



Factoring Model Law Working Group

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PRELIMINARY DRAFTING SUGGESTIONS FOR THE MODEL LAW ON FACTORING

1. This document provides preliminary drafting suggestions for the future Model Law on Factoring. At this stage, this document contains preliminary versions of three possible chapters:
 - a) Chapter I – Scope and general provisions (Page 2) (this Chapter needs to be expanded as additional Chapters are prepared)
 - b) Chapter II – Transfers of receivables (Page 14)
 - c) Chapter III – Making a transfer of a receivable effective against third parties (Page 22)
 - d) Chapter VI – Rights and Obligations of the Parties (Page 24)
 - e) Chapter VII – Collection and Enforcement (Page 37)
 - f) Chapter VIII – Conflict of Laws (Page 45)
2. The drafting follows the [UNICITRAL Model Law on Secured Transactions \(MLST\)](#) as a starting point, as the MLST is the most recent example of a model law developed by an intergovernmental organisation in this area and reflects current thinking on best practices. The drafting also considers the [United Nations Convention on the Assignment of Receivables in International Trade \(RC\)](#) as a relevant international treaty in this area. This methodology is also consistent with the definition and scope of the project as included in our Work Programme ([C.D. \(98\) 14 rev. 2](#)).
3. The tables in each of the chapters on the following pages include proposed text for Articles to be included in the future Model Law on Factoring, their corresponding Articles in the MLST and/or RC, as well as items for discussion. The Working Group is also invited to consider issues of numbering, structure, etc, as the present draft is of a preliminary nature. Many of the Articles prepared are based on consensus or discussion which took place during the first and second session of the Working Group. Where possible, the relevant sections of the [Summary Report of the First Session \(Study LVIII A – W.G.1 – Doc. 4 rev. 1\)](#) and the [Summary Report of the Second Session \(Study LVIII A – W.G.2 – Doc. 4\)](#) have been referenced accordingly.
4. The Secretariat is grateful to Working Group Members Mr Bruce Whittaker (University of Melbourne) and Mr Marek Dubovec (Kozolchyk National Law Center (NatLaw)) for their assistance in the preparation of this document.

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER I – SCOPE AND GENERAL PROVISIONS

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Article I – Scope of application			
1.	This Law applies to [transfers] of receivables.	Article 1(1) This Law applies to security rights in movable assets.	Article 1(1) This Convention applies to: (a) Assignments of international receivables and to international assignments of receivables as defined in this chapter, if, at the time of conclusion of the contract of assignment, the assignor is located in a Contracting State;	The Working Group may wish to consider whether the Model Law should use the term “transfer” or “assignment” (or something else entirely).
2.	Despite paragraph 1, this Law does not apply to:	Article 1(3) Notwithstanding paragraph 1, this Law does not apply to security rights in: (a) The right to request payment under, or to receive the proceeds of, an independent guarantee or letter of credit; (b) Intellectual property in so far as this Law is inconsistent with [the law relating to intellectual property to be specified by the enacting State]; (c) Intermediated securities; [or] (d) Payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions [; or] (e) Any other types of asset to be specified by the enacting State, such as those that are subject to specialized secured transactions and asset-based registration regimes under other law to the extent that that other law governs matters addressed in this Law].		It may be worth giving further consideration to whether it is desirable to exclude certain types of transfers of receivables from the scope of the Model Law, for at least two reasons: - While the primary focus of the Model Law is to facilitate the transfer of receivables as a capital-raising tool, there is no <i>a priori</i> reason why it should not facilitate transfers of receivables in other contexts. - If a receivable is covered by the Model Law but some dealings in it are not, then difficult priority issues can arise if there is a competition between a transfer that is covered by the law, and one that is not.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
(a)	[a transfer of a receivable as part of the sale or change in ownership status of the business out of which the assigned receivable arose]; or		Article 4(1) This Convention does not apply to assignments made: ... (b) As part of the sale or change in the <u>ownership or legal status</u> of the business out of which the assigned receivables arose.	This language is taken from the RC. There is no equivalent provision in the MLST. The Working Group may wish to consider whether this should be retained, both for the reasons set out above, and taking the following factors into account: - there is no equivalent provision in the MLST; - the UCC and PPSAs do however contain a similar exclusion; and - the meaning of some of the text is unclear (e.g. "change in ownership status"). ¹
(b)	[a transfer of a receivable for collection].			It was suggested at the first meeting of the Working Group that the law should perhaps exclude transfers for collection. The consensus was that they should not necessarily be excluded for all purposes. If that is agreed, then para (b) would come out. Note that this text does not appear in either the RC or the MLST. Furthermore, some specific provisions might be needed to clarify the aspects of the Model Law that would not apply to such transfers (e.g., registration). ²
3.	[<i>Application to proceeds – to be discussed.</i>]	Article 1(4). This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset to which this Law does not apply, to the extent that [any other law to be specified by the enacting State] applies to security	Article 14. Right to payment 1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent: (a) If payment in respect of the assigned receivable is made to the	

¹ See summary of this issue in Paragraph 66 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

² See summary of this issue in Paragraph 56 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		rights in those types of asset and governs the matters addressed in this Law.	<p>assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;</p> <p>(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and</p> <p>(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable.</p> <p>2. The assignee may not retain more than the value of its right in the receivable.</p>	
4.	Nothing in this Law affects the rights and obligations of a transferor or a debtor under other laws governing the protection of parties to transactions made for personal, family or household purposes.	Article 1(5) Nothing in this Law affects the rights and obligations of the grantor and the debtor of the receivable under other laws governing the protection of parties to transactions made for personal, family or household purposes.	<p>Article 4(1) This Convention does not apply to assignments made:</p> <p>(a) To an individual for his or her personal, family or household purposes;</p> <p>Article 4(4) Nothing in this Convention affects the rights and obligations of the assignor and the debtor under special laws governing the protection of parties to transactions made for personal, family or household purposes.</p>	This concept was discussed in principle at the first meeting of the Working Group, but no conclusion was reached on how it should be formulated. ³

³ See summary of this issue in Paragraph 120 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
5.	Nothing in this Law overrides a provision of any other law that limits the transfer of specific types of receivable[, with the exception of a provision that limits the transfer of a receivable on the sole ground that it is a future receivable, or a part of or an undivided interest in a receivable].	Article 1(6) Nothing in this Law overrides a provision of any other law that limits the creation or enforcement of a security right in, or the transferability of, specific types of asset, with the exception of a provision that limits the creation or enforcement of a security right in, or the transferability of, an asset on the sole ground that it is a future asset, or a part of or an undivided interest in an asset.	Article 8. Effectiveness of assignments 3. Except as provided in paragraph 1 of this Article, Article 9 and Article 10, paragraphs 2 and 3, this Convention does not affect any limitations on assignments arising from law.	The Working Group has only generally discussed “statutory bars” on transfers, and is yet to reach a conclusion. If those bars were not to be overridden, this provision will be retained. ⁴ The Working Group may wish to consider whether the text in square brackets is necessary, or whether paragraph (6) of this Article makes the point sufficiently clear without additional text here.
	Article 2. Definitions			The corresponding heading in the MLST says “Definitions and rules of interpretation”, but appears to contain only definitions.
	For the purposes of this Law:			
(-)	“Debtor” means a person who owes payment of the receivable, including a guarantor or other person secondarily liable for payment of the receivable.	Article 2(i) “Debtor of the receivable” means a person that owes payment of a receivable that is subject to a security right, including a guarantor or other person secondarily liable for payment of the receivable;		This is a slightly simplified version of the definition “debtor of the receivable” in the MLST.
(-)	“Proceeds” of a receivable means whatever is received in respect of the receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods.	Article 2(bb) “Proceeds” means whatever is received in respect of an encumbered asset, including what is received as a result of a sale or other transfer, lease, licence or collection of an encumbered asset, civil and natural fruits, insurance proceeds, claims arising from defects in, damage to or loss of an encumbered asset, and proceeds of proceeds;	Article 5(j). “Proceeds” means whatever is received in respect of an assigned receivable, whether in total or partial payment or other satisfaction of the receivable. The term includes whatever is received in respect of proceeds. The term does not include returned goods;	It was decided at the second meeting of the Working Group that the Model Law should include a definition of “proceeds”, and that it should be a “middle-ground” approach between the MLST and the RC (without deciding what that “middle-ground” should look like. ⁵ This draft is taken from the RC, as a basis for further discussion. Issues to consider include:

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

⁵ See summary of this issue in Paragraph 199 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
				<ul style="list-style-type: none"> - whether it should be limited to cash proceeds (and if so, what “cash” means in this context); and - whether it should capture only proceeds “in total or partial payment or other satisfaction” of the receivable, or should include (e.g.) insurance claims or proceeds of disposition of the receivable (whether voluntarily or by operation of law).
(-)	<p>“Receivable” means a [contractual] right to payment of a sum of money, other than:</p>	<p>Article 2(dd). “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to payment of funds credited to a bank account and a right to payment under a non- intermediated security;</p>	<p>Article 2(a) “Assignment” means the transfer by agreement from one person (“assignor”) to another person (“assignee”) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (“receivable”) from a third person (“the debtor”). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;</p>	<p>The MLST uses the expression “right to payment of a monetary obligation”. That is arguably a slightly jumbled formulation, as one technically holds either a right to <i>discharge</i> of a monetary obligation, or a right to <i>payment</i> of a sum of money. The proposed language is also closer to the corresponding text in the RC. It does however use the term “money”, which may raise questions about exactly this means (e.g. does it include cryptocurrencies?).</p> <p>The Working Group decided at its first meeting that the concept of receivable should apply to contractual rights, but that the exact meaning of that term needed further consideration. The Working Group did not form a view on whether the Model Law should extend to non-contractual payment rights (and if so, which ones).⁶</p>

⁶ See summary of this issue in Paragraph 28 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	(i) a right to payment under a negotiable instrument;	Article 2(dd)... a right to payment evidenced by a negotiable instrument ...	Article 4(3). Nothing in this Convention affects the rights and obligations of any person under the law governing negotiable instruments.	The RC states that nothing in the Convention “affects the rights and obligations of any person under the law governing negotiable instruments”. The proposed drafting follows the MLST approach. The Working Group has not yet made a decision on how negotiable instruments should be dealt with in the Model Law. ⁷
	(ii) a right to payment of funds credited to a bank account;	Article 2(dd). ...a right to payment of funds credited to a bank account ...	Article 4(2). ...(f) Bank deposits;...	Similar to the previous paragraph, the RC does not exclude bank accounts from the definition of “receivable”, but instead says that the Convention “does not apply” to an assignment of a receivable arising from bank deposits.
	(iii) a right to payment under a security;	Article 1(3)(c). Notwithstanding paragraph 1, this Law does not apply to security rights in: ... (c) Intermediated securities; Article 2(dd) “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, <u>a right to payment of funds credited to a bank account and a right to payment under a non-intermediated security</u> ;	Article 4(2). This Convention does not apply to assignments of receivables arising under or from: ... (d) Inter-bank payment systems, inter-bank payment agreements or clearance and settlement systems relating to securities or other financial assets or instruments; (e) The transfer of security rights in, sale, loan or holding of or agreement to repurchase securities or other financial assets or instruments held with an intermediary;	
	(iv) a right to payment under an independent guarantee or letter of credit;	Article 1(3) Notwithstanding paragraph 1, this Law does not apply to security rights in:	Article 4(2). This Convention does not apply to assignments of receivables arising under or from:	The MLST put this exclusion into Article 1, rather than as an exclusion to the definition of receivable in Article 2(dd), because it wanted to exclude letters of

⁷ See summary of this issue in Paragraph 49 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		(a) The right to request payment under, or to receive the proceeds of, an independent guarantee or letter of credit;	... (g) A letter of credit or independent guarantee.	credit etc from the whole law, not just from the concept of a receivable. As the Model Law is only about receivables, we may be able to achieve the same effect by simply excluding it from the definition of receivable. The RC adopts a different drafting technique, but with substantially the same result.
	(v) a right to payment arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions; or	Article 1(3) Notwithstanding paragraph 1, this Law does not apply to security rights in: ... (d) Payment rights arising under or from financial contracts governed by netting agreements, except a payment right arising upon the termination of all outstanding transactions; ...	Article 4(2). This Convention does not apply to assignments of receivables arising under or from: ... (b) Financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions; ...	Same point as for the preceding paragraph.
	(vi) [others?].			Other potential exclusions to be discussed. See for example Article 4(2) of the RC. Whether there is a need for additional exclusions (or indeed for the exclusions listed in subparas (i) to (v)) will depend on whether the primary definition of "receivable" is left very broad. For example, they may not be needed if the primary definition is limited to classical factoring arrangements, i.e. receivables from the sale of goods or provision of services, similarly to the UNIDROIT Factoring Convention
(-)	"Security" means: [(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:	Article 2(hh) "Securities" means: [(i)] An obligation of an issuer or any share or similar right of participation in an issuer or in the enterprise of an issuer that:		The term "security" is used in an exclusion from the definition of "receivable" (subpara (iii)). This definition does however add complexity to the Model Law. Similarly, if other exclusions from the definition of

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	<p>(A) Is one of a class or series, or by its terms is divisible into a class or series; [and] (B) Is of a type dealt in or traded on a recognized market, or is issued as a medium for investment; [and (ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i)(A) and (B).;]</p>	<p>a. Is one of a class or series, or by its terms is divisible into a class or series; [and] b. Is of a type dealt in or traded on a recognized market, or is issued as a medium for investment; [and (ii) The enacting State to specify any additional rights that should qualify as securities even if they do not satisfy the requirements expressed in subparagraphs (i) a. and (i) b.;</p>		<p>“receivable” (e.g. the exclusion of netting agreements) necessitate additional detailed definitions then this will detract from the Model Law as a whole, as it will become cluttered with definitions that have no relevance to factoring.</p>
(-)	<p>“Transfer” of a receivable means:</p>	<p>Article 2(kk) “Security right” means:</p>	<p>Article 2. For the purposes of this Convention: (a) “Assignment” means the transfer by agreement from one person (“assignor”) to another person (“assignee”) of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (“receivable”) from a third person (“the debtor”). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer;</p>	<p>The Working Group may wish to consider whether this text should be retained here (the approach taken in the MLST), or moved to Article 1(1) (the approach taken in the RC).</p>
	<p>(i) an [absolute/outright] transfer of the receivable by agreement; and</p>	<p>Article 2(kk) (ii) The right of the transferee under an outright transfer of a receivable by agreement;</p>		<p>This is to exclude transfers by operation of law. It covers both outright transfers, and transfers by way of security. See also the discussion of the definition of “receivable” earlier in this table, with respect to non-contractual rights to payment.⁸</p>
	<p>(ii) [A transfer/An assignment] of the receivable by agreement, or the creation of an interest in the receivable by agreement, in either case to secure payment or other performance of an obligation, regardless of the way in which the parties have described the transaction, the status of</p>	<p>Article 2(kk) (i) A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; ...</p>		<p>This captures the creation of an interest in a receivable by way of security. This was not discussed at the first meeting, at least not in depth. The text is included as a prompt for further discussion.</p> <p>The corresponding definition in the MLST (of “security right”) divides the subject matter up differently, by dealing first with in-substance security rights (whether or not by way of transfer), and then with outright transfers of</p>

⁸ See discussion of this issue in Paragraphs 11-28 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	the transferor or the nature of the secured obligation.			receivables. That reflects the fact that the primary focus of the MLST is on security rights, not transfers. For the Model Law, however, the primary focus is on outright transfers, not on security rights <i>per se</i> . The proposed drafting here reflects this.
(-)	"Transfer agreement" means an agreement made in accordance with Article 6(4) that provides for the transfer of a receivable.	Article 2(jj) "Security agreement" means: (i) An agreement, regardless of whether the parties have denominated it as a security agreement, between a grantor and a secured creditor that provides for the creation of a security right; and (ii) An agreement that provides for the outright transfer of a receivable;		The corresponding definition in the MLST (of "security agreement") repeats the substance of the subparagraphs of the definition of "security right", i.e. the express inclusion in the law of outright transfers of receivables, in addition to in-substance security rights. Given the way in which we define "transfer" of a receivable, it is not clear that this is necessary. The proposed text also cross-refers to the requirements for a transfer agreement that are set out in Article 6(4). The MLST does not do this in the corresponding definition of security agreement, but instead simply says in its Article 6(3) that a security agreement "must" comply with the requirements set out in the Article. The intention behind Article 6(3) of the MLST no doubt is that an agreement can only be a security agreement for the purposes of the MLST if it complies with those requirements, but the drafting leaves this less than completely clear. The proposed drafting of the definition of transfer agreement removes the uncertainty.
(-)	"Transferee" means a person to whom or in whose favour a receivable is transferred.	Article 2(ff) "Secured creditor" means: (i) A person that has a security right; and	Article 2. ... (b) In the case of an assignment by the initial or any other assignee	The dichotomy of having both "to whom" and "in whose favour" is intended to capture both limbs of the definition of transfer (i.e. <i>transfer</i> of a

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		(ii) A transferee under an outright transfer of a receivable by agreement;	("subsequent assignment"), the person who makes that assignment is the assignor and the person to whom that assignment is made is the assignee.	receivable to a transferee, or creation of a security right in favour of a transferee).
(-)	"Transferor" means a person who transfers a receivable.	Article 2(o) "Grantor" means: (i) A person that creates a security right to secure either its own obligation or that of another person; (ii) A buyer or other transferee of an encumbered asset that acquires its rights subject to a security right; and (iii) A transferor under an outright transfer of a receivable by agreement;		
(-)	"Writing" includes an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.	Article 2 (nn) "Writing" includes an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.	Article 5(c) "Writing" means any form of information that is accessible so as to be usable for subsequent reference. Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing;	The draft definition comes from the MLST. The corresponding definition in the RC includes the following explanation of what can constitute the "signing" of a writing: "Where this Convention requires a writing to be signed, that requirement is met if, by generally accepted means or a procedure agreed to by the person whose signature is required, the writing identifies that person and indicates that person's approval of the information contained in the writing." The Working Group may wish to consider whether the Model Law should include an equivalent explanation as well.
	Article 3. Party autonomy			The proposed text for this Article is materially identical to the corresponding provisions in the MLST.
1.	With the exception of Articles [...], the provisions of this Law may be	Article 3(1). With the exception of Articles 4, 6, 9, 53, 54, 72, paragraph 3, and 85-107, the provisions of this		

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	derogated from or varied by agreement.	Law may be derogated from or varied by agreement.		
2.	An agreement referred to in paragraph 1 does not affect the rights or obligations of any person who is not a party to the agreement.	Article 3(2). An agreement referred to in paragraph 1 does not affect the rights or obligations of any person that is not a party to the agreement.		
3.	[Nothing in this Law affects any agreement to use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution.]	Article 3(3). Nothing in this Law affects any agreement to use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution.		The Working Group may wish to consider whether it wants to include this text in the Model Law, or whether it is less important here than in the MLST (on the basis that the MLST covers transactions where these mechanisms may be more important).
	Article 4. General standards of conduct			The proposed text for this Article is identical to the corresponding provision in the MLST.
	A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.	Article 4 A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner.		
	Article 5. International origin and general principles			The proposed text for this Article is identical to the corresponding provisions in the MLST. It also reflects Article 4 of the UNIDROIT Model Leasing Law, so its inclusion would be consistent with the model law drafting conventions of UNIDROIT.
1.	In the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.	Article 5(1) In the interpretation of this Law, regard is to be had to its international origin and the need to promote uniformity in its application and the observance of good faith.	Article 7(1) In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
			uniformity in its application and the observance of good faith in international trade.	
2.	Questions concerning matters governed by this Law that are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.	Article 5(2) Questions concerning matters governed by this Law that are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.	Article 7(2) Questions concerning matters governed by this Convention that are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.	

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER II – TRANSFERS OF RECEIVABLES

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
	Article 6. Requirements for the transfer of a receivable			
1.	A receivable may be transferred by a transfer agreement, provided that the transferor has rights in the receivable or the power to transfer it.	Article 6(1) A security right is created by a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it.	Article 8. Effectiveness of assignments 1. An assignment is not ineffective as between the assignor and the assignee or as against the debtor or as against a competing claimant, and the right of an assignee may not be denied priority, on the ground that it is an assignment of more than one receivable, future receivables or parts of or undivided interests in receivables, provided that the receivables are described: (a) Individually as receivables to which the assignment relates; or (b) In any other manner, provided that they can, at the time of the assignment or, in the case of future receivables, at the time of conclusion of the original contract, be identified as receivables to which the assignment relates.	
2.	A transferor may transfer:	Article 8 A security right may encumber:		Article 8 of the MLST also contains Article 8(a), which says that a security right may encumber “any type of movable asset”. As this law deals only with receivables, it did not seem necessary to include an equivalent provision here. Note that Article 8(1) of the RC that uses a different drafting technique, consistent with its more limited aspirations.
	(a) a part of or an undivided interest in receivables;	Article 8(b) A part of or an undivided right in a movable asset;		

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
	(b) a generic category of receivables; and	Article 8(c) A generic category of movable assets; and		The Working Group may wish to consider whether this is necessary, or whether the fact that a person can transfer all of their receivables, together with the reference to “generic category” in paragraph (5) of this Article, make it sufficiently clear that a person can transfer something less, like a category.
	(c) all of its receivables.	Article 8(d) All of a grantor’s movable assets.		
3.	A transfer agreement may provide for the transfer of a future receivable, but the transfer occurs only when the transferor acquires rights in the receivable or the power to transfer it.	Article 6(2) A security agreement may provide for the creation of a security right in a future asset, but the security right in that asset is created only when the grantor acquires rights in it or the power to encumber it.		It was suggested at the second meeting of the Working Group that it should be clarified that “future receivable” covers both future receivables arising under an existing contract, and future receivables arising under future contracts. The Working Group may wish to consider whether this clarification should be provided in the Model Law itself (e.g. by way of a definition in Article 2) or by commentary to that effect in the Commentary. ⁹
4.	A transfer agreement must be [in/evidenced by] a writing that is signed by the transferor and:	Article 6(3) Except as provided in paragraph 4, a security agreement must be [concluded in] [evidenced by] a writing that is signed by the grantor and:		Article 6(3) of the MLST also contains two paragraphs that set out how the security agreement should identify the obligation that is secured. As the principal focus of this law is on transfers of receivables rather than secured credit, it may overly complicate the Model Law with marginally-relevant text if we were to include similar provisions here as well. This draft also does not include an equivalent of Article 7 of the MLST, for the same reason.

⁹ See discussion of this issue in Paragraphs 10-15 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
				The Working Group should discuss whether any additional text is needed to ensure that the State does not impose some formalities, like notarisation.
	(a) identifies the transferor and the transferee; and	Article 6(3)(a) Identifies the secured creditor and the grantor;		
	(b) describes the receivables as provided in paragraph 5.	Article 6(3)(c) Describes the encumbered asset as provided in Article 9 [; and		
5.	A transfer agreement must describe the receivables in a manner that reasonably allows their identification. This includes a description that indicates that the receivables consist of all of the transferor's receivables, or all of the transferor's receivables within a generic category.	Article 9 Description of encumbered assets and secured obligations 1. The encumbered assets and secured obligations must be described in the security agreement in a manner that reasonably allows their identification. 2. A description of encumbered assets that indicates that the encumbered assets consist of all the grantor's movable assets, or of all the grantor's movable assets within a generic category, satisfies the standard in paragraph 1.		
	Article 7 - Proceeds			
1.	The right of the transferee of a receivable extends to the receivable's identifiable proceeds.	Article 10(1) A security right in an encumbered asset extends to its identifiable proceeds.	Article 14 1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent: (a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable; (b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the	The Working Group discussed this topic at its first meeting, but without coming to a view on how it should be handled. This text is included as a starting point for further discussion. ¹⁰

¹⁰ See discussion of this issue in Paragraphs 214-219 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
			<p>proceeds and also to goods returned to the assignor in respect of the assigned receivable; and (c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to such person in respect of the assigned receivable. 2. The assignee may not retain more than the value of its right in the receivable.</p>	
	<p>Article 8 – Contractual limitations on the transfer of receivables</p>			<p>The suggested text for Article 8 is materially identical to the corresponding text in the MLST. It is provided as a starting point for discussion.</p>
<p>1.</p>	<p>A transfer of a receivable is effective notwithstanding any agreement [between the initial or any subsequent transferor and the debtor or any transferee] limiting in any way the transferor's right to transfer the receivable.</p>	<p>Article 13(1) A security right in a receivable is effective notwithstanding any agreement between the initial or any subsequent grantor and the debtor of the receivable or any secured creditor limiting in any way the grantor's right to create a security right.</p>	<p>Article 9(1) An assignment of a receivable is effective notwithstanding any agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables.</p>	<p>The text in square brackets is in both the MLST and RC precedents. The Working Group may wish to consider, however, whether they are needed.</p>
<p>2.</p>	<p>Neither a transferor nor a transferee is liable to any person for breach by the transferor of an agreement referred to in paragraph 1, and the other party to the agreement may not avoid the contract giving rise to the receivable or the transfer agreement on the sole ground of the breach of that agreement. A person that is not a party to the agreement referred to in paragraph 1 is not</p>	<p>Article 13(2) Nothing in this Article affects any obligation or liability of the grantor for breach of the agreement referred to in paragraph 1, but the other party to the agreement may not avoid the contract giving rise to the receivable or the security agreement on the sole ground of the breach of that agreement, or raise against the secured creditor any claim it may have as a result of such a breach against the grantor, as provided in Article</p>	<p>Article 9(2) Nothing in this Article affects any obligation or liability of the assignor for breach of such an agreement, but the other party to such agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.</p>	<p>The Working Group decided at its first meeting that a debtor should not be able to sue a transferor at all for breaching an anti-assignment clause.¹¹ That goes beyond the language of Article 13(2) of the MLST.¹² As a result of this change in approach from the MLST, it may be that the final sentence of this paragraph is no longer needed.</p>

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

¹² See summary of this issue in Paragraph 162 of the Summary Report of the First Session of the Working Group (Study LVIII A – W.G.1 – Doc. 4 rev. 1)

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
	liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.	64, paragraph 2. A person that is not a party to the agreement referred to in paragraph 1 is not liable for the grantor's breach of the agreement on the sole ground that it had knowledge of the agreement.		
3.	This Article applies only to receivables:	Article 13(3) This Article applies only to receivables:	Article 9(3) This Article applies only to assignments of receivables:	<p>The Working Group decided at its Second meeting that this provision should be based on the corresponding text in the RC (Article 9). This drafting follows the substantially identical (but more recent) drafting of the MLST.</p> <p>At its Second meeting, the Working Group discussed but did not decide whether similar principles should apply to supporting rights.¹³</p> <p>More generally, the Working Group may wish to reconsider the breadth of these exclusions once the scope of the Model Law has been settled (i.e. some of the exclusions may not be needed).</p>
	(a) arising from a contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;	Article 13(3)(a) Arising from a contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;	Article 9(3)(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;	
	(b) arising from a contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;	Article 13(3)(b) Arising from a contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;	Article 9(3)(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;	

¹³ See discussion of this issue in Paragraphs 28-47 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
	(c) representing the payment obligation for a credit card transaction; or	Article 13(3)(c) Representing the payment obligation for a credit card transaction; or	Article 9(3)(c) Representing the payment obligation for a credit card transaction; or	
	(d) arising upon net settlement of payments due pursuant to a netting agreement involving more than two parties.	Article 13(3)(d) Arising upon net settlement of payments due pursuant to a netting agreement involving more than two parties.	Article 9(3)(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.	
	Article 9. Personal or property rights securing or supporting payment of a receivable			
	A transferee of a receivable has the benefit of any personal or property right that secures or supports payment of the receivable without a new act of transfer. If that right is transferable under the law governing it only with a new act of transfer, the transferor is obliged to transfer the benefit of that right to the transferee.	Article 14 A secured creditor with a security right in a receivable or other intangible asset or in a negotiable instrument has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset without a new act of transfer. If that right is transferable under the law governing it only with a new act of transfer, the grantor is obliged to transfer the benefit of that right to the secured creditor.	<p>Article 10. Transfer of security rights</p> <p>1. A personal or property right securing payment of the assigned receivable is transferred to the assignee without a new act of transfer. If such a right, under the law governing it, is transferable only with a new act of transfer, the assignor is obliged to transfer such right and any proceeds to the assignee.</p> <p>2. A right securing payment of the assigned receivable is transferred under paragraph 1 of this Article notwithstanding any agreement between the assignor and the debtor or other person granting that right, limiting in any way the assignor’s right to assign the receivable or the right securing payment of the assigned receivable.</p> <p>3. Nothing in this Article affects any obligation or liability of the assignor for</p>	<p>This is a topic that has not yet been considered in detail by the Working Group. The suggested text is materially the same as the corresponding provision in the MLST and is provided here as a starting point for discussion.¹⁴</p> <p>At its Second meeting, the Working Group also discussed but did not decide whether “anti-assignment override” rules should apply to supporting rights as well, along the lines of Article 10 of the RC.¹⁵</p>

¹⁴ See Paragraph 31 of the Issues Paper for the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 2)

¹⁵ See discussion of this issue in Paragraphs 28-47 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
			<p>breach of any agreement under paragraph 2 of this Article, but the other party to that agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person who is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.</p> <p>4. Paragraphs 2 and 3 of this Article apply only to assignments of receivables:</p> <p>(a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of real property;</p> <p>(b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;</p> <p>(c) Representing the payment obligation for a credit card transaction; or</p> <p>(d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.</p> <p>5. The transfer of a possessory property right under paragraph 1 of this Article does not affect any obligations of the assignor to the debtor or the person granting the property right with respect to</p>	

Art.	Suggested text	Corresponding Article in MLST	Corresponding Articles in RC	Discussion
			<p>the property transferred existing under the law governing that property right.</p> <p>6. Paragraph 1 of this Article does not affect any requirement under rules of law other than this Convention relating to the form or registration of the transfer of any rights securing payment of the assigned receivable.</p>	

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER III – MAKING A TRANSFER OF A RECEIVABLE EFFECTIVE AGAINST THIRD PARTIES

Art.	Suggested text	Corresponding Article in MLST	Corresponding Article in RC	Discussion
	Article 10. Registration			
1.	A transfer of a receivable is only effective against third parties if a notice with respect to the transfer is registered in the Registry.	Article 18(1) A security right in an encumbered asset is effective against third parties if a notice with respect to the security right is registered in the Registry.		For some aspects of registration, see Part I of the Issues Paper for the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 2)
2.	If the third-party effectiveness of a transfer lapses, third-party effectiveness may be re-established in accordance with paragraph 1, but the transfer is effective against third parties only as of that time.	Article 21 A security right that is effective against third parties remains effective against third parties despite a change in the method for achieving third-party effectiveness, provided that there is no time when the security right is not effective against third parties.		This provision may not be necessary, and the consequence of a lapse may be explained in a commentary.
	Article 11. Proceeds			
	[To be discussed.]	<p>1. If a security right in an asset is effective against third parties, a security right in any proceeds of that asset arising under Article 10 is effective against third parties without any further act if the proceeds are in the form of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.</p> <p>2. If a security right in an asset is effective against third parties, a security right arising under Article 10 in any proceeds of that asset other than the types of proceeds referred to in paragraph 1 is effective against third parties:</p> <p>(a) For [a short period of time to be specified by the enacting State] after the proceeds arise; and</p> <p>(b) Thereafter, only if the security right in the proceeds is made effective against third</p>	<p>1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:</p> <p>(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;</p> <p>(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and</p> <p>(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the</p>	

Art.	Suggested text	Corresponding Article in MLST	Corresponding Article in RC	Discussion
		parties by one of the methods applicable to the relevant type of encumbered asset referred to in the provisions of this chapter before the expiry of the time period specified in subparagraph (a).	proceeds and also to goods returned to such person in respect of the assigned receivable. 2. The assignee may not retain more than the value of its right in the receivable.	
	Article 12. Continuity in third-party effectiveness upon a change of the applicable law to this Law	Article 23		This topic is yet to be discussed by the Working Group.
1.	If a transfer is effective against third parties under the law of another State and this Law becomes applicable, the transfer remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of:	1. If a security right is effective against third parties under the law of another State and this Law becomes applicable, the security right remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of:		
	(a) the time when third-party effectiveness would have lapsed under the law of the other State; and	(a) The time when third-party effectiveness would have lapsed under the law of the other State; and		
	(b) the expiry of [a short period of time to be specified by the enacting State] after this Law becomes applicable.	(b) The expiry of [a short period of time to be specified by the enacting State] after this Law becomes applicable.		
2.	If a transfer continues to be effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.	2. If a security right continues to be effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.		

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER VI – RIGHTS AND OBLIGATIONS OF THE PARTIES

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Section I. Transferor and transferee			A number of provisions in the RC that are referenced in this Section (such as Articles 12(1) and 12(2)) contain text along the lines of “Unless otherwise agreed between the assignor and the assignee,…” This language will not be needed in those provisions if the Working Group agrees to retain proposed Article 3(1) in Chapter I, and so has not been included at this stage.
	Article (1). Rights and obligations of the transferor and the transferee	Article 52 Sources of mutual rights and obligations of the parties	Article 11 Rights and obligations of the assignor and the assignee	
1.	The mutual rights and obligations of the transferor and the transferee arising from their agreement are determined by the terms and conditions set out in that agreement, including any rules or general conditions referred to therein.	1. The mutual rights and obligations of the grantor and the secured creditor arising from their agreement are determined by the terms and conditions set out in that agreement, including any rules or general conditions referred to therein.	1. The mutual rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules or general conditions referred to therein.	
2.	The transferor and the transferee are bound by any usage to which they have agreed and, unless otherwise	2. The grantor and the secured creditor are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.	2. The assignor and the assignee are bound by any usage to which they have agreed and, unless otherwise agreed, by	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	agreed, by any practices they have established between themselves.		any practices they have established between themselves. 3. In an international assignment, the assignor and the assignee are considered, unless otherwise agreed, implicitly to have made applicable to the assignment a usage that in international trade is widely known to, and regularly observed by, parties to the particular type of assignment or to the assignment of the particular category of receivables.	
	Article (2). Representations of the transferor	Article 57 Representations of the grantor of a security right in a receivable	Article 12 Representations of the assignor	
1.	The transferor of a receivable represents, as at the time of the transfer, that:	1. At the time of conclusion of a security agreement that creates a security right in a receivable, the grantor represents that:	1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:	This text has been modified somewhat from the corresponding provisions in the MLST and the RC, in order to accommodate future receivables, as discussed at the Second meeting of the Working Group. ¹⁶
(a)	The transferor has the right to transfer the receivable;		(a) The assignor has the right to assign the receivable;	
(b)	The transferor has not previously transferred the receivable to another transferee; and	(a) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and	(b) The assignor has not previously assigned the receivable to another assignee; and	

¹⁶ See discussion of this issue in Paragraphs 10-15 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
(c)	The debtor does not and will not have any defences or rights of set-off.	(b) The debtor of the receivable does not and will not have any defences or rights of set-off.	(c) The debtor does not and will not have any defences or rights of set-off.	
2.	The transferor does not represent that the debtor has, or will have, the ability to pay.	2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.	2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor has, or will have, the ability to pay.	
	Article (3). Right to notify the debtor	Article 58 Right of the grantor or the secured creditor to notify the debtor of the receivable	Article 13 Right to notify the debtor	
1.	The transferor, the transferee or both may send the debtor notification of the transfer and a payment instruction, but after notification of the transfer has been received by the debtor only the transferee may send a payment instruction.	1. The grantor or the secured creditor or both may give the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been received by the debtor of the receivable only the secured creditor may send a payment instruction.	1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction.	
2.	Notification of a transfer or payment instruction sent in breach of an agreement between the transferor and the transferee is not ineffective for the purposes of Article (7), but nothing in this Article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.	2. Notification of a security right in a receivable or payment instruction sent in breach of an agreement between the grantor and the secured creditor is not ineffective for the purposes of Article 63, but nothing in this Article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.	2. Notification of the assignment or a payment instruction sent in breach of any agreement referred to in paragraph 1 of this Article is not ineffective for the purposes of Article 17 by reason of such breach. However, nothing in this Article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Article (4). Right to payment	Article 59 Right of the secured creditor to payment of a receivable	Article 14 Right to payment	<p>The Working Group will need to consider whether the words in square brackets in paragraphs (a), (b) and (c) should be deleted.</p> <p>Article 14 of the RC refers (most of the time) to an “assigned receivable”, rather than just a “receivable”. The Working Group may wish to consider whether the longer formulation should be used in this Article as well.</p>
1.	As between the transferor and the transferee, whether or not notification of the transfer has been sent:	1. As between the grantor of a security right in a receivable and the secured creditor, whether or not notification of the security right has been sent:	1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:	
(a)	If payment with respect to the receivable is made to the transferee, the transferee is entitled to retain the proceeds of payment [and goods returned in respect of the receivable];	(a) If payment with respect to the receivable is made to the secured creditor, the secured creditor is entitled to retain the proceeds of payment and to any tangible asset returned with respect to the receivable;	(a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and goods returned in respect of the assigned receivable;	
(b)	If payment in respect of the receivable is made to the transferor, the transferee is entitled to the proceeds [and also to goods returned to the transferor in respect of the receivable]; and	(b) If payment with respect to the receivable is made to the grantor, the secured creditor is entitled to payment of the proceeds of the payment and to any tangible asset returned to the grantor with respect to the receivable; and	(b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to goods returned to the assignor in respect of the assigned receivable; and	
(c)	If payment in respect of the receivable is made to another person over whom the transferee has priority, the transferee is entitled to payment of the proceeds of the payment [and to	(c) If payment with respect to the receivable is made to another person over whom the secured creditor has priority, the secured creditor is entitled to payment of the proceeds of the payment and to any	(c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to goods returned to	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	any asset returned to that person with respect to the receivable].	tangible asset returned to that person with respect to the receivable.	such person in respect of the assigned receivable.	
2.	The transferee may not retain more than the value of its right in the receivable.	2. The secured creditor may not retain more than the value of its right in the receivable.	2. The assignee may not retain more than the value of its right in the receivable.	
	Section II. Debtor			
	Article (5). Principle of debtor protection	Article 61 Protection of the debtor of the receivable	Article 15 Principle of debtor protection	The RC uses a defined term (“original contract”) to refer to the contract that gives rise to the receivable. The Working Group may wish to consider whether the Model Law should use the same approach, or follow the approach taken in the MLST.
1.	Except as otherwise provided in this Law, a transfer does not[, without the consent of the debtor,] affect the rights and obligations of the debtor, including the payment terms contained in the [original contract/contract giving rise to the receivable].	1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not, without the consent of the debtor of the receivable, affect its rights and obligations, including the payment terms contained in the contract giving rise to the receivable.	1. Except as otherwise provided in this Convention, an assignment does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the original contract.	Similar to the point made at the start of this table, the Working Group may consider that the words in square brackets are not needed, if the Working Group agrees to retain proposed Article 3(1) in Chapter 1.
2.	A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change:	2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:	2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change:	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
(a)	The currency of payment specified in the [original contract/contract giving rise to the receivable]; or	(a) The currency of payment specified in the contract giving rise to the receivable; or	(a) The currency of payment specified in the original contract; or	
(b)	The State specified in the [original contract/contract giving rise to the receivable] in which payment is to be made to a State other than that in which the debtor is located.	(b) The State specified in the contract giving rise to the receivable in which payment is to be made to a State other than that in which the debtor of the receivable is located.	(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor is located.	
	Article (6). Notification of the debtor	Article 62 Notification of a security right in a receivable	Article 16 Notification of the debtor	
1.	Notification of the transfer or a payment instruction is effective when received by the debtor if it [reasonably identifies the receivable and the transferee, and] is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the transfer or a payment instruction is in the language of the [original contract/contract giving rise to the receivable].	1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor, and is in a language that is reasonably expected to inform the debtor of the receivable about its contents. 2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.	1. Notification of the assignment or a payment instruction is effective when received by the debtor if it is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if notification of the assignment or a payment instruction is in the language of the original contract.	At its second meeting, the Working Group agreed that this Article should be based on Article 16 of the RC. The text in square brackets in the first sentence is not in Article 16, but instead is in the definition of “notification” in RC Article 5. In contrast, the MLST has a briefer definition of “notification of a security right in a receivable”, and instead includes the square-bracketed text in the MLST Article 62(1) itself. The Working Group may wish to consider what

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
				approach should be taken in the Model Law. ¹⁷
2.	Notification of the transfer or a payment instruction may relate to receivables arising after notification.	3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.	2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.	
3.	Notification of a transfer constitutes notification of all prior transfers.	4. Notification of a security right in a receivable created in favour of a secured creditor by the initial or any other secured creditor constitutes notification of all prior security rights in that receivable.	3. Notification of a subsequent assignment constitutes notification of all prior assignments.	<p>The corresponding provision in Article 62 of the MLST is somewhat more expansive. The Working Group may wish to consider which approach should be used in the Model Law.</p> <p>Also, Article 16(3) of the RC refers to notification of a “subsequent” assignment. The Working Group may also wish to consider whether the word “subsequent” is needed, or whether it could be left out (on the basis that it must by necessity be “subsequent” to the prior transfers).</p>
	Article (7). Debtor’s discharge by payment	Article 63 Discharge of the debtor of the receivable by payment	Article 17 Debtor’s discharge by payment	
1.	Until the debtor receives notification of the transfer, it is [entitled to be] discharged by paying in accordance	1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in	1. Until the debtor receives notification of the assignment, the debtor is entitled to be	The Working Group may wish to consider whether the first set of words in square brackets (which are

¹⁷ See discussion of this issue in Paragraphs 82-89 of the Summary Report of the Second Session of the Working Group (Study LVIII A – W.G.2 – Doc. 4)

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	with the [original contract/contract giving rise to the receivable].	accordance with the contract giving rise to the receivable.	discharged by paying in accordance with the original contract.	in the RC, but not the MLST) are needed.
2.	After the debtor receives notification of the transfer, subject to paragraphs 3 to 8, the debtor is discharged only by paying the transferee or, if otherwise instructed in the notification [of the transfer] or subsequently by the transferee in a writing received by the debtor, in accordance with that payment instruction.	2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with that payment instruction.	2. After the debtor receives notification of the assignment, subject to paragraphs 3 to 8 of this Article, the debtor is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor, in accordance with such payment instruction.	The Working Group may wish to consider whether the words in square brackets (which are in the RC, but not the MLST) are needed. The Working Group may also wish to consider whether the text starting with “or subsequently” is needed, or whether the subsequent writing in question would be a payment instruction and so covered already, by paragraph 3.
3.	If the debtor receives more than one payment instruction relating to a single transfer of the same receivable by the same transferor, the debtor is discharged by paying in accordance with the last payment instruction received from the transferee before payment.	3. If the debtor of the receivable receives more than one payment instruction relating to a single security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.	3. If the debtor receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, the debtor is discharged by paying in accordance with the last payment instruction received from the assignee before payment.	
4.	If the debtor receives notification of more than one transfer of the same receivable made by the same transferor, it is discharged by paying in accordance with the first notification received.	4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.	4. If the debtor receives notification of more than one assignment of the same receivable made by the same assignor, the debtor is discharged by paying in accordance with the first notification received.	
5.	If the debtor receives notification of one or more [subsequent transfers/transfers of the same	5. If the debtor of the receivable receives notification of one or more security rights in the same receivable created in favour of a	5. If the debtor receives notification of one or more subsequent assignments, the debtor is discharged by paying in	There are some differences in approach between Article 17(5) of the RC and Article 63(5) of the

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	receivable in favour of a transferee by the initial or any other transferee], it is discharged by paying in accordance with the notification of the last of such [subsequent] transfers.	secured creditor by the initial or any other secured creditor, it is discharged by paying in accordance with the notification of the last of such security rights.	accordance with the notification of the last of such subsequent assignments.	MLST. The Working Group may wish to discuss what approach should be taken in the Model Law. The Working Group may also wish to consider whether this paragraph should be subject to paragraph 4.
6.	If the debtor receives notification of the transfer of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this Article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.	6. If the debtor of the receivable receives notification of a security right in a part of or an undivided interest in one or more receivables, it is discharged either by paying in accordance with the notification or in accordance with this Article as if the debtor of the receivable had not received the notification. 7. If the debtor of the receivable receives a notification as provided in paragraph 6 and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.	6. If the debtor receives notification of the assignment of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this Article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.	
7.	If the debtor receives notification of the transfer from the transferee, the debtor is entitled to request the transferee to provide within a reasonable period of time adequate proof that the transfer from the initial transferor to the initial transferee and any intermediate transfer have been made. Unless the transferee does so, the debtor is discharged by paying in accordance with this Article as if the notification had not been received.	8. If the debtor of the receivable receives notification of a security right in the receivable from the secured creditor, the debtor of the receivable is entitled to request the secured creditor to provide within a reasonable period of time adequate proof of its security right and, if the security right is created in favour of a secured creditor by the initial or any other secured creditor, adequate proof of the security right created by the initial grantor in favour of the initial secured creditor, and of any intermediate security right. Unless the secured creditor does so, the debtor of the	7. If the debtor receives notification of the assignment from the assignee, the debtor is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor is discharged by paying in accordance with this Article as if the notification from the assignee had not been received. Adequate proof of an assignment	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Adequate proof of a transfer includes but is not limited to any writing emanating from the transferor and indicating that the transfer has taken place.	<p>receivable is discharged by paying in accordance with this Article as if it had not received notification of the security right.</p> <p>9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.</p>	includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.	
8.	This Article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund, discharges the debtor.	10. This Article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund, discharges the debtor of the receivable.	8. This Article does not affect any other ground on which payment by the debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor.	
	Article (8). Defences and rights of set-off of the debtor	Article 64 Defences and rights of set-off of the debtor of the receivable	Article 18 Defences and rights of set-off of the debtor	
1.	In a claim by the transferee against the debtor for payment of the [transferred] receivable, the debtor may raise against the transferee all defences and rights of set-off arising from the [original contract/contract giving rise to the receivable], or any other contract that was part of the same transaction, of which the debtor could avail itself as if the transfer had	<p>1. Unless otherwise agreed in accordance with Article 65, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:</p> <p>(a) In the case of a receivable arising from a contract, all defences and rights of set-off arising from that contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security</p>	1. In a claim by the assignee against the debtor for payment of the assigned receivable, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the assignment had not been made and such claim were made by the assignor.	Similar to the question posed in relation to Article (4), the Working Group may wish to consider whether the word “transferred” is needed.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	not been made and the claim were made by the transferor.	right had not been created and the claim were made by the grantor; and		
2.	The debtor may raise against the transferee any other right of set-off, provided that was available to the debtor at the time it received the notification.	(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.	2. The debtor may raise against the assignee any other right of set-off, provided that it was available to the debtor at the time notification of the assignment was received by the debtor.	
3.	[Notwithstanding paragraphs 1 and 2, defences and rights of set-off that the debtor may raise pursuant to Article [9 or 10] against the transferor for breach of an agreement limiting in any way the transferor's right to transfer the receivable are not available to the debtor against the transferee.]	2. Notwithstanding paragraph 1, the debtor of the receivable may not raise a breach of an agreement referred to in Article 13, paragraph 2, as a defence or right of set-off against the secured creditor.	3. Notwithstanding paragraphs 1 and 2 of this Article, defences and rights of set-off that the debtor may raise pursuant to Article 9 or 10 against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor against the assignee.	The Working Group may consider that this paragraph is not needed, if it forms the view that anti-assignment clauses should be completely ineffective, in that they do not preclude a transfer but also that a breach does not give rise to any actionable claims at all.
	Article (9). Agreement not to raise defences or rights of set-off	Article 65 Agreement not to raise defences or rights of set-off	Article 19 Agreement not to raise defences or rights of set-off	
1.	The debtor may agree with the transferor in a signed writing not to raise against the transferee the defences and rights of set-off that it could raise in accordance with Article (8). Such an agreement precludes the debtor from raising against the transferee those defences and rights of set-off.	1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off that it could raise in accordance with Article 64.	1. The debtor may agree with the assignor in a writing signed by the debtor not to raise against the assignee the defences and rights of set-off that it could raise pursuant to Article 18. Such an agreement precludes the debtor from raising against the assignee those defences and rights of set-off.	The Working Group may wish to consider whether the second sentence is needed, or whether it is sufficiently covered by the first sentence.
2.	The debtor may not waive defences:		2. The debtor may not waive defences:	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
(a)	Arising from fraudulent acts of the transferee; or		(a) Arising from fraudulent acts on the part of the assignee; or	
(b)	Based on the debtor’s incapacity.		(b) Based on the debtor’s incapacity.	
		3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.		
3.	Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the transferee is determined by Article (10), paragraph 2.	2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable. The effectiveness of such a modification against the secured creditor is determined by Article 66, paragraph 2.	3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the assignee is determined by Article 20, paragraph 2.	
	Article (10). Modification of the [original contract/contract giving rise to a receivable]	Article 66 Modification of the contract giving rise to a receivable	Article 20 Modification of the original contract	
1.	A modification of the [original contract/contract giving rise to a receivable] that is concluded before notification of the transfer between the transferor and the debtor and that affects the transferee’s rights is effective as against the transferee, and the transferee acquires corresponding rights.	1. In the case of a receivable arising from a contract, an agreement concluded before notification of a security right in a receivable between the grantor and the debtor of the receivable that affects the secured creditor’s rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.	1. An agreement concluded before notification of the assignment between the assignor and the debtor that affects the assignee’s rights is effective as against the assignee, and the assignee acquires corresponding rights.	The start of this paragraph has been adjusted to more closely track the heading to the Article. Other adjustments are designed to improve its readability.
2.	An agreement concluded after notification of the transfer between the transferor and the debtor that	2. An agreement under paragraph 1 concluded after notification of a security	2. An agreement concluded after notification of the assignment between the assignor and the debtor that affects the	

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	affects the transferee's rights is ineffective against the transferee unless:	right in a receivable is ineffective against the secured creditor unless:	assignee's rights is ineffective as against the assignee unless:	
(a)	The transferee consents to it; or	(a) The secured creditor consents to it; or	(a) The assignee consents to it; or	
(b)	The receivable is not fully earned by performance and [either the modification is provided for in the [original contract/contract giving rise to the receivable] or,] in the context of [the original contract/that contract], a reasonable transferee would consent to the modification.	(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.	(b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.	The Working Group may wish to consider what type of modification is contemplated by the text in square brackets.
3.	Paragraphs 1 and 2 do not affect any right of the transferor or the transferee arising from breach of an agreement between them.	3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.	3. Paragraphs 1 and 2 of this Article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.	
	Article (11). Recovery of payments	Article 67 Recovery of payments	Article 21 Recovery of payments	
	Failure of the transferor to perform the [original contract/ contract giving rise to the receivable] does not entitle the debtor to recover from the transferee a sum paid by the debtor to the transferor or the transferee.	The failure of the grantor of a security right in a receivable arising from a contract to perform that contract does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.	Failure of the assignor to perform the original contract does not entitle the debtor to recover from the assignee a sum paid by the debtor to the assignor or the assignee.	

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER VII – COLLECTION AND ENFORCEMENT

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	<p>A. Outright transfers</p>		<p>A number of provisions in this Chapter deal only with outright transfers, or only with security transfers. In doing so, the drafting follows the dichotomy employed in the MLST. The Working Group may wish to consider whether these should be made defined terms, for example using the distinction drawn between paragraphs (a) and (b) of the draft definition of “transfer” in Article 2 of Chapter I. (The proposed drafting for this Chapter assumes that this will be done.)</p> <p>As an alternative, the Working Group may wish to consider whether this Chapter needs to have separate provisions for outright vs security transfers (given that they are largely identical), or whether the bulk of the Articles can be amalgamated.</p> <p>The Working Group may also wish to consider how this Chapter should apply if the collection or enforcement is to take place after the relevant receivables have been converted into proceeds, so that the transferee is no longer enforcing against receivables as such.</p>
	<p>Article (1). Collection of payment under an outright transfer</p>	<p>Article 83 Collection of payment by an outright transferee of a receivable</p>	
<p>1.</p>	<p>The transferee under an outright transfer of a receivable is entitled to collect the</p>	<p>1. In the case of an outright transfer of a receivable by agreement, the transferee is entitled to collect the receivable at any time after payment becomes due.</p>	<p>As the Model Law deals only with transfers by agreement (see the definition of “transfer” in</p>

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	receivable at any time after payment becomes due.		Article 2 of Chapter I), the words “by agreement” may not be needed. The other suggested amendments are intended to align the structure of the paragraph more closely to the corresponding paragraph in Article (2) below, for consistency.
2.	The transferee exercising the right to collect under paragraph 1 is also entitled to enforce any personal or property right that secures or supports payment of the receivable.	2. The transferee exercising the right to collect under paragraph 1 is also entitled to enforce any personal or property right that secures or supports payment of the receivable.	
3.	The right of the transferee to collect under paragraphs 1 and 2 is subject to Articles [rights and obligations of debtors].	3. The right of the transferee to collect under paragraphs 1 and 2 is subject to Articles 61-71.	
	B. Security transfers		See the comment above in relation to the heading to Part A. The Working Group may also wish to consider whether this part of the Chapter should include provisions equivalent to Articles 74-76 of the MLST.
	Article (2). Collection of payment under a security transfer	Article 82 Collection of payment	
1.	After default, the transferee under a security transfer of a receivable is entitled to collect the receivable at any time after payment becomes due.	1. After default, the secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank account or non-intermediated security is entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, deposit-taking institution or issuer of the non-intermediated security.	A number of suggested changes from the text of the MLST are designed to align the language more closely to proposed Article (1)(1). The language (and other provisions in this Chapter) may need to be reconsidered once the

Art.	Suggested text	Corresponding Articles in MLST	Discussion
			Working Group has decided on the extent to which the Model Law should apply to bank accounts (whether as “receivables”, or as proceeds).
2.	The transferee may exercise the right to collect under paragraph 1 before default if the transferor consents.	2. The secured creditor may exercise the right to collect under paragraph 1 before default if the grantor consents.	
3.	The transferor exercising the right to collect under paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the receivable.	3. The secured creditor exercising the right to collect under paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.	
4.	If a transfer of a right to payment of funds credited to a bank account has been made effective against third parties by registration of a notice, the transferee is entitled to collect or otherwise enforce its interest in the bank account only pursuant to an order of a court, unless the deposit-taking institution agrees otherwise.]	4. If a security right in a right to payment of funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security right only pursuant to an order of a court, unless the deposit-taking institution agrees otherwise.	Similar to the comment in relation to paragraph 1, this will need to be reconsidered once the Working Group has decided whether (and if so, how) the Model Law is to apply in relation to bank accounts.
[4/5].	The right of the transferee to collect under paragraphs 1 to [3/4] is subject to Articles [rights and obligations of debtors].	5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to Articles 61-71.	
	Article (3). Right of the transferee to [dispose of/sell] a receivable	Article 78 Right of the secured creditor to dispose of an encumbered asset	The Working Group may wish to consider whether this Article needs to refer to “sale or other disposal”, or whether it can be limited to “sales” only.

Art.	Suggested text	Corresponding Articles in MLST	Discussion
			The Working Group may also wish to consider whether this Chapter needs to retain the references to judicial enforcement.
1.	After default, the transferee under a security transfer is entitled to sell [or otherwise dispose of] the receivable either by applying or without applying to [a court or other authority to be specified by the enacting State].	1. After default, the secured creditor is entitled to sell or otherwise dispose of, lease or license an encumbered asset either by applying or without applying to [a court or other authority to be specified by the enacting State].	
2.	If the transferee decides to exercise the right provided in paragraph 1 by applying to [a court or other authority to be specified by the enacting State], the method, manner, time, place and other aspects of the sale [or other disposition] are determined by [the rules to be specified by the enacting State].	2. If the secured creditor decides to exercise the right provided in paragraph 1 by applying to [a court or other authority to be specified by the enacting State], the method, manner, time, place and other aspects of the sale or other disposition, lease or licence are determined by [the rules to be specified by the enacting State].	
3.	If the transferee decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to be specified by the enacting State], the transferee may select the method, manner, time, place and other aspects of the sale [or other disposition], including whether to sell [or otherwise dispose of] receivables individually, in groups or altogether.	3. If the secured creditor decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to be specified by the enacting State], the secured creditor may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence, including whether to sell or otherwise dispose of, lease or license encumbered assets individually, in groups or altogether.	
4.	If the transferee decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to	4. If the secured creditor decides to exercise the right provided in paragraph 1 without applying to [a court or other authority to be specified by the enacting State], the secured creditor must give notice of its intention to:	

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	be specified by the enacting State], the transferee must give notice of its intention to:		
(a)	The transferor [and any person who owes the [secured obligation/obligation that is secured by the security transfer];	(a) The grantor and the debtor;	
(b)	Any person with a right in the receivable that informs the transferee of that right in writing at least [a short period of time to be specified by the enacting State] before the notice is sent to the transferor; and	(b) Any person with a right in the encumbered asset that informs the secured creditor of that right in writing at least [a short period of time to be specified by the enacting State] before the notice is sent to the grantor;	
(c)	Any other transferee that registered a notice with respect to a transfer of the receivable at least [a short period of time to be specified by the enacting State] before the notice is sent to the transferor.	(c) Any other secured creditor that registered a notice with respect to a security right in the encumbered asset at least [a short period of time to be specified by the enacting State] before the notice is sent to the grantor; and	
		(d) Any other secured creditor that was in possession of the encumbered asset when the enforcing secured creditor took possession.	
5.	The notice referred to in paragraph 4 must be given at least [a short period of time to be specified by the enacting State] before the sale [or other disposition] takes place and must contain:	5. The notice referred to in paragraph 4 must be given at least [a short period of time to be specified by the enacting State] before the sale or other disposition, lease or licence takes place and must contain:	
(a)	A description of the receivables;	(a) A description of the encumbered assets;	
(b)	A statement of the amount required at the time the notice is given to satisfy the [secured obligation/obligation secured by	(b) A statement of the amount required at the time the notice is given to satisfy the secured obligation, including interest and the reasonable cost of enforcement;	

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	the security transfer], including interest and the reasonable cost of enforcement;		
(c)	A statement that the transferor or any other person with a right in the receivable is entitled to terminate the enforcement process as provided in Article [75]; and	(c) A statement that the grantor, any other person with a right in the encumbered asset or the debtor is entitled to terminate the enforcement process as provided in Article 75; and	See the question put to the Working Group in relation to the heading to this Part B.
(d)	A statement of the date after which the receivable will be sold [or otherwise disposed of] or, in the case of a public [sale/disposition], the time, place and manner of the intended [sale/disposition].	(d) A statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, or, in the case of a public disposition, the time, place and manner of the intended disposition.	
6.	The notice referred to in paragraph 4 must be in a language that is reasonably expected to inform the recipient about its content.	6. The notice referred to in paragraph 4 must be in a language that is reasonably expected to inform the recipient about its content.	
7.	It is sufficient if the notice to the transferor referred to in paragraph 4 is in the language of the transfer agreement.	7. It is sufficient if the notice to the grantor referred to in paragraph 4 is in the language of the security agreement.	
8.	The notice referred to in paragraph 4 need not be given if the receivable is of a kind sold on a recognized market.	8. The notice referred to in paragraph 4 need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.	
	Article (4). Distribution of the proceeds of a [sale/disposition] of a receivable and transferor's liability for any deficiency	Article 79 Distribution of the proceeds of a disposition of an encumbered asset and debtor's liability for any deficiency	
1.	If the transferee decides to exercise the right provided in Article [(3)] by applying to [a court or other authority to be specified by the enacting State], the	1. If the secured creditor decides to exercise the right provided in Article 78 by applying to [a court or other authority to be specified by the enacting State], the distribution of the proceeds of sale or other disposition of, lease or licence of an encumbered asset is determined by [the provisions to be	

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	distribution of the proceeds of sale [or other disposition] of a receivable is determined by [the provisions to be specified by the enacting State], but in accordance with the provisions of this Law on priority.	specified by the enacting State], but in accordance with the provisions of this Law on priority.	
2.	If the transferee decides to exercise the right provided in Article [(3)] without applying to [a court or other authority to be specified by the enacting State]:	2. If the secured creditor decides to exercise the right provided in Article 78 without applying to [a court or other authority to be specified by the enacting State]:	
(a)	[Subject to Article [preferential claims],] the enforcing transferee must apply the proceeds of its enforcement to the [secured obligation/obligation secured by the transfer] after deducting the reasonable cost of enforcement;	(a) [Subject to Article 36,] the enforcing secured creditor must apply the proceeds of its enforcement to the secured obligation after deducting the reasonable cost of enforcement;	
(b)	Except as provided in paragraph 2(c), the enforcing transferee must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing transferee of its claim, to the extent of the amount of that claim, and remit any balance remaining to the transferor; and	(b) Except as provided in paragraph 2 (c), the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim, to the extent of the amount of that claim, and remit any balance remaining to the grantor; and	
(c)	Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing transferee may pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified	(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.	

Art.	Suggested text	Corresponding Articles in MLST	Discussion
	by the enacting State] for distribution in accordance with the provisions of this Law on priority.		
3.	The transferor remains liable for any amount owing after application of the net proceeds of enforcement to the [secured obligation/obligation secured by the transfer].	3. The debtor remains liable for any amount owing after application of the net proceeds of enforcement to the secured obligation.	
	Article (5). Post-default rights	Article 72 Post-default rights	
1.	After default, the transferor and the transferee under a security transfer are entitled to exercise:	1. After default, the grantor and the secured creditor are entitled to exercise:	The Working Group may wish to consider whether this Article needs to refer to the transferor.
(a)	Any right under [the provisions of] this chapter; and	(a) Any right under the provisions of this chapter; and	Query whether the words in brackets are needed.
(b)	Any other right provided in the transfer agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.	(b) Any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.	The Working Group may wish to consider whether this provision has any practical application in the context of receivables, or whether it can be deleted.
2.	The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.	2. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.	
3.	Before default, the transferor under a security transfer may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.	3. Before default, the grantor or the debtor may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.	

MODEL LAW ON FACTORING

DRAFTING SUGGESTIONS FOR CHAPTER VIII – CONFLICT OF LAWS

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Definition of “priority”			
	<p>“priority” means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination of the nature of the right, whether the right arises under an [absolute/outright] transfer or is a security right, and whether any requirements necessary to render the right effective against a competing claimant¹⁸ have been satisfied.</p>	<p>Article 2(aa). “Priority” means the right of a person in an encumbered asset in preference to the right of a competing claimant.</p>	<p>Article 5(g). “Priority” means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied.</p>	<p>The proposed text follows the formulation in the RC. The Working Group may wish to consider, however, whether the definition should be limited to the first one and a half lines, and moved to the definitions Article in Chapter I (the approach in the MLST). The balance of the text, if desired, could then be included at the start of Chapter VIII as an interpretive rule for that Chapter, or built into the text of the Articles in Chapter VIII that deal with priority questions.</p> <p>Whichever approach is adopted, the text highlighted in green will need to be aligned with the terminology in the definition of “transfer”, when that definition has been settled.</p>

¹⁸ To be defined.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Article (1).¹⁹ Mutual rights and obligations of the parties			
	<ol style="list-style-type: none"> 1. The law applicable to the mutual rights and obligations of the transferor and the transferee arising from their transfer agreement is the law chosen by them and, in the absence of a choice of law, the law governing the transfer agreement. 2. The law applicable to: <ol style="list-style-type: none"> (a) The mutual rights and obligations of the debtor and the transferee; (b) The conditions under which the transfer may be invoked against the debtor, including whether an agreement limiting the transferor's right to transfer the receivable may be asserted by the debtor; and (c) Whether the obligations of the debtor have been discharged, is the law governing the rights and obligations between the debtor and the transferor. 	<p>Article 84.</p> <p>The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, the law governing the security agreement.</p> <p>Article 96.</p> <p>The law governing the rights and obligations between a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document and the grantor of a security right in that type of asset also is the law applicable to:</p> <ol style="list-style-type: none"> (a) The rights and obligations between the secured creditor and the debtor, obligor or issuer; (b) The conditions under which the security right may be invoked against the debtor, obligor or issuer, including whether an agreement limiting the grantor's right to create a security right 	<p>Article 28.</p> <p>The mutual rights and obligations of the assignor and the assignee arising from their agreement are governed by the law chosen by them.</p> <p>2. In the absence of a choice of law by the assignor and the assignee, their mutual rights and obligations arising from their agreement are governed by the law of the State with which the contract of assignment is most closely connected.</p> <p>Article 29.</p> <p>The law governing the original contract determines the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.</p>	<p>As suggested in the Issues Paper, this drafting merges MLST Articles 84 and 96. The order of the information in para 2 has been reworked a bit as against MLST Article 96, to make it more consistent with para 1.</p>

¹⁹ Temporary numbering system used.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		<p>may be asserted by the debtor, obligor or issuer; and</p> <p>(c) Whether the obligations of the debtor, obligor or issuer have been discharged.</p>		
	<p>Article (2). Effectiveness and priority of transfers</p>			
	<p>Except as provided in Articles [(3) and [MLST 97/98?]], the law applicable to the effectiveness and priority of a transfer of a receivable is the law of the State in which the transferor is located.</p>	<p>Article 86.</p> <p>Except as provided in Articles 87 and 97-100, the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.</p>	<p>Article 30.</p> <ol style="list-style-type: none"> 1. The law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant. 2. The rules of the law of either the forum State or any other State that are mandatory irrespective of the law otherwise applicable may not prevent the application of a provision of the law of the State in which the assignor is located. 3. Notwithstanding paragraph 2 of this Article, in an insolvency proceeding commenced in a State other than the State in which the assignor is located, any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an assignee in insolvency 	<p>We may not need an equivalent of MLST Articles 97 and 98. See below.</p> <p>The term “effectiveness” is intended to encompass effectiveness both as between transferor and transferee, and as against third parties.</p>

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
			proceedings under the law of that State may be given priority notwithstanding paragraph 1 of this Article.	
	Article (3). Transfers of receivables relating to immovable property			
	Notwithstanding Article [(2)], in the case of a transfer of a receivable that either arises from the sale or lease of immovable property or is secured by immovable property, the law applicable to the priority of the transfer of the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which rights in the relevant immovable may be registered is the law of the State under whose authority the immovable property registry is maintained.	Article 87. Notwithstanding Article 86, in the case of a security right in a receivable that either arises from the sale or lease of immovable property or is secured by immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which rights in the relevant immovable may be registered is the law of the State under whose authority the immovable property registry is maintained.		This provision will not be needed if the concept of “receivable” is defined in a way that does not include the types of receivables referred to in the provision.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Article (4). Enforcement of transfers			
	The law applicable to issues relating to the enforcement of a transfer of a receivable is the law applicable to the priority of the transfer[, except as provided in Article [MLST 97]].	<p>Article 88.</p> <p>The law applicable to issues relating to the enforcement of a security right in:</p> <p>(a) A tangible asset is the law of the State in which the asset is located at the time of commencement of enforcement, except as provided in Article 100; and</p> <p>(b) An intangible asset is the law applicable to the priority of the security right, except as provided in Articles 97, 99 and 100.</p>		<p>Question for the Working Group: should this provision apply only to security rights?</p> <p>As noted later in this table, it has not yet been decided whether to include an equivalent of MLST Article 97 in the Model Law. Even if we do, though, it is not clear why it should be described as an exception to this Article. (The same question applies for MLST Article 88 as well.)</p>
	Article (5). Proceeds			
	1. The law applicable to the effectiveness as between the transferor and the transferee of a transfer of proceeds is the law applicable to the effectiveness as between the transferor and the transferee of the transfer of the receivable from which the proceeds arose.	Article 89(1). The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.		
	2. The law applicable to the third-party effectiveness and priority of a transfer of proceeds is the law applicable to the third-party effectiveness and priority of a transfer of a receivable of the same kind as the proceeds.	Article 89(2). The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an		This drafting only works to the extent that the proceeds are themselves receivables. It will need to be reconsidered if a broader definition of “proceeds” is adopted.

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		original encumbered asset of the same kind as the proceeds.		
	Article (6). Meaning of “location” of the transferor			
	<p>For the purposes of the provisions of this chapter, the transferor is located:</p> <ul style="list-style-type: none"> (a) In the State in which it has its place of business; (b) If the transferor has a place of business in more than one State, in the State in which the central administration of the transferor is exercised; and (c) If the transferor does not have a place of business, in the State in which the transferor has his or her habitual residence. 	<p>Article 90.</p> <p>For the purposes of the provisions of this chapter, the grantor is located:</p> <ul style="list-style-type: none"> (a) In the State in which it has its place of business; (b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and (c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence 		<p>The highlighted words appear in MLST Article 90. Query, however, whether they are needed or whether, in the interests of brevity, they could be deleted. The same point arises in Articles (7), (8), (9) and (10).</p>
	Article (7). Relevant time for determining location			
	<ul style="list-style-type: none"> 1. Except as provided in paragraph 2, references to the location of the transferor in the provisions of this chapter refer: <ul style="list-style-type: none"> (a) For issues relating to the effectiveness of the transfer as between the transferor and the 	<p>Article 91.</p> <ul style="list-style-type: none"> 1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer: 		

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	<p>transferee, to the location of the transferor at the time of the putative creation of the transfer; and</p> <p>(b) For third-party effectiveness and priority issues, to the location of the transferor at the time the issue arises.</p> <p>2. If the right of a transferee in a receivable is made effective against the transferor and third parties and the rights of all competing claimants are established before a change in the location of the transferor, references in the provisions of this chapter to the location of the transferor are references, with respect to third-party effectiveness and priority issues, to the location prior to the change.</p>	<p>(a) For creation issues, to the location at the time of the putative creation of the security right; and</p> <p>(b) For third-party effectiveness and priority issues, to the location at the time when the issue arises.</p> <p>2. If the right of a secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change.</p>		
	<p>Article (8). Exclusion of <i>renvoi</i></p>	<p>Article 92. Exclusion of <i>renvoi</i></p>		
	<p>A reference in the provisions of this chapter to “the law” of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.</p>	<p>A reference in the provisions of this chapter to “the law” of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.</p>		

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
	Article (9). Overriding mandatory rules and public policy (<i>ordre public</i>)			
	<ol style="list-style-type: none"> 1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter. 2. This Article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a transfer. 	<p>Article 93(1). The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.</p> <p>Article 93(6). This Article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right.</p>		
	Article (10). Commencement of insolvency proceedings does not affect the law applicable to a transfer			The corresponding heading in the MLST is a bit confusing, because it suggests that insolvency proceedings can have an impact (i.e. the opposite of what the Article actually says). It has been reworked to remove the confusion.
	The commencement of insolvency proceedings in respect of the transferor does not displace the law applicable to a transfer under the provisions of this chapter.	Article 94. The commencement of insolvency proceedings in respect of the grantor does not displace the law applicable to a security right under the provisions of this chapter.		The Issues Paper suggested that this could be merged with the previous Article. The two Articles are a bit different, however - the previous Article deals with what courts can or cannot decide to do, whereas this Article is a straight black-letter rule. The two provisions have been kept separate for

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
				the time being, so that the WG can consider this further.
	Article (11). Multi-unit States			
	<p>If the law applicable to an issue is the law of a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue:</p> <ul style="list-style-type: none"> (a) Any reference in the provisions of this chapter to the law of a State means the law in force in the relevant territorial unit; and (b) The internal conflict-of-laws rules of that State, or in the absence of such rules, of that territorial unit determine the territorial unit whose substantive law is to apply. 	<p>Article 95.</p> <p>If the law applicable to an issue is the law of a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue:</p> <ul style="list-style-type: none"> (a) Any reference in the provisions of this chapter to the law of a State means the law in force in the relevant territorial unit; and (b) The internal conflict-of-laws rules of that State, or in the absence of such rules, of that territorial unit determine the relevant territorial unit whose substantive law is to apply. 		
	[Transfers of rights to payment of funds credited to a bank account]	<p>Article 97.</p> <p>1. Subject to Article 98, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between</p>		<p>The Working Group has not yet decided whether bank accounts should be within the definition of “receivable” for the purposes of the Model Law. The preliminary drafting of chapter I suggests, however, that they should not be included. This is a placeholder to ensure that we include an equivalent of</p>

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		<p>the deposit-taking institution and the secured creditor, is</p> <p>Option A</p> <p>the law of the State in which the deposit-taking institution maintaining the account has its place of business.</p> <p>2. If the deposit-taking institution has places of business in more than one State, the law applicable is the law of the State in which the office maintaining the account is located.</p> <p>Option B</p> <p>the law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that the law of another State is applicable to all such issues, the law of that other State.</p> <p>2. The law of the State determined pursuant to paragraph 1 applies only if the deposit-taking institution has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.</p> <p>3. If the applicable law is not determined pursuant to</p>		<p>MLST 97 in the drafting, if a decision is made to the contrary.</p>

Art.	Suggested text	Corresponding Articles in MLST	Corresponding Articles in RC	Discussion
		<p>paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on Article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, to be inserted here by the enacting State].</p>		
	<p>[Third-party effectiveness of a transfer by registration]</p>	<p>Article 98. If the law of the State in which a grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security, the law of that State also is the law applicable to the third-party effectiveness of the security right in that asset by registration.</p>		<p>MLST 98 provides that the applicable law for security rights over certain types of assets is to be the law of the location of the grantor, even if the general rules in the MLST provide otherwise. Those asset types include bank accounts.</p> <p>Bank accounts could also be subject to the Model Law, either (potentially) as a type of receivable, or as proceeds. Despite this, an equivalent provision may be needed in the Model Law, because the Model Law already uses the location of the transferor as the relevant nexus. (This may need to be reconsidered, however, if the Model Law includes an equivalent of MLST 97 – see the previous item).</p>