



INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW  
INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

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**Factoring Model Law Working Group**

***Third session (remote)***  
**Rome, 26 – 28 May 2021**

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**SUMMARY REPORT**  
**OF THE THIRD SESSION**  
**(Videoconference, 26 – 28 May 2021)**

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1. The third session of the Working Group (the Working Group) to prepare a Model Law on Factoring (MLF) took place via videoconference between 26 and 28 May 2021. The Working Group was attended by 32 participants, comprising of (i) 9 Working Group Members, (ii) 7 observers from six international, regional and intergovernmental organisations, 9 industry associations and academia and (iii) 7 members of the UNIDROIT Secretariat (the list of participants is available in Annex II).

**Item 1: Opening of the session by the Chair**

2. The Chair of the Working Group and Member of the UNIDROIT Governing Council *Henry Gabriel* (Chair) welcomed all participants to the third session.

3. *The Chair declared the session open.*

**Item 2: Adoption of the agenda and organisation of the session**

4. *The Working Group adopted the draft Agenda (UNIDROIT 2021 – Study LVIII A – W.G.3 – Doc. 1, available in Annex I).*

**Item 3: Adoption the Summary Report of the Second Session (Study LVIII A – W.G.2 – Doc. 4)**

5. *The Working Group adopted the Summary Report of the Second Session (UNIDROIT 2021 – Study LVIII A – W.G.3 – Doc. 4).*

**Item 4: Consideration of substantive matters**

**1. Matters identified in the Issues Paper (Study LVIII A – W.G.3 – Doc. 2)**

**Scope of the Model Law on Factoring**

**(a) Negotiable Instruments**

6. With reference to paragraphs 23 – 24 of the Issues Paper, the *Chair* opened the floor for comments on whether the MLF should apply to negotiable instruments.

7. The Working Group discussed the use of negotiable instruments in different States. It was noted parties in developing States tended to use negotiable instruments to strengthen enforcement rights. *Several experts* suggested that as negotiable instruments were regulated by a separate legal regime to factoring it would be undesirable for the MLF to cover negotiable instruments. It was suggested that the MLF should apply to proceeds and supporting obligations in the form of negotiable instruments, but should not apply to transfers of negotiable instruments.

8. *A representative of Factor Chain International (FCI)* explained that bills of exchange were used in many developing States under factoring contracts because investors did not have sufficient confidence that they would get redress from courts under factoring contracts alone. Financial institutions in other States used post-dated cheques to strengthen the creditor's ability to collect

from the debtor. FCI estimated that only a small percentage of the \$3 trillion dollar factoring industry was based on factoring backed by bills of exchange or post-dated cheques.

9. *A representative of the APEC Financial Infrastructure Development Network (APEC FIDN) agreed that negotiable instruments should not be included within the scope of the MLF. However, it noted that negotiable instruments would continue to be an important part of the legal regimes in many States and suggested that the MLF could include a provision clarifying that the MLF would not preclude the use of other existing mechanisms (such as forfaiting). Several participants supported the notion but suggested that it was best dealt with in the Guide to Enactment rather than the MLF itself.*

10. *The Chair summarised the discussion. The Working Group agreed that the MLF would not apply to negotiable instruments. The Working Group further agreed that the Guide to Enactment should provide guidance to States in relation to how a new factoring law should intersect with the use of negotiable instruments. The Guide to Enactment should encourage implementing States to transition to modern factoring practices, without precluding the continued use of negotiable instruments.*

#### **(b) Exclusions from the scope**

11. *With reference to paragraph 25 of the Issues Paper, the Chair opened the floor for comments on whether the MLF should exclude certain types of transactions from its scope.*

12. *The Working Group discussed whether it would be preferable for the MLF to define its scope broadly and include a list of exclusions or alternatively define its scope narrowly by including a limited list of transactions covered by the instrument. It was explained that Article 9 of the United States Uniform Commercial Code included a broad definition and a list of exclusions, whereas Article 9(3) of the 2001 United Nations Convention on the Assignment of Receivables in International Trade (Receivables Convention) included a more limited list of payment rights within the scope of the Convention. Some experts favoured the MLF having a scope limited to payment rights arising from the sale of goods or the provision of services. It was argued that such an approach would avoid the need for a lengthy and complex list of exclusions, which might deter some States from implementing the instrument. Other experts favoured a broader scope with a list of exclusions. It was noted that if a broad scope were to be adopted, a full list of potential exclusions that implementing States could make would be best set out in the Guide to Enactment.*

13. *A representative of the Kozolchyk National Law Center (NatLaw) suggested that the preferable approach regarding the scope of the MLF would depend on the type of State that the instrument was targeting. For States like Jordan and the United Arab Emirates with functioning secured transactions laws, a narrowly defined scope could be preferable as it would allow the MLF to be neatly implemented alongside the existing secured transaction regime. However, for States with no effective secured transactions laws that were considering the MLF as a first step towards broader secured transactions reform, a broader scope could be preferable.*

14. *Neil Cohen noted that a simple and limited scope could be preferable. However, he cautioned that including a narrow scope based on goods and services could become anachronistic due to the increasing use of bundled transactions that included goods, services, intellectual property, licencing, financing and data sharing. It was explained that such hybrid transactions might not easily fall within the definition of "goods and services". It was noted that further consideration would need to be given to bundled transactions which included monetary obligations relating to some transactions within the scope of the MLF and some transactions outside the scope of the MLF. It was further noted that Article 9(3) of the Receivables Convention was a useful starting point for the discussion, however it should not be treated as sacrosanct as its purpose was to provide a 1990s functional approach to*

defining trade receivables. Finally, It was explained that there were two types of exclusions, (i) exclusions due to the nature of the receivable and (ii) exclusions due to the nature of the assignment (transfer). It was suggested that the two different types of exclusions should be discussed separately to avoid confusion.

15. The Working Group did not reach a consensus on how the MLF should approach the scope question and decided that the matter should be considered further at a future meeting. The Working Group went on to consider whether specific types of payment rights should be included within the scope of the instrument, with reference to Article 9(3) of the Receivables Convention.

16. *The Working Group agreed that receivables arising from a contract for the supply or lease of goods or services should be included within the scope of the MLF.*

17. It was suggested that the Guide to Enactment could explain the difficulties that would arise in relation to receivables arising from real property contracts. *Megumi Hara* suggested that the Working Group give further consideration to the assignment of future receivables arising from real property contracts, such as rent. *A representative of NatLaw* noted that while rent was a future receivable that could be financed, it was not typically part of a standard factoring transaction. *The Working Group agreed that receivables arising from a contract for the sale or lease of real property should be retained in square brackets in the scope of the MLF for further consideration.*

18. *The Working Group agreed that receivables arising from a contract for the sale, lease or licence of industrial or other intellectual property should be included within the scope of the MLF, noting that the drafting of the inclusion might require further consideration.*

19. *FCI* noted that the factoring of credit card transactions was practiced by its members, although it was not common. It was suggested that there would be no harm in including credit card transactions within the scope, as it might facilitate access to credit in jurisdictions that adopt the MLF. *Megumi Hara* noted that when the Japanese Civil Code was being reformed, credit card companies had lobbied for anti-assignment clauses to be effective in order to prevent shops where a credit card was used transferring the receivable. It was queried whether this issue would require further consideration in the MLF. *Michel Deschamps* noted that when a consumer used a credit card, in Canada the transaction was characterised as one arising from a credit contract, rather than a contract for the supply of goods or services. The *Chair* affirmed that in the United States, credit card receivables were treated as accounts so they could be used for the purposes of receivables financing. The *Chair* concluded that the matter would need to be explained in the Guide to Enactment. *The Working Group agreed that receivables representing the payment obligation for a credit card transaction should be included within the scope of the MLF.*

20. *The Working Group agreed that the assignment of a net amount owing pursuant to a netting agreement should not be included in the scope of the MLF.*

### **(c) Anti-assignment clauses**

21. The *Chair* recalled that the Working Group had previously decided that the MLF should provide for anti-assignment clauses (AACs) to be ineffective (as consistent with the Receivables Convention), and that the MLF should not preserve the right of the debtor to claim damages from the transferor.

22. With reference to paragraphs 26-32 of the Issues Paper, the *Chair* invited the Working Group to further discuss the scope of the AAC override in the MLF. *Louise Gullifer* suggested that the limit on the scope of AAC override clauses should be connected to the scope of the MLF itself and that the two issues could not be separated.

23. *Several experts* noted that it was too difficult to try to identify in the MLF itself all possible statutory restrictions on assignments that might arise in different jurisdictions. The Working Group agreed that the Guide to Enactment should encourage implementing States to only provide for statutory restrictions on assignments in limited circumstances for important public policy reasons. It was noted that the inclusion of excessive statutory restrictions on assignments would undermine confidence in new factoring laws. *The Working Group decided that the MLF should stay silent on statutory restrictions on assignments and that the matter should instead be addressed in the Guide to Enactment.*

24. *The Working Group decided that the MLF should provide for a complete override of any restrictions on transfers of supporting rights to ensure the approach to overriding AACs for supporting rights was aligned with the approach to overriding AACs on the transfers of the receivables themselves.* It was agreed that the rule in the MLF providing for an override on AACs for supporting rights could be modelled on Article 10(2) of the Receivables Convention. It was further agreed that a provision modelled on Article 10(3) of the Receivables Convention should not be included, so that the override on AACs for supporting rights in the MLF would be a complete override without preserving any residual rights for a party to sue for breach.

#### **(d) Future Receivables**

25. With reference to paragraphs 33 – 36 of the Issues Paper, *the Chair* opened the floor for discussion on the treatment of future receivables in the MLF. It was noted that the Working Group had decided at its second session that the MLF should apply to future receivables that (i) arose out of an existing contract after its conclusion and (ii) arose out of a future contract. It was queried whether it was necessary for the MLF to provide a definition of “future receivables”.

26. *Some experts* favoured the inclusion of a definition of “future receivables” in the MLF on the basis that a definition would provide certainty in jurisdictions that did not enable parties to provide for a transfer of future receivables or had statutory restrictions on the treatment of future receivables. *Other experts* suggested that there was no need for a definition as there was no real risk that the MLF could be read to apply to only one type of future receivable. It was suggested that the matter could be dealt with in the Guide to Enactment. *After discussion, the Working Group decided that the MLF should include a definition of future receivables that identified both (i) future receivables that arose out of an existing contract after its conclusion, and (ii) future receivables that arose out of a future contract.*

27. *The Working Group reaffirmed that under the MLF, the assignment of future receivables would take place once the receivable came into existence without the need for a new act of transfer.*

28. *A representative of FCI* noted that the treatment of future receivables had become more sensitive as a result of the Greensill Capital case. *A representative of FCI* suggested that the Guide to Enactment provide guidance on the relationship between future receivables and fraud.

29. *Louise Gullifer* noted that one of the benefits of including future receivables within the scope of the MLF would be that the registrations relating to future receivables could establish a single point of priority. It was further noted that in some circumstances, a contract for the assignment of future receivables could be concluded where the identity of the debtor was yet unknown. Under such circumstances, it would not be possible to notify the debtor of the receivable until the debtor was identified. It was concluded that this was an issue that required further consideration, as there would be certain matters under the MLF that would depend on the date of notification of the debtor, such as rights to set-off.

**(e) Registration**

30. *The Working Group decided that the MLF should provide for a debtor-based registry. Neil Cohen* noted that it was essential for the MLF to require a debtor-based registry system in order for the instrument to fulfill its purpose of being an initial step for States considering implementation of the 2016 UNCITRAL Model Law on Secured Transactions (MLST). *A representative of NatLaw* suggested that the Guide to Enactment should discourage States from considering registries based on the registration of individual invoices, as such systems had created problems in Latin America.

31. With reference to paragraphs 37 – 39 of the Issues Paper, the *Chair* recalled that, at its second session, the Working Group had decided that five matters should be reflected in the MLF in relation to registration: (i) any person could register data (notice) that identifies the transferor and transferee, and provides a brief description of the receivables; (ii) a single registration could cover one or more transfers; (iii) a registration could be made in advance of the transfer to which it relates; (iv) a registration was effective from the time the data became available to searchers; and (v) any omission or error in the identifier of the transferor that would result in the registered notice not being found in a search against the correct identifier of the transferor rendered the registration ineffective.

32. The *Chair* asked the Working Group whether three additional registry-related issues should be reflected in the MLF: (i) the registry not performing substantive verification of information; (ii) the registration of notices as opposed to agreements or invoices; and (iii) the charging of reasonable fees.

33. *A representative of the United Nations Commission on International Trade Law (UNCITRAL)* noted that the registry provisions in the MLST had proven to be complex for implementing States. It was suggested that it might become similarly complex for implementing States if too many registry provisions were included in the MLF.

34. The Working Group discussed whether only core registry provisions should be included in the MLF and further guidance to implementing States regarding the design and operation of registries could be included in the Guide to Enactment. *Some experts* suggested that it might be preferable for the MLF to include a more complete set of registry provisions on the basis that the registry was a fundamentally important aspect of the MLF and that a poorly designed registry would undermine the entire implementation of the instrument. *Other experts* suggested that including only core registration provisions in the MLF and further guidance in the Guide to Enactment was preferable, otherwise it would be necessary to include almost the entirety of the MLST registry provisions in the MLF. The *Chair* suggested that a subgroup on registration could be formed to further consider the matter.

35. *Several experts* suggested that the three additional issues identified by the *Chair* were of significant importance and should be included in the MLF itself. It was noted that these matters were important in demonstrating to implementing States that the registry would not impose a covert tax on transactions because fees would be low and registrations would happen quickly because the registrar would not be under a duty to investigate the veracity of registrations. *Other experts* suggested that while these matters were important, it might be preferable to discuss them in the Guide to Enactment. *The Working Group decided that (i) the registry not performing substantive verification of information, (ii) the registration of notices as opposed to agreements or invoices, and (iii) the charging of reasonable fees, were matters related to the core operation of the registry system and should be included in the MLF itself.*

36. *Ole Boger (observer)* suggested that the right to compel deletion should also be included in the MLF.



37. *Roy Goode (observer)* suggested that the MLF should provide (i) a set of rules that could operate without the need for the creation of a registry and (ii) an additional set of rules that provide for a registry. It was noted that such an approach would encourage States to consider implementing the MLF even if they were not yet ready to adopt a registry system. It was further noted that the Receivables Convention annexes provided for different models for perfection and that the MLF could consider adopting a similar approach. *Several experts* noted that the approach of the Receivables Convention annexes had been a compromise solution adopted two decades ago and that it would be preferable for the MLF to adopt a registry-based system of perfection.

**(f) Debtor discharge**

38. With reference to paragraphs 40 – 44 of the Issues Paper, the *Chair* opened the floor for discussion on debtor discharge. *The Working Group reaffirmed that the elements covered by Article 17 of the Receivables Convention and Article 63 of the MLST were appropriate for inclusion in the MLF.*

39. The Working Group decided that clearer drafting was required in Article 7(5) of the draft MLF in distinguishing between chains of transfers between different parties and multiple transfers between the same party. It was noted that clarity was important because the MLF imposed different debtor discharge obligations dependent on whether it was a chain of transfers or multiple transfers. Where there was a chain of transfers between different parties, the debtor obtained discharge by paying pursuant to the last notification, whereas where there were multiple transfers of the same receivable by the same transferor, the debtor obtained discharge by paying pursuant to the first notification. It was noted that the language “subsequent transfer/assignment” was insufficiently clear in distinguishing between the two different situations.

40. *Megumi Hara* queried whether the MLF should include a rule clarifying which party would be liable for the cost of of the debtor complying with an assignment. It was noted that the French Civil Code was amended in 2016 to provide that the assignee would be primarily liable for the assignment cost, although the debtor was allowed to demand the cost from both the assignee and the assignor. *A representative of FCI* explained that in domestic factoring, there was usually no cost associated with an assignment. For international transfers, the industry practice was for the debtor to assume any charges related to the international transfer. It was suggested that there was no need to address this issue in the MLF.

**(g) Notification**

41. With reference to paragraphs 45 – 49 of the Issues Paper, the *Chair* asked the Working Group whether the MLF should include safe harbours as mechanisms to deliver notifications to the debtor.

42. *A representative of APEC FIDN* suggested that the only possible safe harbour in the context of notifying a debtor would be any notification process set out in the contract between the seller/assignor and debtor. *A representative of NatLaw* agreed, noting that the matter being discussed related to the form of the notification rather than the content of the notification. It was suggested that the MLF would not need to adopt a particular form as done in the United States Uniform Commercial Code in relation to notices of disposals. *Michel Deschamps* noted that he had never seen an underlying contract between a debtor and seller that specified the mode of debtor notification in relation to the assignment of a receivable.

43. *A representative of FCI* suggested that it would not be necessary to include a safe harbour for debtor notifications. It was noted that in practice, both transferors and transferees had a strong interest in ensuring that a debtor had been notified of an assignment and that in most contexts this

could be done through sending emails that required the recipient to confirm that it had read the contents of the email.

44. *The Working Group decided that the Model Law did not need to provide safe harbours as mechanisms to deliver notifications to the debtor.*

45. *A representative of the International Chamber of Commerce (ICC) queried whether the MLF provided a safe harbour for the factor where a debtor and seller negotiated a change or terminate the underlying transaction. Bruce Whittaker noted that the matter was addressed in Article 10 of the draft MLF which reflected the approach in Article 66 of the MLST.*

46. *The Chair asked the Working Group whether the MLF should include good faith protections for debtors who made payments to the wrong party and subsequently sought discharge of their obligations.*

47. *Ole Boger (observer) suggested that there might be value in the MLF including good faith protections for the debtor, as doing so would allow for the notification process to be less cumbersome. The Chair queried whether there would be the need for good faith protections if the MLF had clear notice requirements. Ole Boger (observer) responded that it would be less important to have a good faith protection for debtors if the MLF had strong notice requirements, although strong notice requirements could become burdensome in situations where there were multiple transfers between different parties and the debtor was receiving multiple notifications.*

48. *Neil Cohen suggested that instead of providing for a good faith protection, the MLF could provide some flexibility where a debtor has made an error in paying the wrong party after receiving multiple notifications. It was explained that in some instances, the cost for the debtor to obtain legal advice to determine which notification should be complied with might be higher than the value of the receivable.*

49. *A representative of FCI suggested that the MLF should not provide good faith protections for debtors who made payments to the wrong party and sought discharge of their obligations.*

50. *Michel Deschamps noted that a good faith protection would be difficult to apply in practice. It was noted that the Quebec Civil Code had a good faith protection for debtors, although it had never been applied and that practitioners were unclear on its scope.*

51. *Louise Gullifer suggested that it might be preferable for the MLF to allow for the debtor to request further information in relation to whether they were under an obligation to pay pursuant to the first or a subsequent notification. Ole Boger (observer) noted that the risks arose in situations where the debtor was unclear as to which party to pay and one of the other parties was insolvent. He agreed that allowing the debtor to request further information would reduce the need for a good faith rule.*

52. *The Working Group decided that the MLF should not include good faith protections to debtors who make payments to the wrong party. The Working Group agreed that Article 7 of the draft MLF should be amended to allow for the debtor to request further information in relation to whether they were under an obligation to pay pursuant to the first or the subsequent notification, according to whether it was a chain of transfers or multiple transfers between the same parties.*

53. *Louise Gullifer queried whether further guidance was required in relation to the notification requirements for the two different types of future receivables. A representative of FCI noted that for future receivables where the debtor was known, the notification would usually describe the future receivables generically. The Chair noted that Article 62(3) of the MLST as reflected in Article 6(2) of the draft MLF provided a basic rule allowing for the notification of a transfer of future receivables.*

54. *The Working Group agreed that the Guide to Enactment should include additional explanation on how debtor notification requirements would differ in relation to the two types of future receivables.*

55. *Louise Gullifer queried whether in situations involving multiple assignments or subsequent assignments, the MLF should require notifications to include the identities of the transferor and transferee rather than just the transferee. It was queried what the existing industry practices were on the matter.*

56. *A representative of APEC FIDN noted that in emerging markets where domestic single factor transactions were prevalent, there was an increased risk that a debtor would receive multiple notifications involving a fraudulent seller/transferor. It was suggested that in such circumstances, there would be value in providing the debtor with additional information, including the identity of the transferor.*

57. *A representative of FCI noted that existing practice for payment instructions was not to include the identity of the transferor. It was explained that often there would be chain of transfers involving export factors and import factors and that including the name of the transferor might risk further confusing the debtor. It was recommended that the MLF's approach to payment instructions should be kept simple and only require the identity of the transferee to be disclosed.*

58. *Michel Deschamps noted that in the case of silent factoring transactions (where the factor acquired the receivable but the transferor received payment), the notification to the debtor would only provide the payment instructions. It was further suggested that there might be some merit in requiring notifications to provide both the name of the transferor and transferee and suggested that the matter be further discussed at the next session.*

59. *Megumi Hara noted that providing the identity of the transferor in the notification to the debtor might become complex where there was a chain of transfers between parties A→B→C. It was noted that Article 6(3) of the draft MLF provided that a notification of a transfer constituted notification of all prior transfers, which meant that a notification regarding a transfer from B→C would constitute notification of the transfer from A→B→C. A representative of FCI noted that in practice, the letter from the transferor (party A) to the debtor would include the new name of the third party (the import factor, or party C) to whom the receivable was being transferred, without reference to the identity of the export factor (party B).*

60. *The Working Group tentatively decided that while there would be some value in developing States for notifications to include the identities of the transferor and transferee, the MLF should not impose this as a requirement as it was not consistent with industry practice. The Working Group noted the issue for further discussion at its fourth session.*

#### **(h) Payment Instruction**

61. With reference to paragraph 50 of the Issues Paper, the *Chair* queried whether the MLF should follow the approach in Article 62 of the MLST in prescribing minimal requirements for effective payment instructions and notifications of transfers.

62. *A representative of FCI suggested that the approach in Article 62 of the MLST should be adopted in the MLF. It was explained that a notification of transfer had to contain a description of the encumbered asset to allow the debtor to identify the transferred receivable. In situations where only part of the receivable was to be transferred, the notice would need to indicate the part that was to be transferred. Louise Gullifer queried whether the notification of transfer could relate to single receivables, multiple receivables or all receivables owed to the transferee. A representative of FCI*

confirmed that all three situations were possible. In practice, FCI members did not encounter significant problems in providing payment instructions to the debtor. It was noted that the main issue that arose in relation to notification of the debtor was where the notification was received by one department in a large organisation which acknowledged receipt but the notification then subsequently became lost in the bureaucracy.

63. *The Working Group decided that the MLF should include the elements for effective payment instructions set out in Article 62 of the MLST.*

**(i) Non-fiat currencies**

64. The Working Group discussed how the MLF should treat payments in non-fiat currencies, such as cryptocurrencies. *The Working Group agreed that the MLF should be drafted to accommodate the emerging use of cryptocurrencies.* It was noted that some invoice platforms were built on the Ethereum blockchain and facilitated payments in the cryptocurrency "Ether". *A representative of FCI noted that it was unaware of any of its members using cryptocurrencies in their factoring transactions.*

65. *Giuliano Castellano* noted the difference between "money" and "legal tender" and suggested that the MLF should not use the term "legal tender". It was suggested that the MLF could define the concept of "money" broadly to include cryptocurrencies. It was noted that the issue went beyond payments in cryptocurrencies, as receivables could also be transformed into digital assets.

66. *The Secretary-General* queried whether an assignment contract that required a payment in a digital asset would be considered an obligation in kind and therefore be linked to the liquidity of the digital asset. It was noted that these complex matters probably should not be dealt with in the MLF and should instead be discussed in the Guide to Enactment. It was suggested that the Working Group should consider the work being undertaken by UNIDROIT in the field of digital assets.

67. *The Working Group agreed that the MLF should allow for the possibility of payments in non-fiat currencies. The Working Group agreed that the use of the term "money" in the Model Law should be broad enough to encompass future developments in the field of digital currencies and that the Guide to Enactment should provide further guidance on the issue.*

**(j) Waivers and defences**

68. *The Working Group agreed to adopt the approach in Article 19(2) of the Receivables Convention in relation to the waiver of defences and the application of laws protecting consumer debtors of receivables.*

**(k) Extra-judicial remedies**

69. With reference to paragraphs 52 – 53 of the Issues Paper, the *Chair* asked the Working Group whether the Guide to Enactment should explain the consequences of a junior factor collecting receivables. *A representative of NatLaw* noted that Article 4(1)(c) of the draft MLF provided that where a junior transferee collected payment, the senior transferee had the right to claim the proceeds of the collection. It was suggested that while this was the correct result on a policy basis, the matter needed to be explained in the Guide to Enactment.

70. *The Working Group reaffirmed that the MLF should have priority rules that clarified the positions of junior and senior transferees.*

**(l) Conflicts of Laws**

71. With reference to paragraphs 54 – 55 of the Issues Paper, the *Chair* asked the Working Group whether the MLF needed to adapt Article 12 of the draft MLF (which reflected Article 23 of the MLST) to apply to circumstances where the transferor's location changed.

72. *The Working Group reaffirmed its previous decisions in relation to conflicts of laws and decided that Article 12 of the draft MLF should remain consistent with the approach in Article 23 of the MLST.*

### **(m) Insolvency**

73. With reference to paragraphs 56 – 57 of the Issues Paper, the *Chair* asked the Working Group whether additional matters of insolvency law should be included in the MLF or its future Guide to Enactment.

74. *Several experts* suggested that the MLF should not include additional specific insolvency rules. However, it was emphasised that the interaction between the MLF and the domestic insolvency law was a critical matter. *Neil Cohen* suggested that the Guide to Enactment could explain the importance of the interaction between the MLF and domestic insolvency law in ensuring that the rights of transferees were upheld in insolvency. It was further suggested that the Guide to Enactment could include specific examples of insolvency laws that would be counterproductive to the purpose of the MLF in facilitating access to finance.

75. *Catherine Walsh* noted that the UNCITRAL Legislative Guide on Secured Transactions emphasised that security rights should be upheld in insolvency unless there was a strong justification not to do so. It was recommended that the language in the Legislative Guide on Secured Transactions be further discussed by the Working Group at its next session.

76. *A representative of FCI* noted that the applicable law in insolvency was an issue that caused confusion for factors across the world where the debtor became insolvent. *A representative of FCI* recommended that the issue be given further consideration in the Guide to Enactment. *A representative of NatLaw* suggested that FCI could develop a Practitioner's Guide for the MLF which could provide further guidance on this issue. *Louise Gullifer* agreed that issues regarding the insolvency of the debtor rather than the transferor were better dealt with in a Practitioner's Guide.

77. *Megumi Hara* suggested that the Guide to Enactment should also consider the treatment of receivables that arise after the commencement of insolvency proceedings. It was noted that the issue was not just limited to developing States and had caused challenges in Japan.

78. *A representative of NatLaw* noted that UNCITRAL Working Group V was undertaking a project on the law applicable in insolvency that might be relevant for the MLF.

79. *The Secretary-General* noted that the UNICTRAL Legislative Guide on Insolvency Law also recommended that security rights should have priority in insolvency unless there was a strong justification for them not to. It was further explained that insolvency practices had significantly changed in recent years with a focus on hybrid proceedings and suggested that these matters could be discussed in the Guide to Enactment.

80. *The Working Group agreed that there was no need for additional insolvency rules in the MLF, although the Guide to Enactment should explain that implementing States should ensure that domestic insolvency laws were well coordinated with factoring laws. The Working Group further agreed that the Guide to Enactment should adopt the position in the UNCITRAL Insolvency Legislative*

*Guide that secured interests should have priority in insolvency unless there was strong justification for them not to.*

**(n) Transition**

81. With reference to paragraphs 58 – 60 of the Issues Paper, the *Chair* asked the Working Group whether the MLF should provide further guidance on how transition to a new factoring regime should be accomplished.

82. *Neil Cohen* identified two separate issues related to transition. First, he noted the importance of providing guidance to States in relation to how a new factoring law should be implemented, including education, promotion and training processes to allow for businesses to adapt to the new regime. Second, he noted that the MLF itself would need to provide technical rules governing how the new law would treat existing rights under the prior system. It was suggested that the Guide to Enactment could provide clear guidance on the result sought in terms of ensuring that legal rights under the old law would remain effective for a certain period of time to allow transition to the new legal regime. It was further suggested that the Guide to Enactment could go further than UNCITRAL instruments in providing tailored guidance to implementing States, based on their pre-existing laws. It was concluded that this work could potentially be undertaken by a subgroup on transition.

83. *A representative of UNCITRAL* noted that it was difficult for implementing States to understand the MLST's transition rules. It was noted that the UNCITRAL Practice Guide to the MLST had proven easier for States to understand by explaining the intended results of the transition rules. It was suggested that the Guide to Enactment should provide a clear explanation of the MLF's transition rules.

84. *A representative of FCI* agreed that it was important for the Guide to Enactment to provide clear guidance on transition issues.

85. *Bruce Whittaker* noted that the MLST provided transition rules governing how long assignees with pre-existing interests had to register notices under the new regime. It was noted that security rights over assets tended to exist for a longer time than security interests over trade receivables and it was queried whether the rules in the MLST on transition were appropriate for inclusion in the MLF.

86. *Louise Gullifer* noted that the appropriate time for the effectiveness of prior interests would depend on the previous law. *Catherine Walsh* noted that agreements relating to future receivables could continue to exist for long periods of time under the existing law. Under such circumstances, it would be appropriate for the implementing State to adopt a transition rule that provided a longer time for assignees to register in the newly established registry.

87. *Neil Cohen* noted that the rule in Article 105(1) of the MLST would be appropriate for inclusion in the MLF. Article 105(1) provided that a prior security right was effective against third parties until the earlier of (a) the time it would have ceased to be effective against third parties under the prior law, and (b) the expiration of a period of time to be specified by the enacting State. It was explained that the implementing State could choose an appropriate length of time based on whether long-term future receivables were being factored under the prior law.

88. *The Working Group noted the challenges that arose for implementing States in transitioning to new factoring laws. The Working Group agreed that the MLF should have transition provisions initially based on those in the MLST and that further guidance should be provided in the Guide to Enactment tailored to the different situations for States transitioning to a new factoring law.*

89. *The Working Group decided that a subgroup should be established to further consider the MLF's approach to transition.*

90. *The Working Group agreed that the Model Law should allow States to decide how long pre-existing transfers would continue to enjoy third party effectiveness once a new factoring law had come into force. It was noted that agreements between parties regarding future receivables might involve long-term arrangements, so it would be up to each implementing State to consider transitional time limits, as consistent with Article 105(1) of the Model Law on Secured Transactions.*

#### **(o) Regulation**

91. The *Chair* noted that issues related to regulatory rules would be explored in the Guide to Enactment.

## **2. Preliminary drafts for the Model Law on Factoring (Study LVIII A – W.G.3 – Doc. 3)**

92. The *Chair* opened the floor for comments on the draft MLF. It was suggested that the Working Group concentrate on conceptual and general language matters and that fine tuning of the drafting itself could be undertaken at a later stage.

#### **(a) Title**

93. *Several experts* noted that the name of the instrument might require further consideration, as the scope of the instrument was likely to be wider than the traditional notion of factoring. *Other experts* suggested that the Working Group should consider a variety of sources in preparing the Model Law on Factoring ("MLF"), including the assignment rules in the UNIDROIT Principles of International Commercial Contracts, the ICC Contract Rules and the Principles of European Contract Law.

94. *A representative of FCI* noted that the draft MLF did not use the term "factoring". It was noted that the Factoring Convention defined "factoring" too narrowly for the purposes of the MLF and suggested that the Working Group give the matter further consideration.

#### **(b) Article 1(1)**

95. *Ole Boger (observer)* noted that the definition in Article 1(1) was too broad. It was noted that it would be an unusual drafting technique to begin with such a broad definition which was then restricted in subsequent articles. He suggested that the issue be revisited once the Working Group had agreed upon the best method of defining the instrument's scope.

#### **(c) Article 1(2)(a)**

96. The Working Group discussed whether to retain Article 1(2)(a), which excluded transfers of receivables as part of the sale of a business out of which the transferred receivable arose from the scope of the MLF.

97. *Louise Gullifer* noted that it was difficult to consider the issue without first deciding the scope of the instrument. It was explained that if the scope of the instrument was limited to trade receivables and Article 1(2)(a) was retained, there could be different rules governing transfer and priority of the

receivables from the sale of a business which could cause complex issues. *Bruce Whittaker* agreed, and suggested that it would be problematic for the instrument to include a particular asset as a receivable but then have the MLF only apply to some transfers of that receivable. It was noted that this could cause priority issues.

98. The *Chair* suggested that the Working Group should consider excluding transfers that were not traditionally financing transactions from the scope of the MLF.

99. A representative of *NatLaw* noted that starting the Model Law with a list of complex exclusions would risk making the instrument unattractive to implementing States. It was noted that in the United Arab Emirates, this particular exclusion had generated a large number of questions.

100. *Catherine Walsh* agreed that Article 1(2)(a) was likely to raise more questions than answers and supported its deletion. It was suggested that the matter would not need significant attention in the Guide to Enactment.

101. *Neil Cohen* noted that the exclusion reflected in Article 1(2)(a) had been included in the Receivables Convention because lobby groups had argued that the treaty could create an unreasonable burden on parties that bought and sold businesses. Neil Cohen cautioned that certain provisions might need to be retained to ensure that the certain stakeholders did not oppose the instrument. *Ole Boger (observer)* noted that if Article 1(2)(a) was removed, a transferee would be obliged to notify every debtor of the business that the transfer of the ownership of the business had taken place, which might be a cumbersome obligation.

102. *Louise Gullifer* suggested that it might be relevant for the Working Group to consider the typical method of selling businesses in developing States. It was suggested that sole traders might be more common than incorporated entities and queried whether the language “change in ownership status” properly reflected existing methods.

103. The Working Group decided to delete Article 1(2)(a).

#### **(d) Article 1(2)(b)**

104. The Working Group discussed whether to retain Article 1(2)(b), which excluded transfers of receivables for collection from the scope of the MLF.

105. A representative of *FCI* noted that in international factoring, the import factor in some circumstances would not be liable for the default risk of the debtor and would only provide a collection service. It was suggested that this practice should not be excluded from the draft MLF and that Article 1(2)(b) should be removed.

106. A representative of *NatLaw* asked where there was a transfer of the receivable from an export factor to an import factor, whether the import factor acted as an agent in collecting the receivable. A representative of *FCI* responded that the import factor would not merely be an agent and that there would be a transfer of the receivable to the import factor, which would then be in a stronger position to apply to the domestic court to request payment.

107. A representative of *APEC FIDN* noted that including the transfer of receivables solely for the purpose of debt collection within the scope of the MLF might cause problems in some jurisdictions. It was noted that such transactions did not relate to increasing access to finance and suggested that Article 1(2)(b) be retained.



108. *Neil Cohen* noted that Article 1(2)(b) would exclude the transfer of receivables for collection from the entirety of the scope of the MLF. It was noted that if the Working Group decided that collection-only transfers should be included within the scope but did not think it was appropriate for collection-only transfers to be subject to the MLF's rules for third party effectiveness, there were drafting techniques that could achieve such a result.

109. *Bruce Whittaker* suggested that for implementing States that did not have well developed rules for receivables, there would be a benefit in the MLF applying to collection-only transfers.

110. The *Chair* summarised that there appeared to be consensus that Article 1(2)(b) should be removed, however the Working Group might need to consider whether any specific aspects of the MLF should be excluded in their application to collection-only transfers.

111. *The Working Group decided to delete Article 1(2)(b).*

**(e) Article 1(3)**

112. *The Working Group deferred discussion on Article 1(3) until a later session.*

**(f) Article 1(4)**

113. The Working Group discussed whether to retain Article 1(4), which preserved the application of laws protecting parties to transactions made for personal, family or household purposes.

114. *A representative of NatLaw* noted that the substance of Articles 1(4) and (5) related to how the MLF interacted with existing laws. It was suggested that if Articles 1(4) and (5) were retained, they should be moved to a different part of the instrument.

115. *A representative of FCI* noted that removing Article 1(4) might have political consequences that could make the MLF less desirable for implementing States.

116. *Ole Boger (observer)* noted that the corresponding provision in the Receivables Convention (Article 4(4)) applied only to "special" laws governing the protection of parties to transactions made for personal, family or household purposes. It was queried whether the term "special" should be added to Article 1(4) of the MLF to clarify that not all laws associated with consumer protection would take priority over the MLF. *A representative of UNCITRAL* noted that the Receivables Convention had used the term "special" because in the 1990s consumer protection laws were still somewhat new. It was explained that the MLST did not use the term "special" because by the time it was drafted, consumer protection laws had become so general they were no longer "special". It was suggested that the MLF follow the drafting of the MLST.

117. The *Chair* suggested that rather than changing the text of Article 1(4) which was consistent with Article 1(5) of the MLST, the Guide to Enactment could explain that Article 1(4) applied to laws specifically related to consumer protection. *Several experts* agreed with this approach.

118. *The Working Group decided to retain Article 1(4). The Working Group decided that the Guide to Enactment should explain that the application of Article 1(4) was limited to laws specifically related to consumer protection.*

**(g) Article 1(5)**

119. *Several experts* noted that it was important to retain Article 1(5) as it allowed States to exclude the application of the MLF to specific types of receivables for public policy reasons, such as national security contracts, wage claims or special needs trusts. Several experts also supported the deletion of the second part of Article 1(5) in square brackets, on the basis that Article 6 of the draft MLF already dealt with application to future receivables.

120. *The Working Group decided to delete the bracketed text in Article 1(5).*

## **(h) Article 2**

### Definition of “debtor”

121. *Louise Gullifer* noted that as the MLF would apply to future receivables that had not yet arisen, the definition of “debtor” as a person who “owes payment” in the present tense did not fully encompass debtors who would owe a payment of a future receivable. *A representative of FCI* noted that it was important for the MLF not to be seen as providing legitimacy to risky transactions that related to future debtors that did not exist, as had occurred in the Greensill Capital case. The *Chair* noted that either the definition of “debtor” could be changed to “owes payment now or in the future”, or the matter could be explained in the Guide to Enactment. *Louise Gullifer* noted that changing the definition to “owes payment now or in the future” would not cover both types of future receivables and suggested that the definition should not be changed.

122. *The Working Group decided that in order to maintain consistency with the MLST, the definition of “debtor” should not be changed in relation to future receivables, and that the Guide to Enactment should provide further explanation on the issue.*

123. *Bruce Whittaker* explained that the draft MLF proposed using the shorter term “debtor”, instead of the term “debtor of the receivable” used in the MLST. It was explained that the longer term was necessary in the MLST as the term “debtor” had a different meaning and it would be unnecessary to burden the MLF with the additional words. *A representative of NatLaw* noted a preference for the MLF using the longer term. *A representative of FCI* expressed a preference for the shorter term.

124. *The Working Group decided to use the term “debtor” rather than “debtor of the receivable”.*

125. *Neil Cohen* noted that including guarantors in the definition of “debtor” might cause challenges in other parts of the MLF. It was explained that guarantor in the definition would require guarantors to receive notifications as “debtors” under the MLF and would allow guarantors to use any defences that “debtors” had. *Megumi Hara* and *Ole Boger (observer)* agreed with Neil Cohen. *A representative of FCI* noted that it was not usual in practice for third party guarantors to receive notifications of assignments.

126. *The Working Group decided to retain the definition of “debtor” in the draft MLF, subject to further discussion at a later session on how the definition would impact on the treatment of guarantors.*

### Definition of “proceeds”

127. The *Chair* reminded the Working Group that at its second session it was decided that the MLF should include a definition of “proceeds” that adopted a middle-ground approach between the MLST and the Receivables Convention.

128. *Bruce Whittaker* explained that the definition of “proceeds” in the draft MLF was based on Article 5(j) of the Receivables Convention. He queried whether the definition of “proceeds” should be limited to cash-type proceeds or should be broader and cover tangible goods, as consistent with the MLST (for example, whether a caravan exchanged for proceeds should itself be considered proceeds).

129. *Louise Gullifer* suggested that if the definition of “proceeds” was not limited to cash-type proceeds, then parties would be registering notices relating to tangible assets in the register which was designed for the registration of transfers of receivables. *Neil Cohen* suggested that limiting the definition of “proceeds” to cash proceeds should be done carefully so not to limit the right to collect in refinancing situation. *A representative of NatLaw* agreed that the definition of “proceeds” should include refinancing. It was noted that the UNCITRAL Legislative Guide on Insolvency contained a definition of “cash proceeds” that could be used if the Working Group decided to limit the definition of “proceeds” to cash proceeds.

130. *Several experts* suggested that the definition of “proceeds” should be clarified to ensure that it covered interest repayments.

131. *Bruce Whittaker* queried whether the language “in total or partial payment or other satisfaction” covered insurance claims or proceeds of disposition of the receivable. *A representative of NatLaw* noted that the definition of “proceeds” should allow the assignee to have a claim to an asset and for that claim to be a property right protected in insolvency. It was further noted that the assignee should also automatically acquire a benefit in the supporting right, but the dividing line between supporting rights and proceeds was unclear in relation to insurance claims. It was suggested that the matter be discussed further at the next meeting.

132. *The Secretary-General* cautioned that a broad functional definition of “proceeds” might cause problems. It was noted that refinancing and insurance claims would not be considered as “proceeds” in most civil law States, as refinancing claims would be considered to be the same claim novated. It was further noted that most States would have specific regulations for insurance contracts and that the MLF might become too complex if it required modifications to the implementing State’s insurance laws. *Catherine Walsh* agreed, and noted that the definition of “proceeds” in the MLST was not ideal and had tried to capture both civil law and common law concepts.

133. It was noted that the second sentence of the definition “the term includes whatever is received in respect of proceeds” was a reference to proceeds of proceeds. *Catherine Walsh* suggested it might be better for the second sentence to use the term “proceeds of proceeds”.

134. *Catherine Walsh* queried why the third sentence of the definition excluded returned goods. *Neil Cohen* suggested that while returned goods would logically be proceeds, there was a functional reason to limit the definition of “proceeds” as the law would not work in relation to returned goods for a number of reasons.

135. *Several experts* suggested that it was not possible to define “proceeds” in the abstract and that its use throughout the instrument had to be checked before the definition was decided. The *Chair* noted that the definition would need to be considered once further research had been done on the issues identified by the Working Group.

136. *The Working Group* decided to retain the definition of “proceeds” and discuss the matter further at the next session.

Definition of “receivable”

137. *Several experts* noted that the definition of “receivable” could not be adopted until the instrument’s approach to scope had been decided.

138. *The Secretary-General* queried whether a narrow definition of trade receivables would cover dealings with public authorities. It was further queried whether such types of factoring transactions were important to the factoring industry. *A representative of FCI* responded that public administration debt procurements were an integral part of the factoring industry and should be included within the scope of the MLF.

139. *The Working Group* decided to retain the word “contractual” in the definition of “receivable”. *The Working Group* decided to defer further discussion on the definition of “receivable”.

#### Definition of “security”

140. *Bruce Whittaker* noted that the definition of “security” related to the not yet decided definition of “receivable” and that it might be necessary to defer discussion on the definition of “security”.

141. *A representative of NatLaw* noted that in implementing factoring laws, the key domestic stakeholders were usually regulatory agencies such as the central bank rather than the ministry of justice. It was suggested that having long, complex and precise definitions might create enactment challenges.

142. *The Working Group* decided to defer discussion on the definition of “security”.

#### Definition of “transfer/assignment”

143. *Roy Goode (observer)* queried the use of terms “transfer” and “assignment” in the draft MLF, noting that “transfer” had a broader meaning than “assignment” as it also covered novations. *Bruce Whittaker* explained that “transfer” had been preferred in the draft MLF to make the instrument more user-friendly and that it was the term used in the domestic personal property security laws in Australia, New Zealand and Canada. It was acknowledged that in some contexts the terms “transfer” and “assignment” could have different meanings.

144. *A representative of UNCITRAL* noted that the Receivables Convention used the term “assignment” whereas the MLST generally used the term “transfer”.

145. *A representative of FCI* noted that the General Rules of International Factoring used the word “assignment”.

146. *Alejandro Garro* noted a preference for using the term “assignment” for consistency with the Receivables Convention.

147. *A representative of the ICC* noted that in the ICC Uniform Customs and Practice for Documentary Credits (UCP 600), the term “transfer of guarantee” was used, however when referring to the transfer of proceeds, the term “assignment” was used. It was noted that translation difficulties could arise if both the terms “transfer” and “assignment” were used in the MLF, as both terms were translated into the same word in Chinese.

148. *A representative of NatLaw* noted that this was a labelling issue rather than a substantive issue, as the definition would remain the same, regardless of which term was used. *The representative* noted a slight preference for the use of “transfer”.

149. *Neil Cohen* suggested that either term could be used and that the Guide to Enactment could explain that an implementing State could choose either term in their domestic legislation.

150. *Louise Gullifer* noted that under English law, loan documents that used “transfer” could cause issues as it was not clear whether the transaction was an assignment or a novation. It was noted that it was likely to be an issue of legal culture and rules in each jurisdiction and supported the approach suggested by Neil Cohen.

151. *Michel Deschamps* noted that “assignment” could be preferable on the basis that it better corresponded with the French equivalent “association de creance”. He noted that other practitioners in Canada generally used the term “assignment” rather than “transfer”. *Catherine Walsh* indicated a slight preference for the use of “assignment” on the basis that it was the term more commonly used by the factoring industry. *A representative of the ICC* also supported the use of the term “assignment” on the basis that it was the term more commonly used by practitioners.

152. No consensus was reached on the use of the terms “assignment” or “transfer”. The *Chair* noted there appeared to be slight preference for the use of “assignment”. *The Working Group decided to put the words “transfer/assignment” in brackets in Article 1(1) for further discussion at a future meeting.*

153. *The Working Group decided that the MLF should use the term “outright” transfer/assignment rather than “absolute” transfer/assignment.*

154. *Bruce Whittaker* explained that the definition of “transfer” as drafted was broad enough to cover both transfers by way of security and other types of security interests that didn’t involve the transfer of a property interest in the receivable.

155. *Ole Boger (observer)* noted that by defining “transfer” broadly to cover security interests that were not a full transfer of rights, the MLF could allow transferees to demand payment from the debtor in relation to such rights. It was queried whether this was the correct policy approach. *A representative of NatLaw* explained that Chapter 7 of the draft MLF distinguished notification and collection rights depending on the type of a transfer.

156. *Neil Cohen* suggested that the Guide to Enactment explanation on the definition of “transfer” might be more important than the definition itself. It was suggested that it might be preferable to have a broad definition in the instrument and let the Guide to Enactment explain that the definition included different types of security interests, such as fixed charges and floating charges. *A representative of NatLaw* agreed that the Guide to Enactment could explain to implementing States that the MLF should apply to security interests over receivables to the extent that such security interests existed under the domestic law (for example, if the domestic law provided for pledges, then the MLF as implemented by that State would apply to pledges over receivables).

157. *A representative of FCI* noted that most factoring was done by way of outright transfer of the receivable. In some States, factoring was done by way of a pledge over the receivable for historical reasons. It was suggested that such existing practices should not be undermined by the MLF. It was further suggested that the MLF should provide that an outright transfer should constitute a true sale under the MLF. Many factoring agreements (particularly for invoice discounting transactions) allowed the factor to charge/back a receivable to the assignor if it was not paid. It was concluded that the definition of “transfer” in the draft MLF covered all of the described practices and was therefore acceptable to the factoring industry.

158. *Ole Boger (observer)* queried whether pledges over receivables would still be used in jurisdictions after implementation of the MLF, as most parties would prefer to use outright transfers.

*A representative of FCI* suggested that the MLF should still provide for the old financing methods as it might take time for parties to adapt to the new legal regime and start using outright transfers. *Louise Gullifer* noted that any security interests over receivables included within the scope of the MLF would need to be registered in the registry to enjoy priority over third parties.

159. *A representative of NatLaw* noted that States that had separate systems for outright transfers and security interests had experienced problems with their laws. It was explained that Egypt's factoring law only applied to outright transfers which had created many unresolved priority issues in relation to security interests. It was suggested that the scope of the MLF in relation to security interests over receivables should not be crafted too narrowly in order to avoid creating priority issues. *Neil Cohen* agreed, and noted that if the MLF narrowly chose some security interests to be within the scope of the MLF and excluded others it would create undesirable strategic behaviours and a range of litigable issues.

160. *Megumi Hara* queried whether the definition of "outright transfer" should include the concept of part interests or undivided interests. It was noted that the transfer of undivided interests was a difficult notion in many civil law States. *Louise Gullifer* noted that Article 6 of the draft MLF provided that transferors could transfer part of or undivided interests in receivables and queried whether it would be best to retain that rule in Article 6 or move it to the definitions the Article 2. It was suggested that the Guide to Enactment could provide further explanation on the matter.

161. *The Working Group* decided to retain the definition of "transfer/assignment", subject to further discussion.

#### Definition of "transfer/assignment agreement"

162. *Ole Boger (observer)* suggested that the parties to the transfer agreement should be included in the definition.

163. *Bruce Whittaker* explained that the cross-reference to Article 6(4) in the definition of "transfer agreement" had been made to try to avoid the need for another article. *Ole Boger (observer)* suggested that the cross reference be removed and that the definition should spell out the entire issue.

164. *Catherine Walsh* suggested that the draft MLF should try to avoid including substantive rules in the definitions section.

165. *The Working Group* requested the Secretariat revise the drafting of the definition of "transfer agreement" for consideration by the Working Group at its next session.

#### Definition of "transferee/assignee" and "transferor/assignor"

166. *Bruce Whittaker* explained that the draft MLF differed from the MLST in not including the concept of buyers and other types of transferees in the definition of "transferee", and instead relied on the concept of "a person to whom or in whose favour a receivable is transferred". It was explained that this reference was designed to encompass both outright transfers and security interests in receivables.

167. *Louise Gullifer* noted that under the MLST the definition of "grantor" included a transferee of an encumbered asset that acquired its rights subject to a security right. It was noted that the definition was complex but was needed to ensure the priority rules operated properly. *Bruce Whittaker* noted that a buyer of an encumbered asset that acquired its right subject to a security

interest would be treated as a competing party in a priority dispute. It was suggested that the issue needed further consideration in the draft MLF.

168. *The Working Group retained the definition of "transferee/assignee" and "transferor/assignor", subject to further discussion.*

#### Definition of "Writing"

169. *A representative of NatLaw suggested that the definition of "writing" was sufficient and that the Guide to Enactment could describe the types of technologies that it could encompass.*

170. *Alejandro Garro suggested that the explanation contained in Article 5(c) of the Receivables Convention should be included in the Guide to Enactment.*

171. *The Working Group adopted the definition of "writing" and agreed that further guidance should be provided in the Guide to Enactment.*

#### **(i) Article 3**

172. *Neil Cohen noted that the inclusion of guarantors in the definition of "debtor" might require further consideration in relation to Article 3.*

173. *Ole Boger (observer) queried whether in the situation where a factor and client agreed to an AAC that deviated from the AAC override in the MLF, whether the AAC would be invalidated if the factor then transferred the receivable to another factor in violation of the AAC. The Chair suggested that the issue could be explored in the Guide to Enactment.*

174. *Bruce Whittaker queried whether Article 3(3) should be retained on the basis that it was less relevant in the factoring context. It was explained that Article 3(3) had been included in the MLST as a compromise solution on the basis that it would support access to alternative dispute resolution procedures for small and medium business enterprises.*

175. *Several experts noted that while Article 3(3) did not have a substantive effect, there was no harm in retaining it. A representative of the ICC suggested that it should be retained as it would provide guidance to industry.*

176. *The Working Group agreed to remove the square brackets around Article 3(3).*

#### **(j) Article 4**

177. *The Working Group adopted Article 4.*

#### **(k) Article 5**

178. *Several experts suggested that Article 5 should be deleted. It was noted that the clause was important in international conventions but was not relevant for soft law instruments such as model laws. It was further suggested that it would be strange for the model law to instruct a judge to consider how the implementation of the model law operated in other States in making decisions in a domestic context. Instead, it was suggested that the Guide to Enactment could explain that international concepts included in the model law should be properly incorporated into the domestic implementing law.*

179. *Other experts* suggested that Article 5 should be retained. It was noted that the rule in Article 5 aimed at harmonisation in ensuring that the MLF would be interpreted the same way in two different States. It was further noted that corresponding provisions existed in the MLST and the UNCITRAL Model Law on Cross-Border Insolvency. It was further noted that allowing judges to consider practices in other jurisdictions had been useful under the UNCITRAL Model Law on International Commercial Arbitration. It was explained that there had been strong resistance to the removal of the equivalent articles in the MLST during negotiations. *A representative of FCI* suggested that if Article 5 made it easier for domestic courts to consider interpretation decisions related to the MLF made by foreign courts, there would be value in retaining it.

180. *A representative of NatLaw* suggested that the good faith aspect of Article 5(1) was not necessary on the basis that Article 4 already required a person to exercise its rights and perform its obligations under the MLF in good faith and a commercially reasonable manner. *Catherine Walsh* agreed, and noted that the good faith principle had originally come from the United Nations Convention on Contracts for the International Sale of Goods. *Alejandro Garro* noted that the good faith principle was also reflected in Article 31 of the Vienna Convention on the Law of Treaties.

181. *The Secretary-General* noted that the removal of Article 5 would not undermine the MLF being operationally consistent with the MLST. It was further noted that the desire of ensuring the MLF was interpreted consistently around the world could be explored in the Guide to Enactment, although it would be challenging to do so if Article 5 was removed and the format of the Guide to Enactment was an article-by-article commentary.

182. *The Working Group did not reach a consensus on Article 5. The Working Group decided to place Article 5 in square brackets for further discussion at a future session.*

#### **Item 4: Organisation of future work**

183. *The Working Group agreed that its fourth session would be held between 1–3 December 2021 and that it would a hybrid meeting allowing for in person or remote participation.*

#### **Item 5: Any other business**

184. *The Chair* expressly thanked Hamza Hameed, Marek Dubovec and Bruce Whittaker for their assistance in preparing the documentation for the Working Group's third session.

#### **Item 6: Closing of the session**

185. *The Chair* thanked all participants for their contributions to the third session.

186. *The Chair declared the session closed.*



**ANNEX I****ANNOTATED AGENDA**

1. Opening of the session by the Chair
2. Adoption of the agenda and organisation of the session
3. Adoption of the Summary Report of the Second Session (Study LVIII A – W.G.2 – Doc. 4)
4. Consideration of substantive matters:
  - (a) Matters identified in the Issues Paper (Study LVIII A – W.G.3 – Doc. 2)
  - (b) Preliminary drafts for the Model Law on Factoring (Study LVIII A – W.G.3 – Doc. 3)
5. Organisation of future work
6. Any other business
7. Closing of the session

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