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Factoring Model Law Working Group

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ISSUES PAPER

1. This document provides a discussion of issues that the Factoring Model Law Working Group may wish to consider at its second session in preparing the Model Law.

2. The issues analysed in this document were identified by either (i) Working Group experts during an informal meeting in Cartagena in February 2020; (ii) the Chair of the Working Group; (iii) Members of the Working Group during and/or after the first session; or (iv) the Secretariat. This document is not intended to provide an exhaustive list of issues or a full legal analysis of each issue. The purpose of the document is to provide a starting point for the Working Group's deliberations and a structure for discussions at the second session.

3. The document retains the parts of the Issues Paper from the first session ([Study LVIII A – W.G.1 – Doc. 2](#)) relating to preliminary matters associated to the Model Law on Factoring. The second part of this document relates to the content and structure of the Model Law, and is divided into five sections:

- i. Effects of a transfer as between parties (creation)
- ii. Registration relating to the rights of factors
- iii. Rights and obligations of a debtor of the receivable
- iv. Enforcement of the rights of factors
- v. Conflict of laws

4. The part relating to the structure of the Model law on Factoring has also been retained from the Issues Paper of the first session. Noting that the discussion of several other issues at the first session of the Working Group was not concluded and might require further deliberation, the Working Group members are invited to raise any of these matters during the course of the second session, with reference to [Study LVIII A – W.G.1 – Doc. 2](#). The Working Group is also invited to examine [Study LVIII A – W.G.1 – Doc. 3](#), which provides further background analysis on relevant international instruments and domestic factoring laws.

5. The Secretariat is grateful to the Kozolchuk National Law Center (NatLaw) and Mr Bruce Whittaker for their assistance in the preparation of this document.

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I. PRELIMINARY MATTERS

A. Background

6. In December 2018, as one of its proposals for the UNIDROIT 2020-2022 Work Programme, the World Bank Group (WBG) suggested that UNIDROIT develop a Model Law on Factoring. The WBG proposal highlighted three reasons why a UNIDROIT Model Law on Factoring should be developed:

- (i) To facilitate the use of factoring as an important form of financing increasing access to credit;
- (ii) To address the constraints in access to credit as a limit on economic growth, particularly in developing countries and emerging markets; and
- (iii) The gap that currently exists in international standards regarding factoring. The proposal noted that existing instruments largely focus on international or cross-border transactions and do not provide sufficient guidance to States to develop functional domestic factoring frameworks. UNCITRAL Model Law on Secured Transactions (UNCITRAL Model Law), on the other hand, does provide elaborate asset specific rules for the development of national rules for assignments of receivables. Adoption of the Model Law in itself, however, is not sufficient to develop a fully functional national factoring system.

7. At its 98th session in May 2019, the UNIDROIT Governing Council approved the project for the 2020-2022 Triennial Work Programme.¹

8. On 11 February 2020 an initial informal meeting on the project was held in the margins of an international secured transactions conference in Cartagena, Colombia.

9. On 1-3 July 2020, the Factoring Model Law Working Group met remotely for its first session. The [Summary Report of the first session](#) was presented as part of [Document C.D. \(99\) B.8](#) at the 99th Session of the UNIDROIT Governing Council (Rome, 23 - 25 September 2020) which took note of the progress made by the Factoring Model Law Working Group.

B. Format of the Model Law

10. The Factoring Model Law will consist of a set of black letter rules, accompanied by a limited commentary on each rule to explain its operation. This approach is consistent with the other model law that the Institute has developed, the UNIDROIT Model Law on Leasing, adopted in 2008. The Model Law on Leasing comprised of 24 articles accompanied by a 24-page commentary.²

11. During the informal Cartagena meeting several experts queried whether the Working Group would also need to develop more detailed implementation documents, such as a Guide to Enactment, as consistent with the practice of some UNCITRAL Working Groups. As the timeframe for the development and adoption of the Model Law is only three years, it is anticipated that the Working Group will only initially have sufficient time to prepare the Model Law itself and a limited commentary. Once the Model Law has been adopted in 2023, the UNIDROIT Governing Council could consider whether the mandate of the Working Group should be extended to prepare additional implementation documents, depending on whether there is an identified need for such materials.

¹ UNIDROIT 2019 C.D. (98) 17, p. 36.

² The Model Law on Leasing and accompanying commentary is available at: <https://www.unidroit.org/explanatory-model-law-leasing-2008/english>.

C. Target Audience

12. The Model Law will be a standalone instrument for adoption by States looking to reform their domestic law to facilitate factoring. As consistent with all UNIDROIT instruments, the Model Law should be capable of being adopted by both common law and civil law States.

13. While the Model Law should be capable of serving as a model for law reform in any State, it was suggested at the Cartagena meeting that the Working Group should develop the Model Law with a focus on developing States and emerging markets that want to reform their existing domestic factoring laws but are not yet in a position to undertake a full reform of their secured transactions law.

D. Title of the instrument

14. It is anticipated that the formal title of the instrument will be the 'UNIDROIT Model Law on Factoring'. However, it was suggested during the Cartagena meeting that this title might be unduly limiting or misleading, on the basis that the Model Law may apply to other receivables transactions beyond factoring, such as securitisation.

Questions for the Working Group:

- *Is the proposed title "UNIDROIT Model Law on Factoring" appropriate or should a broader title be considered (it may be prudent to revisit this question once the Working Group has discussed the scope of the instrument)?*

E. Terminology

Use of Standard Definitions

15. It is suggested that the Model Law and other documentation produced by the Working Group builds on the "Standard Definitions for Techniques of Supply Chain Finance (SCF)",³ as adopted by the Global Supply Chain Finance Forum.⁴

16. The Standard Definitions document provides definitions for terms such as receivables discounting, forfaiting, factoring, factoring variations, payables finance, distributor finance, and pre-shipment finance, explaining their mechanics. It is not suggested that the Model Law would need to define the various techniques, merely that Working Group documents use the Standard Definitions when distinguishing between different SCF techniques to ensure uniformity, consistency and accuracy.

Consistency of terminology with existing instruments

17. Existing instruments use different terminology for related concepts. The Working Group will need to consider which terminology the Factoring Model Law should use. The terminology to be adopted by the Factoring Model Law will to a large extent depend on the scope of the instrument.

³ <https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-Standard-Definitions-for-Techniques-of-Supply-Chain-Finance-Global-SCF-Forum-2016.pdf>.

⁴ The Global Supply Chain Finance Forum represents a number of industry associations with members around the world, including the International Chamber of Commerce (ICC) Banking Commission, BAFT, the Euro Banking Association (EBA), Factors Chain International (FCI), and the International Trade and Forfaiting Association (ITFA). The International Factors Group, one of the original sponsoring associations is now integrated with FCI.

The below table sets out the different language used for several core concepts in four instruments that have been adopted over the past 30 years.

Factoring Convention (1988)	Receivables Convention (2001)	UNCITRAL Model Law (2016)	AFREXIMBANK Factoring Model Law (2016)
Supplier	Assignor	Grantor	Client
Factor	Assignee	Secured Creditor	Factor
Factoring Contract	Contract of Assignment	Security Agreement	Factoring Contract
Contract of sale of goods	Original Contract	Agreement between the grantor and the debtor of the receivable	Supply Contract
Notice of the assignment	Notification of assignment	Notification of a security right in a receivable	Notice of the assignment

F. Composition of the Working Group

18. As consistent with UNIDROIT's established working methods, The Working Group is composed of the following experts selected by UNIDROIT for their expertise in the field of factoring. Experts participate in a personal capacity and represent the world's different systems and geographic regions. The Factoring Working Group is composed of:

- Henry Gabriel (Chair) (United States)
- Giuliano Castellano (Italy)
- Michel Deschamps (Canada)
- Neil Cohen (United States)
- Louise Gullifer (United Kingdom)
- Alejandro Garro (Argentina)
- Megumi Hara (Japan)
- Catherine Walsh (Canada)
- Bruce Whittaker (Australia)

19. UNIDROIT has also invited a number of intergovernmental organisations and individual experts with knowledge in the field of factoring to participate as observers in the Working Group. Participation of these different organisations will ensure that different regional perspectives are taken into account in the development and adoption of the instrument. It is also anticipated that the cooperating organisations will assist in the regional promotion, dissemination and implementation of the Model Law once it has been adopted. The following organisations have been invited to participate as observers in the Working Group:

- The World Bank Group
- The United Nations Commission for International Trade Law (UNCITRAL)
- The Kozolchyk National Law Center (NatLaw)
- The European Bank for Reconstruction and Development (EBRD)
- The Organization of American States (OAS)

- The African Export-Import Bank (AFREXIMBANK)
- Organisation for the Harmonisation of Business Law in Africa (OHADA)

20. Finally, UNIDROIT has also invited a number of industry associations to participate as observers in the Working Group, to ensure that the Model Law will address the industry's needs in facilitating factoring across the globe. The industry associations will also assist in promoting the implementation and use of the Model Law. The following private sector associations have been invited to participate as observer's in the Working Group:

- Factors Chain International (FCI)
- World of Open Account (WOA)
- Secured Finance Network (CFA)
- APEC-APFF/Financial Infrastructure Development Network
- International Chamber of Commerce (ICC)

G. Methodology and Organisation

21. Under the guidance of the Working Group Chair Professor Henry Gabriel, the Working Group will undertake its work in an open, inclusive and collaborative manner. As consistent with UNIDROIT practice, the Working Group will not adopt any formal rules of procedure and seek to make decisions through consensus.

22. The Factoring Model Law is a high priority project on the UNIDROIT Work Programme for the period 2020-2022. The Secretariat intends to complete the entire project during this Work Programme.

- (a) Drafting of the Model Law over four sessions 2020-2021:
 - i. First session: 1-3 July 2020 (remote)*
 - ii. Second session: 14-16 December 2020*
 - iii. Third session: 26-28 May 2021*
 - iv. Fourth session: second half of 2021*
- (b) Consultations and finalisation 2022
- (c) Adoption by the Governing Council at its 102nd session in May 2023

II. CONTENT AND STRUCTURE OF THE MODEL LAW

H. Effects of a transfer as between parties (creation)

23. Depending on the steps that a law requires the parties to take, a transfer of a receivable may produce effects solely between the transferor and transferee, or also as against third parties. Under the UNCITRAL Model Law, those steps differ. To produce an effect between the transferor and transferee, the parties must enter into an agreement that meets the requirements prescribed by applicable contract law. To produce an effect against third parties who are competing claimants with respect to the same receivable, an additional step must be taken, which under the UNCITRAL Model Law is registration.⁵ Notification of the debtor of the receivable is neither a condition of the effectiveness of the transfer as between the transferor and transferee, nor against competing third-party claimants. It has a legal effect against the debtor of the receivable, including its obligation to pay and obtain discharge.⁶ This sub-section concerns the various aspects of an effect of the transfer as between the transferor and transferee.

24. The current trend is to condition the creation of a security right only on execution of an agreement that provides for its creation and sufficiently identifies the receivables to be encumbered or transferred. The UNCITRAL Model Law does not impose any specific formal requirements for the creation of a security right in receivables. Furthermore, the agreement may be executed and signed by the parties electronically. The agreement may be individually negotiated or made available as a standardised form that parties wishing to participate in a trading platform must execute. In contrast, some countries require notification of the debtor of the receivable as a condition of creation, or that the agreement must be executed in a specific form and be notarised as additional requirements.

25. The Working Group already discussed and confirmed that the Factoring Model Law should enable parties to provide in an agreement for a transfer of future receivables.⁷ The Factoring Model Law should also permit a transfer of a part of a receivable and an undivided interest in receivables. The Receivables Convention recognises the validity of such transfers in Article 8(1) and the UNCITRAL Model Law, more broadly for movable assets, in Article 8(b). This would enable the parties to structure their transaction to fit their needs, and transfer a right to collect less than a full value of the receivable or a percentage of a pool of receivables.

26. To facilitate ordinary factoring transactions that involve revolving receivables, the parties should be able to describe the receivables without having to individualise them. The advantage of permitting general descriptions is that they reduce the complexity and cost of transferring receivables, including because they allow a single agreement to capture all existing and future receivables, without having to make a new act of transfer every time a receivable is generated. Often, the transferor would seek financing against revolving pools of receivables for which a detailed description would be very cumbersome. The UNCITRAL Model Law in Article 9(1-2) and the Receivables Convention in Article 8(1) recognise descriptions that may be as generic as “all existing and future receivables of the transferor” or any other reasonable description of the receivables (e.g., all receivables owed to the transferor by Companies A-C).

⁵ On perfection and registration, see Part I of this Issues Paper

⁶ See Part J(vii) of this Issues Paper

⁷ See summary of this issue in Paragraph 146 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Question for the Working Group:

- *Is there any reason not to follow the approach of the UNCITRAL instruments with respect to the standards for describing receivables in a “factoring agreement”?*

27. During the first meeting of the Working Group, several issues were discussed in connection with proceeds of receivables.⁸ The discussion centred on primarily two issues: i) the types of proceeds that the Factoring Model Law should cover, which is an issue of scope and definition; and ii) various conflicting claims to proceeds, which is an issue of priorities. Proceeds are also considered in the discussion of conflict-of-laws provisions⁹ as well as “third-party obligors” such as where the assignor collects proceeds of the receivable from the debtor of the receivable.¹⁰

28. An aspect of proceeds that has not been considered concerns the automatic extension of the right of the transferee to the proceeds of the receivable. This is especially important for a factor who acquired a security right in the receivables, and in a situation where the transferor collects the receivable.

Question for the Working Group:

- *Should the Model Law incorporate the equivalent of Article 10 of the UNCITRAL Model Law?*

29. Another issue that belongs to this category concerning the effect of transfers of receivables is anti-assignment clauses. During the first meeting, the Working Group agreed that the Factoring Model Law should completely override the effect of anti-assignment clauses without preserving the debtor’s right to sue for breach of contract. The Working Group agreed to give further consideration to i) statutory bars on the types of receivables that could be transferred and ii) whether the instrument should limit the types of receivables for which anti-assignment clauses would be overridden, along the lines of Article 13(3) of the UNCITRAL Model Law.¹¹

30. Following up on those discussions, the Working Group may wish to consider several related issues. First, Article 13 of the UNCITRAL Model Law overrides the effect of an anti-assignment clause on the creation of a security right while Article 8 of the Receivables Convention overrides the effect of a restriction on assignment. Terminologically, different formulations are used, but the effect would seem to be equivalent. Second, the Working Group left open the identification of the types of receivables that should be subject to the anti-assignment override provision. While the lists in both the UNCITRAL Model Law and the Receivables Convention are the same, the latter authorises States to submit a declaration that this provision will further not apply when the receivables are owed by the government or a public entity. Finally, Article 10(2) of the Receivables Convention provides for an explicit override of any restriction on a transfer of a property or personal right securing payment of the assigned receivable. In contrast, the combination of Articles 13 and 14 of the UNCITRAL Model Law achieves the same effect without an explicit provision.¹² The Working Group already agreed to follow a different approach with respect to the effect of breaching an anti-assignment clause, but is yet to discuss whether the effect should be the same with respect to a breach concerning a transfer of a “supporting right”,¹³ that is to say whether, for instance, a third party that issued the undertaking (e.g., a guarantor) could sue the transferor for the breach of a clause that restricts the transfer of

⁸ See Paragraphs 213-218 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

⁹ See Part L of this Issues Paper

¹⁰ See Part K of this Issues Paper

¹¹ See Paragraph 162 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

¹² Guide to Enactment of the UNCITRAL Model Law, para 115.

¹³ See Paragraph 31 of this Issues Paper.

that undertaking. In some other aspects, the Working Group might want to consider adapting the more recent drafting of the UNCITRAL Model Law, but some of the issues in this paragraph may necessitate a drafting approach that is more specific to transfers of receivables.

Questions for the Working Group:

- *If there is no difference in terms of the substantive effect of the two provisions concerning the override of anti-assignment clauses, is the terminology of the Receivables Convention more suitable for the purposes of the Factoring Model Law?*
- *Is there any merit in further limiting (e.g., those owed by the government) the list of receivables that would not be subject to the provision that overrides the effect of an anti-assignment clause?*
- *The Working Group may wish to confirm that the override of anti-assignment clauses is to apply not only to receivables, but also any "supporting rights", and, if so, consider the effect of a breach and the drafting approach.*

31. It is not uncommon for debtors or third parties to issue undertakings or grant property rights that support the payment of receivables. These undertakings may be issued as personal or property rights, such as a security right in some other asset.¹⁴ One common example would be a receivable generated from a sale of goods whereby the seller/transferor of the receivable also retains ownership to the goods (security right) until full payment. The rights supporting the payment of a receivable may be accessory (e.g., a surety) or independent (e.g., a letter of credit). The UNCITRAL instruments do not use the accessory/independent terminology as that might not have an identical content in domestic laws (e.g., under some laws retention of ownership is not accessory, but a pledge of goods is). The UNIDROIT Principles on International Commercial Contracts (2016) in Article 9.14 refer to "rights securing performance of the right assigned". Transferee should be put into a position to benefit from these undertakings, and without having to take any further step (unless the law governing the undertaking does require a separate act of transfer, such as to be able to draw on the letter of credit). Article 14 of the UNCITRAL Model Law provides that a transferee of a receivable, including a receivable embodied in a negotiable instrument, has the benefit of any personal or property right that secures or supports payment. If the right is transferable only with a new act of transfer, "the grantor is obliged to transfer the benefit of that right to the secured creditor."

Questions for the Working Group:

- *While it is expected that domestic laws address some of the issues raised in the preceding paragraph, should the Factoring Model Law provide for a specific rule to modernise and harmonise those frameworks?*
- *Is there any reason to depart from the approaches set out in the international standards?*

I. Registration relating to the rights of factors

32. The main policy underpinning a third-party effectiveness (perfection) regime based on registration is that providing potential creditors and other searchers notice about transfers through a public registration system enhances predictability, transparency, and certainty, which benefit the availability and lower the cost of receivables financing. Unlike the UNIDROIT Factoring Convention, the Receivables Convention and UNCITRAL Model Law provide rules on perfection and registration relating to the rights of factors. The rules in the UNCITRAL Model Law are much more elaborate

¹⁴ Guide to Enactment of the Secured Transactions Model Law, at 116.

providing detailed guidance on the establishment and operation of electronic registration systems for notices of security rights, not limited to transfers of receivables.

33. Section I of the Annex to the Receivables Convention provides model rules for determining priority based on registration. The UNCITRAL Model Law provides for a unitary registration system that encompasses all types of encumbrances over movable property,¹⁵ such as security rights in receivables that would include pledges, security (fiduciary) assignments of receivables, and outright transfers of receivables by agreement (absolute assignments). The benefit of the registration regime contemplated by the UNCITRAL Model Law is that it subjects all contractual types of transfers of receivables to a single registration system, and thus facilitates the determination of priorities.

34. During its first meeting, the Working Group decided that registration should be the sole method to achieve perfection with respect to transfers of receivables.¹⁶ Though the Factoring Model Law would adopt a registration-based priority system, the Working Group would need to decide on what details to include to enable enacting States to establish and operate a registration system. Implementation of the Factoring Model Law will depend on a number of elements, including whether the State has already established some form of a registry for secured transactions more broadly. If so, such a system may not need any modifications to enable registration of notices covering transfers of receivables, as that is expected to have been already provided for. However, a system may also significantly depart from the relevant UNCITRAL instruments that provide for the establishment of an electronic notice-based system where notices are indexed according to an identifier of the grantor/transferor of receivables. The absence of any details with respect to the core features of a registration system may lead to the implementation of solutions that would not be consistent with the UNCITRAL instruments, and complicate the ratification of the Receivables Convention and adoption of the UNCITRAL Model Law. The Factoring Model Law may need to reflect at least Articles 4 and 5 of Section II of the Annex that set out some of the fundamental features of a modern electronic registry for registering notices of security rights. A Commentary to the Factoring Model Law could provide general guidance for detailed provisions on how to establish and operate the registry aimed at States that are yet to establish one, particularly by reference to the UNCITRAL instruments on the subject of registries of notices for security rights.

35. Article 3 of the Annex to the Receivables Convention provides for the establishment of a registration system “for...data about assignments [].” The type of a registry that this provision would set up is a notice-filing system. Article 4 of the Annex provides the fundamental features of a notice-filing registration regime¹⁷ that are consistent with the regime for registering notices relating to security rights provided for in the UNCITRAL Model Law. These features include the following: 1) any person may register data (notice) that identifies the transferor and transferee, and provides a “brief description”¹⁸ of the receivables; 2) a single registration may cover one or more transfers; 3) a registration may be made in advance of the assignment to which it relates; 4) a registration is effective from the time the data is available to searchers; and 5) any omission or error in the identifier of the transferor that would result in the registered notice not being found in a search against the correct identifier of the transferor renders the registration ineffective. Notices submitted for registration would identify the transferor, the transferee and receivables in accordance with Articles 8-12 of the Model Registry Provisions of the UNCITRAL Model Law. The law should not require the identification of a debtor of the receivables or provide for indexing according to debtor.

¹⁵ See, e.g., UNCITRAL Legislative Guide on Secured Transactions, p. 150 (“it establishes a single, central registry for registering all security rights in all types of movable assets.”)

¹⁶ See Paragraph 213 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

¹⁷ Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade (Part 2), p. 35.

¹⁸ Id. The words “brief description” are intended to include a generic description, such as “all receivables from car business” or “all receivables from countries A, B and C”.

36. Article 5 of the Annex to the Receivables Convention provides that any person may search the record against the identifier of the transferor and obtain a search result. This rule thus incorporates the principle of public access to the registry, as “[o]nly a publicly accessible registry could provide the transparency necessary with regard to the rights of third parties.”¹⁹

Questions for the Working Group:

- *Should the Model Law provide rules that address only the fundamental aspects of a registry or also some operational aspects?*
- *If only the fundamental aspects are to be addressed, should this be done similarly to the Annex to the Receivables Convention or by incorporating several registry provisions from the UNCITRAL Model Law?*
- *Should the Commentary provide some guidance i) on the implementation of a registration system where a State does not have one yet as well as ii) for situations where a State already has a registration system that also covers transfers of receivables?*

J. Rights and obligations of a debtor of the receivable

37. One of the main purposes of rules governing rights and obligations of debtors of receivables (hereinafter also debtors) is to ensure that the transfer of receivables does not adversely affect their rights under the contract that generated the receivables. These rules also have important implications for the enforcement rights of the transferee because they determine when a transferee has the right to collect payment directly from the debtor of the receivable. The UNIDROIT Factoring Convention, the Receivables Convention and UNCITRAL Model Law all contain rules governing the rights and obligations of debtors of the receivable. The Working Group already discussed some aspects relating to the rights of debtors of the receivable when the debtor is a consumer as well as overriding the effect of anti-assignment clauses in contracts between transferors and debtors.

38. The Receivables Convention provides rules governing various aspects, including a) party autonomy and trade usages/practices, b) representations (warranties) of the transferor, c) the right of the transferee to send a notification and payment instruction to the debtor of the receivable, d) the right of the transferee to payment, e) debtor protection, f) the legal effect of notification of the debtor of the receivables about the transfer, g) the right of the debtor of the receivables to discharge its debt and request adequate proof of the transfer, h) rules governing multiple notifications and/or payment instructions, i) the debtor’s right to assert defences and rights of set-off against the transferee, j) the effectiveness of modifications to the contract that generated the receivable as against the transferee, and k) recovery of payments. Some of these rules may already be included in general contract law, the law on assignments of rights and obligations and secured transactions law. However, even if general rules already exist, a State may decide to adopt specific rules applicable to factoring in order to provide a set of default provisions that reduce the cost of negotiating agreements and clarify the rights and duties of debtors of receivables as against transferees. These rules are subject to party autonomy, which means that they are modifiable by the parties.

- i. Sources for rights and obligations of the transferor and transferee

39. Both the Receivables Convention and the UNCITRAL Model Law adhere to the principle of party autonomy, such that their rules (subject to some exceptions not relevant for the issues covered in this Section of the Issues Paper) are supplemental in character and the parties are free to modify them so long as they do not affect the rights of third parties. The main assumption underlying party

¹⁹

Id.

autonomy is that allowing the transferor and transferee to structure their transaction as they see fit will typically permit transferors to gain wider access to receivables financing. These instruments are built on an assumption and a market practice where parties to a “factoring contract” include provisions governing their specific rights and duties. Article 11(1) of the Receivables Convention provides that the mutual rights and obligations of the transferor and the transferee that arise by agreement are determined by the terms and conditions provided for in that agreement. Following Article 9 of the Vienna Sales Convention, the Receivables Convention also recognises trade usages as agreed upon by transferor and transferee as well as trade practices developed between them. Trade usages are thus binding if they are explicitly agreed upon, whereas trade practices are binding unless there is a specific agreement to the contrary. Article 52 of the UNCITRAL Model Law contains a substantively identical rule. The UNIDROIT Factoring convention is silent as to party autonomy and trade usages and practices.

Question for the Working Group:

- *Should the Factoring Model Law recognise these sources that may govern mutual rights and duties of the transferor and transferee?*

ii. Representations of the transferor

40. Representations of the transferor assist in identifying risks with respect to a receivable to be transferred. Similar representations are typically made by borrowers with respect to collateral. Article 12(1) of the Receivables Convention provides for the following three representations upon conclusion of the agreement for transfer: a) the transferor has a right to transfer the receivable, b) the transferor has not previously transferred the receivable, and c) the debtor of the receivable does not and will not have any defences or rights of set-off. Paragraph 2, in turn, provides that the transferor does not represent that the debtor will have the ability to pay. The Receivables Convention does not provide any rules on breach of representations, which are general matters of contract law that are beyond its scope. Article 57 of the UNCITRAL Model Law contains substantively identical rules as the Receivables Convention, albeit with the omission in paragraph 1 under which the transferor represents that it has a right to transfer the receivable. The reason for this omission is “to avoid giving the impression that it applies only to security rights in receivables.”²⁰ The UNIDROIT Factoring Convention does not contain any default rules on representations.

Question for the Working Group:

- *Should these representations be included in the Factoring Model Law, and, if so, should they align with the Receivables Convention or the UNCITRAL Model Law?*

iii. Notification and payment instruction

41. Article 13(1) of the Receivables Convention provides for the right of the transferee to send to the debtor of a receivable a notification about the transfer, and a payment instruction. Although a notification and payment instruction are often included in the same document, a payment instruction is practically distinct from a notification, which also may necessitate provisions that are specific only to payment instructions. While the aim of a notification is to inform the debtor of the receivable about the transfer and that it owes performance to another person, the objective of a payment instruction is to advise the debtor of the receivable how to make payment. After notification has been sent, only the transferee may send a payment instruction. The primary purpose of these rules is to allow a transferee to collect a receivable.

²⁰ See UNCITRAL Secured Transactions Model Law: Guide to Enactment, p. 117.

42. Article 13(2) of the Receivables Convention provides that a notification or payment instruction sent in breach of an agreement between the transferor and transferee does not affect a) the right of the debtor of the receivable to discharge its debt, b) a liability of the party who sent a notification or instruction in breach of an agreement that may arise under some other law. Article 58 of the Secured Transactions Model Law contains substantively equivalent rules with the exception that the transferee has the sole right to send an instruction after the notification has been received by the debtor of a receivable (the Receivables Convention confers that right on the assignee after the notification has been sent). The Receivables Convention refers to the time notification is “sent” (as opposed to “received”) because “neither the assignor nor the assignee has a way to assess the time of receipt,” which is “not important for the determination of who has the right to give a payment instruction as between the assignor and the assignee.”²¹ The UNCITRAL Model Law, on the other hand, refers to the time notification is received because the time of receipt is also the time that the transfer becomes effective against the debtor of the receivable,²² which is also the case under the Receivables Convention. Given the availability of electronic communication mechanisms, the practical difference between “send” and “receive” might not be significant. Unlike the Receivables Convention and UNCITRAL Model Law, Article 2(c) of the UNIDROIT Factoring Convention requires a notice of transfer, which may not accommodate non-notification practices, such as in undisclosed factoring arrangements or securitisation. The Working Group has proceeded on the assumption that the Factoring Model Law would not be limited to notification factoring only.

Question for the Working Group:

- *The Working Group may wish to consider whether the rules on providing notifications of a transfer and corresponding payment instructions should be incorporated in the Factoring Model Law, and, if so, whether there is a reason to depart from the text of the Receivables Convention and the UNCITRAL Model Law?*

iv. Right to payment, proceeds and returned goods

43. Article 14(1) of the Receivables Convention provides for the right of the transferee to retain or claim proceeds of the receivable, including “whatever is received in respect of the [transferred] receivable,” as well as any returned goods. The transferee’s rights to retain or claim payment are not dependent on notification. If the debtor of a receivable makes a payment to a third party, the right of the transferee to claim payment of the proceeds and any returned goods depends on its priority vis-à-vis the third party. Paragraph 1 is thus reflective of the proprietary nature of the transferee’s rights over the receivable, any proceeds and returned goods. The transferor and transferee may modify the effect of these rules. The Working Group discussed a number of aspects relating to proceeds as well as returned goods.²³

44. Article 14(2) of the Receivables Convention provides that the transferee “may not retain more than the value of its right in the receivable,” which is typical in transfers used to secure obligations where the transferor retains a right to claim any surplus. It should be clarified that this rule would not apply to outright transfers (purchases) of receivables where the surplus represents the value of the transferee’s right in the receivable. Article 59 of the UNCITRAL Model Law contains functionally equivalent rules, but some of the drafting is different (e.g., instead of “goods” it refers to “tangible assets” as the term “goods” may have different meanings in local law). The UNIDROIT Factoring Convention only provides for the right of the factor to collect payment, without specifying rights to proceeds or anything else received in respect of the receivable.

²¹ Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade (Part 1), p. 37.

²² See UNCITRAL Model Law on Secured Transactions Guide to Enactment, para. 385.

²³ See Paragraph 214-219 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Questions for the Working Group:

- *Should the Factoring Model Law adopt the substance of these provisions?*
- *Should it track the language of the Secured Transactions Model Law?*

v. Debtor protection

45. Article 15(1) of the Receivables Convention provides that the transfer of receivables does not affect the debtor's rights and obligations, including with respect to the payment terms. The purpose of this rule is to ensure that a transfer of receivables does not materially alter the debtor's position under the contract that generated the receivable. However, in regard to payment terms, paragraph 2 provides that a payment instruction may change the person, address or account, but it may not change the currency or State in which payment is to be tendered. Payment terms, such as the principal and any interest thus remain unaffected. These rules are substantively identical to Article 61 of the UNCITRAL Model Law (one difference is the meaning of location (State) of the debtor that Article 61 does not define). Both of these standards subject the debtor protection rule to other provisions contained therein, which would include an override of anti-assignment clauses, but also any rules other than the Factoring Model Law that may be applicable, such as to protect consumer debtors²⁴. Unlike the Receivables Convention or UNCITRAL Model Law, the UNIDROIT Factoring Convention does not explicitly provide for the general principle of debtor protection, though it does provide for some rights consistent with this principle, such as the right to assert any defences or set-off against the factor.

Question for the Working Group:

- *Should the Factoring Model Law reflect this aspect of debtor protection so that it is clear that its rights and obligations, with some exceptions, remain unaffected?*

vi. Notification of the debtor

46. Article 16(1) of the Receivables Convention provides that a receivables debtor's obligation to pay the transferee arises upon receiving a written notification, which must be "in a language reasonably expected to inform the debtor about its contents"; the language of the contract that generated the receivable meets this test. The Receivables Convention refers generally to the "contents" of the notification while the UNCITRAL Model Law specifies "contents", which means identifying transferred receivables and the transferee. Notification alone is what makes the transfer effective against the debtor — whether the debtor knew or ought to have known about the transfer is irrelevant, in order to "ensure an acceptable level of certainty."²⁵ This should be the sole function of the notification under the Factoring Model Law, and the effectiveness of a transfer against third parties (perfection) should be determined by registration.

47. Article 16(2) of the Receivables Convention allows notification with respect to future receivables, which simplifies and reduces the cost of notification as a notification is not required each time a receivable arises. The Working Group discussed notification of a transfer in connection with future receivables.²⁶ Article 8 (1) (c) of the UNIDROIT Factoring Convention provides that notification may be given only with respect to receivables existing at the time of notification. Paragraph 2 allows a notification to be given with respect to future receivables, but naturally such a notification will not

²⁴ See Paragraph 120 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

²⁵ UN Receivables Convention (Explanatory Notes), p. 38.

²⁶ See Paragraph 144 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

have an impact on the debtor's discharge until the original contract is concluded and the payment obligation becomes due.²⁷

48. Article 16(3) of the Receivables Convention provides that notification of a subsequent transfer constitutes notification of all prior transfers, such that non-notification of any previous transfer does not render a subsequent transfer ineffective as against the debtor. This rule is particularly useful in cross-border transactions where the same receivable may be assigned multiple times (e.g., first to an export factor and then to an import factor). These rules are substantively identical to Article 62 of the UNCITRAL Model Law.

Question for the Working Group:

- *Should the Factoring Model Law reflect this aspect of debtor protection so that it is clear that its rights and obligations, with some exceptions, remain unaffected?*

vii. Debtor discharge, defences and rights of set-off

49. Reflective of standard practice, Article 17(1-2) of the Receivables Convention provides that the debtor of a receivable has a right to discharge its obligation by payment in accordance with the contract that gave rise to the receivable until it receives a written notification. After receipt of the notification, the debtor may only discharge its debt by payment to the transferee (or pursuant to the payment instruction). The debtor of a receivable is discharged even if payment is not made to the transferee that has priority. A different approach might be unfair and inconsistent with the policy of debtor protection effectively requiring the debtor to become the adjudicator of priorities.²⁸ Paragraph 7 provides that if the debtor receives notification from the transferee, it may request "adequate proof" of the transfer and if the transferee does not provide such proof, the debtor may discharge its obligation by paying the transferor. Adequate proof includes "any writing emanating from the [transferor] and indicating that the [transfer] has taken place." This rule is designed to protect the debtor from making a payment to an unknown party that it could not reasonably rely would result in a discharge.²⁹ These rules are substantively identical to Article 63(1) and (8)-(10) of the UNCITRAL Model Law.

50. Paragraphs 3-6 of Article 17 of the Receivables Convention contain several rules governing situations with multiple notifications or payment instructions, which were designed to ensure that the debtor of the receivable can be reasonably certain that payment in accordance with a notification and/or payment instruction will result in discharge. Substantively identical rules can be found in Article 63(3)-(7) of the UNCITRAL Model Law. The UNIDROIT Factoring Convention does not contain any rules on multiple notifications or payment instructions.

51. Article 17(3) of the Receivables Convention provides that if a debtor receives multiple payment instructions of the same receivable, payment in accordance with the latest instruction results in discharge. This rule is intended to ensure that the transferee may change or correct its payment instructions. In the case of receiving notifications of multiple transfers of the same receivable, paragraph 4 provides that payment in accordance with the first notification results in

²⁷ Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade (Part 1), p. 49.

²⁸ Analytical Commentary on the draft Convention on Assignment of Receivables in International Trade (Part 2), p. 6.

²⁹ Compare with *id.* at Article 9.1.12 of the UNIDROIT Principles on Commercial Contract, which is slightly different in that instead of providing that the debtor may discharge its debt by paying the transferor, provides that the debtor may withhold payment.

discharge.³⁰ Thus, after receiving one notification, the debtor does not need to inquire whether the transferor retained any right to make a subsequent transfer and, if so, which notification should be complied with. Paragraph 4 also reflects the reality that the rights covered by the first notification will likely have priority over the subsequent rights under the relevant priority rules. If the debtor receives notification of one or more subsequent transfers of the same receivable, paragraph 5 provides that payment in accordance with the last notification results in discharge. Although such situations are uncommon in practice (as typically the last in a chain of transferees notifies the debtor and sends a payment instruction), paragraph 5 provides that the debtor must follow the instruction in the notification of the last transfer in the chain to provide certainty. However, the notifications would have to be identifiable as notifications relating to subsequent transfers for paragraph 5 to apply; otherwise, the rule in paragraph 4 would control. Finally, paragraph 6 provides that in the case of receiving notification of a part or an undivided interest in one or more receivables, payment either in accordance with the notification, or as if the debtor had not received notification, results in discharge. The justification for this rule is that providing the debtor with the right to choose whether or not notification of a partial transfer is effective avoids overburdening the debtor with the obligation of dividing its payment. As a consequence, paragraph 7 provides that payment in accordance with the notification will only result in a discharge to the extent of the part or undivided interest paid.

52. Article 18(1-2) of the Receivables Convention deals with defences and rights of set-off that the debtor of a receivable may raise against the transferee. The Receivables Convention distinguishes between two types of set-off. Rights of set-off that arise from the original contract or from a closely connected contract (“transactional set-off”) may be asserted by the debtor even if they become available after notification. This approach also applies to defences that arise from the original or closely connected contract. Other rights of set-off arising from a separate contract between the transferor and debtor of the receivable, rule of law, judicial decision or other judicial act (“independent set-off”), may only be asserted if they were available to the debtor at the time of notification. The justification for this approach is that the rights of transferees should not be affected by rights of set-off arising from separate dealings between the transferor and the debtor of the receivable or other events that a diligent transferee could not be reasonably expected to discover. A different approach might negatively impact the availability of receivables financing. Article 18(3) of the Receivables Convention provides that the debtor may not assert any defences or rights of set-off on the grounds that the transferee violated a term in the contract generating the receivable that prohibited or otherwise restricted a transfer of the receivable. If the Factoring Model Law renders anti-assignment provisions completely ineffective, this paragraph would not be necessary. The UNIDROIT Factoring Convention and the UNCITRAL Model Law substantially reflect the approach taken in Article 18 of the Receivables Convention, which is in line with the general principle of debtor protection.³¹

53. Furthermore, Article 19(1) and (2) provide that a receivables debtor may by written agreement waive its right to claim any defences or rights of set off. Paragraph 3 precludes waivers with respect to fraudulent acts of the transferee (defences arising from some fraudulent acts of the transferor may be waived) or incapacity of the debtor of a receivable. If legislation specific to consumer debtors limits the ability to waive certain defences, the provisions of the Factoring Model Law would generally respect them. A waiver of defences provides the receivable with the same kind of “negotiability” that allows negotiable instruments to be enforced by holders in due course without concern for defences or rights of set-off. The effect is that the cost of receivables finance is reduced. A waiver should be enforceable with respect to any existing, but also future defences, and whether or not they are specifically identified in the waiver.

³⁰ Compare with Article 9.1.11 of the UNIDROIT Principles on Commercial Contract, which is substantively the same (“If the same right has been assigned by the same assignor to two or more successive assignees, the obligor is discharged by paying according to the order in which the notices were received”).

³¹ Compare also with Article 9.1.13 of the UNIDROIT Principles on Commercial Contract.

54. Article 20(1) of the Receivables Convention provides that an agreement between the transferor and the receivables debtor concluded prior to notification remains effective against the transferee. Article 20 is not indented to interfere with domestic rules on contract modification, but rather to provide specific rules on the effect of a notification on the rights acquired by the transferee. However, under paragraph 2 an agreement concluded after notification is effective only with the consent of the transferee, or in cases where the receivable is not fully earned by performance and one of the following two circumstances is present: a) modification is provided for in the contract generating the receivable, or b) a reasonable transferee would consent to it. In requiring actual or constructive consent, this paragraph attempts to establish a practical balance between predictability and flexibility. For instance, if a receivable is fully earned, its modification affects the reasonable expectations of the transferee. On the other hand, if a receivable is not fully earned, such as in long-term contracts where a requirement that the transferor would have to obtain the transferee's consent to every small contract modification could slow down the operations while creating an unwelcome burden for the transferee. A modification of the agreement that has no effect on the rights of the transferee is not covered by this Article. Paragraph 3 provides that nothing in Article 20 affects the rights between the transferor and transferee from breach of an agreement. As a consequence, the debtor may discharge its obligation pursuant to a modified contract, but the transferee may claim the balance of the "original receivable" and any compensation from the transferor. Article 66 of the UNCITRAL Model Law contains substantively identical rules. Under both of these instruments, the relevant time is the time when the debtor receives the notification. The UNIDROIT Factoring Convention does not contain any rules on modifications of contracts between the debtor of a receivable and the transferor.

55. Article 21 of the Receivables Convention provides that failure of the transferor to perform under the contract giving rise to the receivable does not entitle the receivables debtor to recover from the transferee a sum paid by the debtor of the receivable to the transferor or the transferee. The primary purpose of this rule is to protect the transferee from a claim by the debtor for the recovery of payments made before full performance of the original contract by the transferor. If the transferor does not perform, the debtor may refuse to pay the transferee; however, if the debtor pays the transferee prior to obtaining performance by the transferor, the debtor may not recover from the transferee the sums paid. This issue may arise particularly when the transferor becomes insolvent before fully performing its obligation. This rule reflects the normal risk allocation where the debtor of a receivable bears the insolvency risk of its counterparty – the transferor. The debtor may assert any rights available under the applicable law against the transferor. Article 67 of the UNCITRAL Model Law provides functionally equivalent rules. The UNIDROIT Factoring Convention provides for the right to recover payments for unjust enrichment or bad faith on the part of the transferee, which the drafters of the Receivables Convention decided to be unsuitable for a wide range of financing or service transactions.

Question for the Working Group:

- *Should the Model Law include equivalent provisions that in various ways affect the rights of the debtor of a receivable?*

K. Enforcement of the rights of factors

56. Unlike in other financing arrangements where the rights to enforce are conditioned on the occurrence of default, it is common for factors in factoring transactions to arrange with their customers to collect the receivables directly as they become due ("pre-default enforcement"). Factors generally enforce their rights by collecting the receivable, such as by informing the debtor of the receivable to make a payment to a designated (lockbox) deposit account. Collection of payments is not a remedy that may be enforced only upon default of the assignor, but it is ordinarily used in disclosed/notification factoring arrangements. Accordingly, a number of provisions that prescribe the steps a factor must take to effectuate enforcement would equally, pre and post-default (e.g., a

notification of payment) be required. For a discussion on the collection of payment see Section J above. The remainder of this section concerns post-default remedies only. This presentation follows the structure of the UNCITRAL Model Law.

57. The method of enforcement may vary depending on the types of remedies recognised by the applicable legal framework, but also according to the assets that a factor has rights to. Extra-judicial remedies may be set out in applicable laws that may also empower parties to provide for other remedies in their agreements, unless inconsistent with the relevant law.³² It is expected that the Model Law would require factors to proceed in commercially reasonable manner, which also applies after default. However, States should also provide for expeditious proceedings before a court or other authority, as recommended in Article 74 of the UNCITRAL Model Law. Such proceedings are essential, particularly where the collateral is perishable or an unreasonably long delay may significantly affect the collateral value. While these may not be circumstances relevant to factoring transactions, the Working Group may consider whether the Model Law can build in further incentives for States to provide for expeditious relief, such as restating and adapting Article 74.

58. The application of the enforcement framework depends on the nature of the transfer of a receivable. Enforcement of rights to receivables where the primary purpose of the transfer is securing the performance of obligations (e.g., pledges and security (fiduciary) assignments of receivables) should be governed by the enforcement framework provided for under the secured transactions law. In contrast, outright transfers of receivables should not be subject to an enforcement framework that ordinarily applies to secured transactions so as to avoid the application of rules that are inappropriate to the rights of outright transferees (e.g., the duty to distribute any surplus).

59. The UNCITRAL Model Law provides general rules on collection of receivables and other rights to payment. Article 82 contains a specific rule on enforcement of a security right in receivables, which provides that the creditor may collect payment after default, or before default with consent of the grantor/assignor. Article 83, moreover, provides a specific rule for collection of payment by an outright transferee of a receivable, stating that the “transferee is entitled to collect the receivable at any time after payment becomes due.” Similarly, the UNIDROIT Convention on International Factoring and the Receivables Convention provide the assignee with a general right to collect payment directly from the debtor of the receivables once it has been notified of the transfer, including prior to default. The legal effect of notification is that the debtor of the receivable may only get discharge by tendering payment to the assignee as provided for in the payment instruction.³³ Notification is relevant for enforcement because it determines when the factor’s enforcement rights become effective against the debtor of receivables.

60. Factors may also be entitled to enforce their rights against assets that are not pure intangible receivables. This may be the case of proceeds of receivables. The Working Group discussed and agreed that the right of a factor should extend to proceeds, but has not settled on the definition of proceeds.³⁴ In this context, the Working Group also discussed the issue of returned goods and the factor’s entitlement to retain returned goods, similarly to Article 14 of the Receivables Convention. If the Model Law encompasses transfers of negotiable instruments, additional considerations may arise for enforcement provisions, as the right to collect provided for in the Model Law may need to take into account collection of an instrument. Receivables may also be supported by personal and property rights that the factor may automatically benefit from or only upon some further act of the assignor. The factor should have the right to enforce these personal and property rights when

³² See Secured Transactions Model Law, art. 71(1)(b).

³³ See Section J (iii) of this Issues Paper

³⁴ See Paragraph 27-28 of this Issues Paper and Paragraph 214-219 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

collecting the receivable. The Working Group discussed the types of personal and property rights that support the payment of a receivable in connection with the creation issues.³⁵

61. The Model Law may also cover specific types of receivables, such as those owed by consumers and public entities i.e., government debtors. Depending on the decision of the Working Group regarding the scope of the Model Law, some consideration may be given to specific protections provided to these types of debtors of receivables.

62. In addition to the right to collect payment from the debtor of the receivables, international standards provide that an assignee may dispose of the collateral, which would include receivables. For such a disposal (not applicable to outright transferees of receivables), the ordinary rules of secured transactions laws would apply. Another remedy recognised in international standards is acceptance in satisfaction of the secured obligation, as provided for in Article 80 of the UNCITRAL Model Law. These enforcement options are much less likely to be utilised in factoring transactions.

63. The UNCITRAL Model Law addresses a number of aspects of enforcement relevant to security rights in general that also affect factoring. For instance, Article 75 covers the rights of affected persons to terminate enforcement. This provision would, for instance, enable the assignor to satisfy an outstanding obligation owed to the factor to terminate the enforcement process. Similarly, receivables may be collected by a junior assignee, but the priority with respect to the collected proceeds will be determined by the priority rules.

Questions for the Working Group:

- *Should the Model Law at a minimum recognise that factors may take any post-default actions against the receivable extra-judicially?*
- *Should the Model Law and/or the Commentary include a provision that incentivises States to provide for expeditious relief for factors?*
- *Should the Model Law deal only with remedies against receivables, or also some other assets and rights that factors "may benefit from", such as proceeds and supporting rights? The Model Law may simply acknowledge that the factor may enforce its rights in those assets, but without specifying any rules to that effect.*
- *What aspects of enforcement should the Model Law cover? Should it deal only with collecting receivables, or also with their disposal and acceptance in satisfaction of the secured obligation?*
- *The Working Group may wish to consider whether any enforcement provisions generally applicable to security rights, such as on the termination of enforcement, should be incorporated and adapted for the purposes of the Model Law.*
- *Should the Model Law simply acknowledge that some other laws may limit the enforcement rights or impose additional requirements on the factor or include some specific provisions in the Model Law itself?*

L. Conflict of laws

64. Factoring transactions may be affected by various uncertainties in the applicable legal regime. These uncertainties are exacerbated for transactions connected to more than one State ("cross-border transactions") due to the absence of adequate conflict of laws provisions applicable to the assignment of receivables. The need to provide certainty and predictability has increased with

³⁵ Paragraph 46-50 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

the recent exponential growth in factoring of foreign receivables.³⁶ When presented with issue connected to more than one State, a court will typically apply: i) its own substantive law to characterise a transaction (e.g. whether it is a transfer of a receivable) or a related issue (e.g. whether it is a priority or enforcement issue) for the purpose of selecting the appropriate conflict-of-laws rule; ii) the conflict-of-laws rules of its own legal system to determine which State's law is applicable to the substance of the dispute; and iii) the substantive law of the State whose law is applicable according to the conflict-of-laws rules of the forum State.³⁷

65. The basis for consideration of the conflict-of-laws provisions should be the Receivables Convention and the UNCITRAL Model Law. For most aspects, the UNCITRAL Model Law, rather than the Receivables Convention would be more suitable for the Factoring Model Law. The two instruments reach substantively the same result, but the drafting is not always exactly the same, such as with respect to the law that applies to the characterisation of the transfer as one in security or outright. Additional guidance may be sought in The Hague Principles on Choice of Law in International Commercial Contracts.³⁸

66. This overview presents the relevant issues in two categories: i) within contractual relationships (e.g., the original (sale) agreement from which the receivable arose), and ii) those that affect property rights (e.g., third-party effectiveness and priority of a transfer of a receivable). The conflict-of-laws rules relating to the former category include two sub-categories: a) rights and obligations between parties who are in contractual privity (e.g. law governing rights and obligations between assignor and assignee), and b) rights and obligations of parties who are not in contractual privity (e.g. the rights of the assignee against the debtor of a receivable and the effect of anti-assignment clauses on those rights). The conflict-of-laws rules relating to the latter category includes the creation, third-party effectiveness, priority, and enforcement of a transfer of a receivable.³⁹ The conflict-of-laws provisions addressing the proprietary aspects of assignments of receivables as well as of contractual nature where the parties are not in privity should be designated in the Factoring Model Law as mandatory. For the remaining aspects, the Factoring Model Law should provide a default rule, but give parties the autonomy to select the governing law.

67. In addition, the Factoring Model Law may also need to deal with situations that result from the change in the governing law, such as where the assignor relocated from jurisdiction A to jurisdiction B. The UNCITRAL Model Law dealt with this situation in Article 23, temporarily preserving the third-party effectiveness of a security right.

68. Depending on the decision with respect to the scope, the future Factoring Model Law may apply to transfers of receivables only, or also to transfers of rights to payment embodied in negotiable instruments. The following assumed its application to receivables only, and a broader scope would necessitate additional considerations. This discussion also assumes that the Factoring Model Law would apply only to typical factoring transactions, excluding some more sophisticated receivables finance transactions, such as securitisation where following the general standard of the UNCITRAL instruments of the location of the grantor may be objected to by some domestic securitisation industries. Should the Working Group decided to cover these within the scope of the Factoring Model Law, appropriate modifications to the draft conflict-of-laws rules would need to be considered.

³⁶ See FCI Report on Evolution of Global Factoring Volume: https://fci.nl/en/industry-statistics?language_content_entity=en.

³⁷ UNCITRAL Model Law on Secured Transactions: Guide to Enactment, para 468 (UNCITRAL, 2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10910_e.pdf.

³⁸ Hague Principles on Choice of Law in International Commercial Contracts (2015), (HCCH, 2015), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>.

³⁹ UNCITRAL Model Law, *supra* note, art. 3(1).

69. Proceeds should be included, insofar as providing appropriate conflict-of-laws provisions. However, the scope of those provisions would depend upon the decision of the Working Group in general as to the types of proceeds the Factoring Model Law should cover.

70. The conflict-of-laws rules should be presented in a separate section of the Factoring Model Law with at least two sub-sections containing articles addressing contractual and property rights issues, respectively. The presentation should not leave an impression that these rules are relevant only in cross-border transactions, but also where foreign law may apply to a purely domestic transaction.

Review of Conflict-of-Laws provisions in the UNCITRAL Model Law on Secured Transactions and Comments for the Working Group's consideration:

Article	Include in the future Factoring Model Law	Comment
84	Yes	In terms of structuring, Articles 84 and 96 may be put together because they deal with contractual issues.
85	No	This article covers the law applicable to various aspects of security rights in tangible assets.
86	Yes	This article covers the law applicable to various aspects of security rights in intangible assets, including receivables.
87	No	<p>Article 87 covered two different types of transactions, namely a security right in a receivable that either arose from the sale, lease, or grant of security in an immovable property or was secured by immovable property.</p> <p>The latter type is common in the securitisation industry, such as where a promissory note is sold to a special purpose vehicle, and carries the mortgage with it. Since neither of these types is common in the factoring industry, it might not be relevant to include this provision in the Factoring Model Law. However, it would be useful in the commentary to highlight these types of situations in the securitisation context and identify the need for enacting States to address them. Additional consideration may need to be given to this aspect following a decision on the scope of the Factoring Model Law.</p>
88, 89, 90, 91	Yes	All these articles cover issues relevant to transfers of receivables. Their structure need not follow the UNCITRAL Model Law order. Article 89 covers security rights in proceeds. Its inclusion in the present form would depend upon a decision by the Working Group on the types of proceeds to cover in the Factoring Model Law. 40
92	Yes	While this may already be the norm in domestic laws, it would be useful to include some version of this provision.
93	Yes	Possibly include only paragraphs (1) and (6), with redrafting, as almost every State is expected to have rules of this sort.
94	Yes	Structurally, this may be presented along with any rules preserved from Article 93.
95	Yes	The content of this article could be synthesised and presented in a single paragraph. ⁴¹
96	Yes	The content would be adapted to omit the reference to negotiable instruments, assuming the future Factoring Model Law does not cover them.
97	No decision on whether to include both options or to the extent which changes should be considered.	Depending on how far a transfer of a receivable in terms of extending to proceeds reaches, some version of this article may need to be incorporated. Additional consideration needed to be given to 'place of business' (plus office) and 'deposit-taking institution' in light of the evolving (often virtual) nature of banks and other institutions which offer similar services.

⁴⁰ Should the same formulation be followed for Article 89, it would exclude bank deposits, which were covered in Article 97.

⁴¹ The exclusion of paragraph 2 may be considered for simplicity. However, a lack of consistency with the UNCITRAL Model Law and the Receivables Convention might confuse readers.

98	Yes – after substantial streamlining to remove items not relevant to Factoring Model Law	References to negotiable instrument/document/non-intermediary securities as well as to the word 'also' should be removed. The Article would only cover receivables as proceeds in bank accounts. This article could be merged with Article 89, or should at least be put in the same category as they both deal with bank accounts.
99	No	Inapplicable to receivables.
100	No	Inapplicable to receivables.
23	Yes	The content of this article would be adapted to apply to receivables only.

M. Structure

71. Both the FCI Factoring Model Law and the AFREXIMBANK Model Law based their structures on the Receivables Convention, which is set out below.

Structure of the Receivables Convention

Chapter 1	Scope of Application
Chapter 2	General provisions
Chapter 3	Effects of assignments
Chapter 4	Rights, obligations and defences
Section 1	Assignor and Assignee
Section 2	Debtor
Section 3	Third parties
Chapter 5	Autonomous conflict-of-laws rules
Chapter 6	Final provisions
ANNEX	
Section 1	Priority rules based on registration
Section 2	Registration
Section 3	Priority rules based on the time of the contract of assignment
Section 4	Priority rules based on the time of notification of assignment

Question for the Working Group:

- *Should the UNIDROIT Factoring Model Law be structured in a similar way to the Receivables Convention?*

ANNEX I**ADDITIONAL RESOURCES**UNIDROIT Instruments

UNIDROIT, UNIDROIT Convention on International Factoring (1988)

<https://www.unidroit.org/english/conventions/1988factoring/convention-factoring1988.pdf>

UNIDROIT, Explanatory Note on the Factoring Convention (2011)

<https://www.unidroit.org/explanatory-report-factoring-1988>

UNIDROIT, UNIDROIT Model Law on Leasing (2008)

<https://www.unidroit.org/english/documents/2008/study59a/s-59a-17-e.pdf>

UNIDROIT, Official Commentary to the UNIDROIT Model Law on Leasing (2010)

<https://www.unidroit.org/explanatory-model-law-leasing-2008/english>

UNCITRAL Instruments

UNCITRAL, United Nations Convention on the Assignment of Receivables in International Trade (2001)

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ctc-assignment-convention-e.pdf>

UNCITRAL, UNCITRAL Legislative Guide on Secured Transactions (2007)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/09-82670_ebook-guide_09-04-10english.pdf

UNCITRAL, Supplement on Security Rights in Intellectual Property (2010)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/10-57126_ebook_suppl_sr_ip.pdf

UNCITRAL, UNCITRAL Guide on the Implementation of a Security Rights Registry (2013)

<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/security-rights-registry-guide-e.pdf>

UNCITRAL, UNCITRAL Model Law on Secured Transactions (2016)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-08779_e_ebook.pdf

UNCITRAL, UNCITRAL Model Law on Secured Transactions: Guide to Enactment (2017)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/mlst_guide_to_enactment_e.pdf

UNCITRAL, UNCITRAL Practice Guide to the Model Law on Secured Transactions (2019)

https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10910_e.pdf

UNCITRAL, HCCH and UNIDROIT, UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests (2012) <https://www.unidroit.org/english/publications/joint/securityinterests-e.pdf>

Other Instruments

AFREXIMBANK, AFREXIMBANK Model Law on Factoring (2016) <https://s3-eu-west-1.amazonaws.com/demo2.opus.ee/afrexim/Model-Law-on-Factoring.pdf>

FCI, Factoring Model Law (2014)
<file:///C:/Users/wbryd/OneDrive/UNIDROIT/Factoring%20Model%20Law/model-factoring-law-cv-140221.pdf>

Global SCF Forum, Standard Definitions for Techniques of Supply Chain Finance (2016)
<https://iccwbo.org/content/uploads/sites/3/2017/01/ICC-Standard-Definitions-for-Techniques-of-Supply-Chain-Finance-Global-SCF-Forum-2016.pdf>

OAS, Model Inter-American Law on Secured Transactions (2002)
https://www.oas.org/dil/Model_Law_on_Secured_Transactions.pdf