedh, 2012, p. 349) because the legal framework that combines several contracts within its scope.

The factoring contract is a composite contract that is a coherent contractual system with sequential parts in successive stages according to a system governed by it as a single transaction that does not accept dismantling and fragmentation aimed at achieving a specific financing purpose that the will of the contractors tended to achieve (Hammad, 2005, p. 7).

**Sixth: Contract based on personal consideration:** The contract falls into the category of contracts based on personal consideration, which may be based on objective elements such as the financial ability of the contractor and his economic status as well as these elements may be personal such as honesty and commercial reputation, so each of the parties to the contract resort to studying the status and position of the another party to see the extent of his ability to meet his obligations arising from the contract (Shafi, 2005, p. 138).

The personal consideration in the contract may lead to its expiry before the deadline specified for it whenever what affects the person of the contractor such as liquidation of his funds or loss of eligibility (Mohammed T., 2010, p. 41), the double consideration of the contracting persons is prevalent in the factoring contract, since the person of each of the contracting parties and his qualities are subject to consideration that extends throughout the life of the contract.

**Seventh: Contract of transfer of ownership:** The factoring contract obliges the creditor customer to transfer his fixed commercial rights under bonds or invoices to the factoring company in a way that ensures the transfer of ownership from the liability of the creditor customer to the liability of the factoring company in a final transfer and then the factoring company will collect the value of those rights in its name and for its own account on the due date without the need for the intervention of the creditor customer. Instead of being claimed by his original creditor, the debtor will be claimed by his new creditor (factoring company) (Al-Saadi, 2020, p. 464). The factoring contract also transfers the ownership of the monetary consideration for those rights from the liability of the factoring company to the liability of the creditor customer, so the essence of the factoring contract is based on the transfer of ownership between the parties to the contract.

**Eighth: Contract of adhesion:** The contract of adhesion is one in which the acceptor conveys the prescribed conditions set by the offeror and does not accept discussion (Al-Hakim, Al-Bakri, and Al-Bashir, Al-Wajeez in the Theory of Obligation in the Iraqi Civil Law, Sources of Commitment, 2012, p. 44). This applies to the factoring contract, where the company is independent by setting the general conditions of the contract that determine the rights and obligations of the parties and cannot be discussed or negotiated by the creditor customer. The factor company predetermines them in the form of a general form submitted to each person wishing to contract (Awadh, 1988, p. 564).

In this way, the characteristic of compliance is achieved as the typical adhesion where the economic positions of the parties to the contract vary, so the weak party (the creditor customer) only has to recognize what was stated in the contract of its general conditions in its entirety or reject it in its entirety, while the special conditions are open to discussion (Jahloul, 2003, p. 24). However, adhesion does not mean that the factoring contract includes arbitrary conditions imposed by the stronger party, but rather an expression of the necessities imposed by considerations of good governance in credit financial institutions (Shafi, 2005, p. 117).

**Ninth: Commercial contract:** The factoring contract is characterized by a commercial contract that arose in the environment of traders to secure the cash liquidity necessary for the conduct of business. It responds to the commercial rights arising from the practice of the merchant creditor of his business without those related to the trader's personal or family transactions or domestic use or that are not related to his trade (Article 1/2 of the Ottawa Convention), factoring contract is a commercial contract and it responds to commercial rights without civil (Saleh, 1987, p. 23). The factoring contract falls under the category of banking operations, which are considered as commercial business by virtue of the law (Article 5/13 of the Iraqi Trade Law No. 30 of 1984), and therefore the

factoring commercial contract emerges from the fact that it responds to commercial rights as well as being a banking operation of a commercial character.

**Tenth: Continuous execution contract:** Time is an essential element in the factoring contract, it is a continuous agreement focused on all the rights of the customer creditor with his debtors during the agreed time range, the generality of the agreement or the principle of collectivity on which the factoring contract is based requires that it be continuous execution. The continuation of the agreement bond leads to the set-off of risks through the balance of obligations on the parties to the contract and achieves full knowledge of the reliability of the financial position of the creditor customer, and therefore the specificity of the factoring contract requires that it be continuous execution to achieve the economic feasibility of the contract (Al-Razzaq, 2010, p. 50).

**The second section: The legal description of the factoring contract:** The factoring contract is characterized by that it is newly existing and of a complex nature overlaps and intertwines multiple legal relations, which led to variation and difference in its legal description, since multiple theories have emerged that seek to find the appropriate legal framework for the factoring contract by including it within one of the contracts called the approach, and this was reflected in comparative legislation, some countries' legislators have intervened to determine the legal description of the factoring contract with special texts, while the legislators of other countries ignored it, which requires the presentation of the most important theories in the description of the factoring contract and then stating the current theory through three requirements, as follows:

**The first requirement: the theory of transfer of rights:** the transfer of rights is an agreement whereby the original creditor in the obligation (the assignor) transfers his personal right in the debtor (assignee (the buyer)) to another person to become the new creditor (the assignor (the seller)) (Sultan, 1974, p. 307). Where the creditor may transfer to others his money from the right of his debtor unless prevented by a provision in the law or the agreement of the contracting parties or the nature of the obligation and the transfer takes place without the need for the consent of the assignee (the debtor) and this is required by Article (362) of the Iraqi Civil Law.

The transfer is a consensual agreement that does not require a special form to be held, but it is sufficient to agree with the assignor and the assignee, mean that the original creditor and the new creditor without the need for the consent of the debtor who has the right, and this is due to transfer of right from one creditor to another creditor would not harm the debtor damages that require the necessity of his consent to the holding of the transfer, in most cases it is equal for the debtor to claim the debt from one person or another (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 237).

As for the execution of the assignment against the assignee (the debtor) or against other parties, it is not achieved unless it is accepted or announced to him, provided that its execution against other parties by accepting the assignee requires that this acceptance be fixed in date (Article 363 of the Iraqi Civil Law).

If the assignment of rights is held as soon as the assignor and the assignee agree without the need for the consent of the debtor, who becomes an assignee after the assignment is decided, but the validity and execution of the transfer of rights depends on the debtor's declaration or acceptance and this is what the Iraqi Federal Court of Cassation ruled under its decision No. 501 on 26/6/2008 (The official website of the Court of Cassation: <https://www.sjc.iq/qview.835/>). The transfer of rights obliges the debtor to pay his debt to the assignee instead of the assignor creditor, which requires the debtor to be informed of the assignment (Al-Nashwa, 2007, p. 142). The assignment shall not be executed against another party, which is any person harmed by the execution of the assignment except by announcing it to the debtor or by his acceptance of it with a fixed date, in order to prevent the creditor from colluding with the debtor by manipulating the real date of acceptance to the detriment of others (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 239). The debtor's acceptance of the assignment or its announcement is not a condition for its convening and does not make him a party to it, but remains and remains a foreigner from the contract in which it was made, but it is a condition for its execution against the debtor and against others (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 238).

The symmetry between the factoring contract and the transfer of right is achieved in many objective provisions that express the points of convergence between them, which can be presented as follows:

**First:** The factoring contract and transfer of right is consistent in that they do not require the debtor's acceptance of their convening, but the contract is decided as soon as the will of its parties meets without taking into account a special form for the decided of the contract (Khalil and Kahla, 2022, p. 167).

**Second:** Both the factoring company and the assignee are considered the owners of the right since the decision of the contract and therefore have recourse to the debtor to collect the debt incurred by him at due (Shafi, 2005, p. 207), so the debtor is not discharged except by payment to the new creditor, because of payment to the assignor is not considered after the debtor accepts the transfer, notifies him of it, or informs him of the contract (Khalil and Kahla, 2022, p. 167).

**Third:** Both the transfer of the right and the factoring contract lead to the transfer of the right from the liability of the other. The transfer of the ownership right transmissions the from the assignor to the assignee in his capacity and his guarantees and insurances such as guarantee, privilege and mortgage and the transfer is comprehensive because a solution of interest or installments and this is what is required by Article (365) of the Iraqi Civil Law, which corresponds to Article (307) of the Egyptian Civil Law and according to the lines of the text The Egyptian Court of Cassation ruled in the appeal numbered (2818) on 18/4/1990 with the following: (Transfer of rights entails the

transfer of the same right assigned from the assignor to the assignee with the characteristics of this right...) this is the consequence of the factoring contract, since the right is transferred from the creditor customer to the factoring company, which is keen to own the right with its qualities, guarantees and insurances to ensure the recovery of the value of the right paid to the customer (Mohammed T., 2010, p. 91).

**Fourth:** The right is transferred with the payments received to the assignee so that the debtor can hold before the assignee all the payments that he had to invoke before the assignor (creditor) at the time of the transfer becoming execution against him and this is stipulated by Article (366) of the Iraqi Civil Law, so the debtor is not committed before the assignee more than he was committed to before the assignor (Shafi, 2005, p. 208) and this we find in the factoring contract, where the right is transferred loaded with payments to factoring company (Dowidar, 1991, p. 326).

**Fifth:** The provisions of the guarantee in the transfer of the right in compensation shall apply to the guarantee of the creditor customer in the face of the factoring company, so that it ensures the existence of the right at the deduction of the contract and also guarantees his personal actions that would detract from the right assigned or its demise even after the transfer of the right to the factoring company, but the creditor does not guarantee the debtor's ease or the adequacy of the insurances that guarantee the right, because the guarantee is transferred to the factoring company, which bears the risk of not meeting the value of the debt at due (Mohammed T., 2010, p. 92).

Perhaps the advanced similarities suggest to the reader that the factoring contract is only a real image of the transfer of the right, but that, contrary to reality, the difference between them exists from several aspects that can be summarized as follows:-

**First:** In the factoring contract, the purchaser of the right must be a commercial institution, often a bank with financial and credit capacity, and this is what gives the contract a commercial character, while the transfer of the right is a real application of civil work, since it does not require that the assignee be a financial or banking institution (Al-Saadi, 2020, p. 465).

**Second:** The factoring contract refers to the commercial rights arising from the practice of the creditor merchant of his business without those related to the trader's personal transactions that are not related to his trade, the factoring contract responds to the commercial rights without civil, while transfer of the right the origin is that every personal right is transferable, whether it is an amount of money or work or abstention from work and whether the right is civil or commercial written in a document or not written (Sultan, 1974, p. 307).

**Third:** The element of speculation is absent from the factoring contract, which it is a credit method to face the problems of collecting commercial debts for small and medium institution and exempting them from administrative and financial problems (Al-Hafeedh, 2012, p. 100), although the factoring company charges interest and commissions, but this is not speculation, but rather a return for the services it performs when collecting the rights of its debtor customers (Luis, 1995, p. 530). As for the transfer of the right, it is often assumed that the assignee buys the right for less than its value, either because it is deferred and has not reached the due or that its fulfillment faces difficulties and obstacles and then returns to the debtor the value of the right in full, so the assignee is a speculator seeking to achieve profit (Al-Badrawi, 1968, p. 390).

**Fourth:** The assignee has recourse against the debtor claiming the right or solutions, while the factoring company can refer to the customer claiming the right, as well as the possibility of recourse to a personal lawsuit originating from enrichment without reason, and even in the event that the institution returns to the lawsuit of right, this lawsuit differs from the lawsuit of the assignee's return in the transfer of the right, because the company does not return to the debtor unless it fulfills the amount by crediting it to the account, while the assignee can return before pays the amount to the assignor (Khalil and Kahla, 2022, p. 168).

**Fifth:** The assignor guarantees to the assignee the existence of the right to transfer for compensation, and in the absence of the right, the assignee has recourse against the assignor to compensate for the damage, including the value of the right, interest and expenses, while the recourse of the factoring company to the customer is on the pretext of recovering the undue (Al-Hafeedh, 2012, p. 102).

**Sixth:** The transfer of rights shall not be executed against the debtor unless it is accepted or announced to him by the notary public without requiring a special form for the debtor's acceptance (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 239) and this separates the transfer of right from the factoring contract, whose execution does not depend on the acceptance of the debtor, but the creditor customer is obligated to notify the debtor regarding the transfer of the right to the factoring company so that the debtor can pay it starting from the date of notification as the new creditor (Mohammed T., 2010, p. 93).

Despite the advanced differences between the factoring contract and the transfer of right, this will not discourage many countries from making the transfer of the right a legal framework for the factoring contract, including Britain, under Article (136/1) of the Money Law of 1925, which stipulated that the transfer be execution and not attached to the condition, explicit and written by the assignor, as well as notifying the debtor explicitly of the occurrence of the transfer without specifying a specific formality for the notification, and then the notification is valid, whether it is integrated with the bill of sale or independent of it. Also, the British legislator did not specify who bears the burden of notification, but left the matter to the agreement of the creditor customer (assignor) and the factoring company (assignee), but he made the notification a condition for the execution of the assignment against the debtor (the assignee) (Al-Hafeez, 2012, p. 104).



The legislator in the United States of America followed in the paths of the British legislator when he took the transfer of the right as a legal framework for the factoring contract after introducing some modifications to its provisions to suit the specificity of this contract, under the text of Article (9-302) of the Unified American Trade Law, which stipulated when transferring rights to the company under the factoring contract that it focuses on commercial rights strictly specified in the contract and that the factoring company finances the creditor customer in exchange for transferring his rights to the factoring company, provided that such rights are fixed against the debtor.

The American legislator also stipulated that the transfer be in writing so that the rights transferred to the factoring company are registered in the public register prepared for this, which makes it enjoy the right of the seller's privilege that the original creditor enjoyed before registration in order to ensure the right of the factoring company against both the creditor customer and the debtor (Al-Hafeedh, 2012, p. 105). The Unified U.S. Commercial Law has granted the factoring company a set of privileges that ensure that it fulfills the credit it granted to the customer using the transfer of right (Mohamed T., 2010, p. 96), while the Algerian legislator did not explicitly specify the legal framework for the factoring contract, but by extrapolating the legal texts in legislative decree No. (93-08) dated 25/4/1993 regulating the general provisions of the factoring contract and inferring the name set by the Algerian legislator for this contract, which is (invoice transfer contract), we find that the transfer of the right who belongs to the intermediary under the factoring contract can only be within the framework of the general principles of the system of transfer of rights (Noha, 2020, p. 21).

At the level of international legislation, we find that the Ottawa convention has followed all the aforementioned countries in resorting to the transfer of rights as a legal framework for the factoring contract, where Article V of it states that (it is permissible to agree on the transfer of current or future rights, even if they are not specified in the contract, provided that they exist at the time of the deduction of the contract or can be specified in the contract after its inception) as Article VIII of the Convention indicated that the transfer is not executed against the debtor unless notified to him thereof, therefore the Ottawa convention has expressly tended to adopt the transfer of right as a legal framework for the factoring contract.

Despite the adoption of the Ottawa convention and some countries for the transfer of rights, this does not remove them from defects because it may involve the adoption of the loss or destabilization of the rights of factoring company, as in the event that the debtor pays to the original creditor (assignor) before announcing the transfer, which makes the payment valid and exonerates the debtor (assignee) and prevents him from claiming the right again by the factoring company (Wafa, 2005, p. 194).

The formalities required by law for the execution of the transfer of the right against the debtor and other parties constitute an obstacle that prevents the factoring contract from performing its functions with the necessary speed, perhaps the most prominent of which is the function of financing through the liquidation of frozen debts to enhance the financial capabilities of the creditor customer, especially since it requires taking into account these procedures when transferring each right to the factoring company.

Perhaps the previous called for some to adopt the theory of contractual subrogation as a legal framework for the factoring contract, and this we will address in the second requirement successively article.

**The second requirement: the theory of contractual subrogation:** The contractual subrogation here is intended as the personal subrogation of the agreement, mean that the substitution of another person in a legal relationship by virtue of the agreement between the creditor and the payer as the latter replaces the creditor in his rights and demands the debtor what resulted in his debt to the creditor, so the payer becomes a new creditor of the debtor and this agreement applies in the face of the debtor even if not accepted provided that both the agreement and fulfillment and more precisely the agreement must not be delayed on subrogation for the time of payment of the debt to the creditor (Al-Razzaq, 2010, p. 98).

The creditor who has fulfilled his right from the non-debtor may agree with this another party to replace him even if the debtor does not accept it and the agreement shall be an official paper whose date may not be delayed from the time of payment, and this referred to in Article (380/1) of the Iraqi Civil Law.

The personal contractual subrogation achieve a double benefit for both the creditor and the debtor, the creditor fulfills his right before the due date or when it comes without following the procedures of forced execution against the debtor, and the subrogation may reduce the amount of debt owed by the debtor if the another party pays an amount less than the original debt, the subrogation is the extent that the payer performs in accordance with the provisions of Article (381) of the Iraqi Civil Law. The following conditions shall be required for the completion of personal contractual subrogation by the will of the creditor:

**First: Agreement on subrogation:** Personal subrogation is not achieved except by agreement between the creditor and the payer, if the another party fulfilled the debt without agreeing with the creditor to replace him with what he fulfilled, the debt fell from the debtor and the obligation to pay expired, and then the creditor cannot replace him to claim a right that no longer exists (Al-Hafeedh, 2012, p. 112).

This is confirmed by the Iraqi judiciary in a decision of the Court of Cassation, which ratified the decision of the Court of First Instance of Mosul, which includes the dismissal of the plaintiff's lawsuit, the owner of a laundry, to oblige the Electricity Department to the value of the burned clothes as a result of a defect in the supply of electrical power because he was not the owner of the clothes, and there is no indication that the plaintiff agreed with the owners of the clothes to replace them and obtain fulfillment by him of their value (Kadhem, 2005, p. 119).

The debtor is not a party to the agreement on subrogation and then there is no need for the debtor's consent to replace the creditor with others or announce the subrogation, and the original that the agreement on subrogation is one of the consensual behavior (Faraj, 2002, p. 187), but the Iraqi legislator stipulated that the agreement be an official paper to protect the rights of both the creditor and the debtor from the serious effects that may result from the agreement on subrogation (Kadhem, 2005, p. 120). While the French legislator has stipulated that the agreement on subrogation is explicit under Article (1250) of the French Civil Law that is announced in a way that directly implies that the intention is to pay the debt to the creditor while remaining in favor of others who have paid the value of the debt (Shafi, 2005, p. 235). We believe that the requirement of the Iraqi legislator that the agreement on subrogation with an official paper takes the condition of the declaration, as writing the agreement on subrogation in front of a public employee and ratifying it by the competent authority is the truest way to express the will.

**Second: the synchronization of subrogation with fulfillment:** It is not enough to achieve personal contractual subrogation that is agreed on subrogation, but requires that it be obtained at the time of fulfillment, it is not correct to be later on it, fulfillment if it is without agreement on subrogation led to the expiration of the creditor's right and then can not be solved by others (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 257). The agreement on subrogation subsequent to fulfillment is unable to revive the obligation after the expiration of fulfillment.

It is also not permissible to delay the agreement on subrogation for the time of payment to ward off fraud, the creditor may collude with the debtor after he has fulfilled his right, so they fraudulently agree on the subrogation of one of the another parties to miss the right of a second mortgagee creditor in order if the text approved the validity of the agreement on subrogation after payment (Explanatory memorandum to the draft revision of the Egyptian Civil Law, 1942, p. 556).

However, the French judiciary allows subrogation prior to fulfillment, considering that the previous agreement is a promise of solutions and there is no lesson in being a reality in a date prior to fulfillment as long as it did not produce an effect except from the moment of fulfillment (Shafi, 2005, p. 235), as some believe (Muhammad A., 1998, p. 114) that there is nothing to prevent the agreement to obtain subrogation before fulfillment. Subrogation is considered valid and productive of its legal effects when it is followed by actual fulfillment, since it is a condition for the realization of subrogation. We see that there is nothing to prevent the adoption of the advanced opinion, especially since the Iraqi legislator has explicitly stipulated in Article (380/1) of the Iraqi Civil Law that it is not permissible to agree on subrogation that are late for fulfillment alone, if the provision of the text did not extend to the agreement on subrogation prior to fulfillment. When the agreement on subrogation fulfills its legal conditions, it has its effects stipulated in Article (381) of the Iraqi Civil Law, represented in the replacement of payer with the creditor in his right, including the characteristics of this right, the consequences that it attaches, the insurances it guarantees, and the payments received thereto, and this subrogation shall be to the extent that it replaced the creditor (the payer).

In the debate between the provisions of each of the factoring contract and the contractual subrogation, we find many similarities that must be presented as follows:

**First:** The legal conditions that must be met in the contractual subrogation are similar to the terms of the factoring contract, which is represented in the creditor's fulfillment of his right, agreement on subrogation, and contemporaneous subrogation with fulfillment (Shafi, 2005, p. 232).

**Second:** The factoring contract and contractual subrogation are consistent in terms of the legal status of the debtor, so he is not considered a party to the contract and therefore the debtor's consent is not required for the decision of the contract or it's enforced (Al-Hafeedh, 2012, p. 116).

**Third:** The element of speculation is absent from both the contractual subrogation and the factoring contract, because of the payer does not return to the debtor except to the extent that he paid to the creditor not the value of the debt (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 261) and that the factoring company charges for the services it provides to the creditor customer and the consequent expenses (Dowidar, 1991, p. 313).

**Fourth:** consistent legal effects of contractual subrogation with the consequences of the factoring contract, the customer creditor fulfills his right from the factoring company then expires this right for him and replace the factoring company instead of the credit customer in his right with the characteristics of this right and the subsequent consequences and guaranteed by the insurance and the payments and then does not have the factoring company more than owned by the customer creditor in the face of the debtor (Dowidar, 1991, p. 323).

**Fifth:** The composite nature is the common element between the contractual subrogation and the factoring contract, the contractual subrogation is a complex process that includes the fulfillment of the right for the creditor since he fulfills his right from the payer and this right expires for him, and then the transfer of the right for the debtor who did not fulfill the right himself does not expire the debt for him, but the right remains in his debt, but for another creditor replaced the original creditor. The payer did not fulfill the right except to replace the original creditor (Al-Hakim, Al-Bakri, and Al-Bashir, 2012, p. 260). As for the factoring contract, it is one of the complex contracts, as it combines the elements of more than one contract of civil and commercial contracts, which constitute a recombinant interconnected contract system that performs multiple functions, foremost of which is financing through the liquidation of frozen debts.

It should be noted that the most correct French jurisprudence held that the factoring contract is only an application of the theory of consensual subrogation and therefore this contract is subject to the general provisions stipulated in Article (1248) of the French Civil Law (Shafi, 2005, p. 234).

Despite the foregoing, this does not mean that the factoring contract and the consensual subrogation is completely identical, therefore the differences between them cannot be ignored, which are reflected as follows:

**First:** The notification is mandatory under the provisions of the contractual subrogation because it is executed against the debtor and others as soon as it occurs, the contractual subrogation is carried out away from the will of the debtor does not require his consent or even his announcement of the subrogation while the notification is necessary in the factoring contract not as a condition for the entry into force of the contract, but represents the most important obligations of the customer creditor to protect the rights of the factoring company from any fraud may resort to the debtor who refrains from fulfilling them as the new creditor claiming not to know the transfer of rights. The notification cuts off the path of good confidence from fulfill to non-factoring company (Tawfiq, 1987, p. 173).

**Second:** The contractual subrogation to the extent that he performed the replacement of the creditor, the return of the payer to the debtor is to the extent that he paid to the original creditor and this is contrary to what has been done under the factoring contract since the company pays the customer creditor about (97%) of the value of the debt and returns by (100%) to the debtor which the difference between the two ratios is allocated to cover the expenses of debt collection as well as being in return for the services provided by the factoring company (Jahloul, 2003, p. 35).

**Third:** If the creditor under the provisions of the contractual subrogation does not guarantee the existence of the right (Sultan, 1974, p. 342), the customer creditor in the factoring contract guarantees the existence of the right at the time of transfer, it is the conditions for the validity of the transfer that the right exists, if this condition is not fulfilled, the transfer is void as if the right does not exist or is owned by others (Tawfiq, 1987, p. 51).

The French legislator has realized the size of the discrepancy between the factoring contract and contractual subrogation and has issued legislation includes the provisions governing the factoring contract under the name of the law of the Daily in 1981 and this made the factoring contract falls under the category of contracts named in the French legislation, but many of factoring company reluctant to apply the provisions of this law for not securing the necessary protection for their financing activities and applied the French legal rules stipulated in the civil and commercial laws, especially those related to contractual subrogation (Shafi, 2005, p. 16) due to the stability of its rules and provisions and the novelty of the Daily Law (Al-Hafeedh, 2012, p. 118).

As for the Egyptian legislator, he took a neutral position, because he did not adopt the provisions of the transfer of right or the contractual subrogation, but only referred to the application of the provisions of the Civil Law to the transfer of financial rights from the seller to the discounted under Article (38) of the Financial Leasing and Factoring Activities Law No. 176 in 2018.

Perhaps the previous predicts that the factoring contract can not be included under the concept of contractual subrogation because of each of them has its own concept, the factoring contract has its own self and this we will address in the third requirement successively article.

**The third requirement: the prospective theory in describing the factoring contract:** we found that the previous theories tried to include the factoring contract within the rules and provisions of one of the traditional legal systems in civil law, but it did not last long because it failed to take note of the organization of the all aspects of the contract. If the provisions of the factoring contract are close to some traditional contracts, this does not mean that it falls within the legal system of those contracts, the factoring contract is characterized by its independent legal existence, although it may be subject at every stage of its legal rules governing one of those contracts (Shafi, 2005, p. 225). In addition to the fact that the application of civil legal systems on commercial transactions involves many disadvantages are their inadequacy to the requirements of trade that is based on speed and credit, the lengthy procedures and formalities associated with the application of civil rules constitute an obstacle to keep pace with the development in the commercial environment (Mohammed T., 2010, p. 124).

In front of the inability of previous theories to describe the factoring contract and their differences with the basic rules and principles on which this contract is based, the modern trend has emerged, which is based on considering the factoring contract a kind of contract of a special nature since it is distinguished from other contracts (Shafi, 2005, p. 226), therefore factoring contract is one of contracts that were born in the arms of banking customs to meet economic needs. We, in turn, adopt the modern trend of giving the special legal nature to the factoring contract, inspired by the privacy enjoyed by this contract, which makes it distinct and unique from other contracts, for several reasons, which we summarize as follows:

**First:** Due to the importance of the factoring contract and its economic effects, it is required that one of the parties to the contract (debt buyer) be an institution or a financial company subject to banking systems and then cannot be a natural person, and the effects of the factoring contract are not limited to its contractors, since the obligatory effect of the contract extends to the debtor without being a party to it, which an exception to the principle of proportionality of contracts to maintain the effectiveness of agreements and protect commercial transactions (Shafi, 2005, p. 60).

**Second:** The specificity of the place of the factoring contract is evident that it must focus on the rights arising from the practice of the merchant of his business without those related to his civil transactions and the matter does not stop at this point, but must take into account the principle of collectivism as the customer creditor is obligated to submit all bonds and invoices proving his commercial rights to the factoring company and shortening dealing with them to achieve the economic feasibility of the contract.

**Third:** The factoring contract falls within the category of credit contracts, but it is distinguished from them in terms of credit recovery, the origin of credit contracts to be recovered by reference to the recipient of credit and this we do not

find in the factoring contract because the credit is granted to the creditor customer and refer to the debtor to collect the value of the right and recover credit and then the obligated to return credit in the factoring contract is not the recipient of credit or the beneficiary of it, but a debtor, and this feature that makes the contract unique from other contracts credit (Al-Hafidh, 2012, p. 349).

**Fourth:** The composite nature is the hallmark of the factoring contract, because it is a composite of several civil and commercial contracts such as the loan contract, the current account, the discounting of commercial papers and other contracts that are fused into one bond forming the factoring contract and therefore it is called the framework agreement.

**Fifth:** The factoring contract provides economic guarantee to the parties to the contract, therefore the factoring company is committed to ensuring that the credit customer does not return in the event of its failure to collect the debt, and the creditor customer is obligated to transfer the ownership of rights to the factoring company so that it can claim the debt on the due date and then each of the parties to the factoring contract has the status of a grantor of the guarantee provided by the other party at the same time, unlike other contracts in which the guarantee provider is foreign to the contract (Hafidh, 2012, p. 44).

Based on the previous, it appears to us the distinct legal existence of the factoring contract and its independence from the rest of the contracts, because it has a special legal nature that makes it refuse to be subject to the general rules to which other contracts are subject. This is reinforced by the legislators of many countries to develop special legislation that includes the provisions governing the factoring contract, including France, Algeria and Egypt, as well as the international endeavors concerned with the contract, represented by the Ottawa convention in 1988, and this includes the recognition of the special legal nature of the factoring contract and its independence from the rest of the contracts in terms of existence.

**CONCLUSION:** Now that we have finished the article on the legal description of the factoring contract, we need to present the main findings and what we see from the proposals on how to put them into practice, as follows:

#### **FIRST: RESULTS**

1. The factoring contract is a contractual template developed in England at the beginning of the eighteenth century and then emerged in the United States of America to meet specific financing needs through the liquidation of frozen debts. It then moved to France to penetrate the legal system, having acquired Anglo-Saxon character within the framework of French treaties, and then spread to many Arab and foreign countries, prompting the legislators of some countries to organize it according to legal rules to become a contract named in those countries, its survival in other countries being undetermined.
2. The Iraqi legal system is devoid of legislative regulation for the factoring contract, whereas the Iraqi legislator only referred to the contract incidentally in Article (27/b) of the Banking Law issued by Order No. 94 of 2004 within banking activities, specifically as one of the forms of granting credits received, for example, but not limited to.
3. The novelty of the factoring contract and its complex nature arising from the meeting of the elements of more than one contract in one system and the consequent intertwined legal relations led to the discrepancy in the description of the factoring contract, so some countries tended to adopt the theory of transfer of the right despite what combines or differentiates between them of similarities and differences, including Britain, the United States of America and Algeria. The Ottawa convention in 1988 has followed this trend, while the French jurisprudence adopted the theory of contractual subrogation and then the French legislator to issue a special legislation known as the Daily Law in 1981, but it did not succeed when applied, while the Egyptian legislator has only referred to the application of the provisions of the Civil Law when transferring financial rights under the factoring contract without specifying or allocating the applicable rules.
4. The factoring contract succeeded in proving its specific legal nature and extending its existence independent of other contracts through the privacy it enjoys, whether in terms of parties or status or effects, as well as its composite nature that makes it refuse to obey and submit to the provisions governing other contracts for the lack of complete congruence, although there are some features of similarity and approximation between them, and this was adopted by the modern trend in describing the factoring contract.

#### **SECOND: RECOMMENDATIONS**

1. We request the Iraqi legislator to find an integrated legal organization for the factoring contract clearly shows its essential elements and legal description and details its provisions in proportion to the importance of this contract, because it has become necessary to address this legislative deficiency to move factoring contract from the category of unnamed contracts and puts under the category of contracts named in Iraq.
2. We request the Central Bank of Iraq to activate the text of Article (27/b) of the Banking Law promulgated by Order No. 94 in 2004 and not to leave it captive to the legislative stalemate through the development of regulations for the practice of factoring activity and to regulate its practice by financial and banking institutions.
3. We request Iraqi banks to take their real role and activate their credit function by adopting a factoring contract like banks in Arab and foreign countries to advance the economic reality of the country by providing the necessary cash liquidity for the management and development of economic projects.

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