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Item No. 5 on the agenda: Development of a Model Law on Factoring

(prepared by the Secretariat)

<i>Summary</i>	<i>Report on the Model Law on Factoring project</i>
<i>Action to be taken</i>	<i>Note the progress made by the Model Law on Factoring Working Group</i>
<i>Mandate</i>	<i>Work Programme 2020-2022</i>
<i>Priority level</i>	<i>High</i>
<i>Related documents</i>	<u>UNIDROIT 2020 - Study LVIII A – W.G.1 – Doc. 4 rev. 1</u> <u>UNIDROIT 2021 - Study LVIII A – W.G.2 – Doc. 4</u> <u>UNIDROIT 2021 - Study LVIII A – W.G.3 – Doc. 4</u>

I. INTRODUCTION

1. The purpose of this document is to update members of the Governing Council on the preparation of a Model Law on Factoring.

II. BACKGROUND

2. In December 2018, as a proposal for the UNIDROIT Work Programme 2020-2022, the World Bank suggested that UNIDROIT develop a Model Law on Factoring (MLF).¹ At its 98th session in May 2019, the UNIDROIT Governing Council approved the project for the 2020-2022 Triennial Work Programme as a high priority project.²

3. The purpose of the Model Law is to provide an instrument for States that want to introduce a new factoring law or update their existing laws but are not yet in a position to undertake a comprehensive secured transactions law reform based on the instruments developed by the United Nations Commission on International Trade Law (UNCITRAL). The instrument will consist of a set of black letter rules, that may eventually be accompanied by a text (in the form of a commentary following each article, or of a separate guide) offering guidance as to how the rules are to be

¹ [UNIDROIT 2019 - C.D. \(98\) 14 rev.2](#), p.17.

² [UNIDROIT 2019 - C.D. \(98\) 17](#), p. 36.

implemented and explaining some of the core concepts, their origin and context, as well as their possible use.

III. THE WORKING GROUP

Composition of the Working Group

4. As consistent with the Institute's established working methodology, the MLF is being developed by a Working Group composed of international legal experts representing different legal systems.³ The Working Group is chaired by Governing Council member Professor Henry Gabriel. In addition, several international, regional, and private organisations with expertise in factoring are participating in the Working Group as observers.⁴

Meetings of the Working Group

5. On 11 February 2020, in the margins of the International Secured Transactions Coordination Conference in Cartagena, Colombia, UNIDROIT held a short planning meeting for the Working Group. Seven Working Group members participated in the meeting, as well as observers from the World Bank Group, UNCITRAL, the OAS and the National Law Center. During the planning meeting, the Working Group identified an initial list of issues for discussion at the first Working Group meeting.

6. The first session of the Working Group took place via videoconference between 1 and 3 July 2020. The Working Group was attended by 32 participants, comprising of (i) 9 Working Group Members, (ii) 18 observers from six international, regional, and intergovernmental organisations, four industry associations and academia and (iii) 5 members of the UNIDROIT Secretariat. The report from the Working Group's first session is available in document [Study LVIII A – W.G.1 – Doc. 4](#). During its first session, the Working Group also established a subgroup to consider issues relating to conflicts of laws, which met several times in 2020.

7. The second session of the Working Group took place via videoconference between 14 and 16 December 2020. The Working Group was attended by 30 participants, comprising of (i) 8 Working Group Members, (ii) 18 observers from six international, regional and intergovernmental organisations, four industry associations and academia and (iii) 4 members of the UNIDROIT Secretariat. The report from the Working Group's second session is available in document [Study LVIII A – W.G.2 – Doc. 4](#).

8. The third session of the Working Group took place via videoconference between 26 and 28 May 2021. The report from the Working Group's third session (document Study LVIII A – W.G.3 – Doc. 4.) will be published on UNIDROIT's website in September.

³ The Working Group is composed of the following experts: (i) Henry Gabriel (Chair) (United States), (ii) Giuliano Castellano (Italy), (iii) Neil Cohen (United States), (iv) Michel Deschamps (Canada), (v) Alejandro Garro (Argentina), (vi) Louise Gullifer (United Kingdom), (vii) Megumi Hara (Japan), (viii) Cathy Walsh (Canada) and (ix) Bruce Whittaker (Australia).

⁴ The following organisations are observing the MLF Working Group: (i) The World Bank Group, (ii) UNCITRAL, (iii) the Kozolchik National Law Centre (NatLaw), (iv) the European Bank for Reconstruction and Development (EBRD), (v) the Organization of American States (OAS), (vi) the African Export-Import Bank (AFREXIMBANK) (vii), the Organisation for the Harmonisation of Business Law in Africa (OHADA) and (viii) several Industry Groups; (a) Factors Chain International (FCI), (b) World of Open Account (WOA), (c) Secured Finance Network (SFN) and (d) the International Chamber of Commerce Banking Commission (ICC).

Legal issues

9. The Working Group is making good progress in preparing the MLF and has resolved several major policy issues. The current draft MLF has six chapters and 40 articles (see structure below), which were based primarily on the corresponding articles in the UNCITRAL Model Law on Secured Transactions. The Working Group was able to review five of the articles in detail at its third session.

Scope of the MLF

10. The MLF will apply to receivables arising from a contract for the supply or lease of goods and services, receivables arising from the contract for the sale, lease or licence of industrial or other intellectual property and receivables representing the payment obligation for a credit card transaction. However, based on the current state of the discussions within the Working Group, the MLF will not apply to negotiable instruments or the assignment of receivables pursuant to a netting agreement. The MLF will apply to future receivables arising out of existing contracts after the conclusion of the factoring agreement and future receivables arising out of future contracts.

11. Further work is required to determine how the scope provisions of the MLF will be drafted. The Working Group continues to discuss whether the MLF should (i) define its scope broadly and include a list of specific exclusions, or (ii) construe its scope narrowly by setting a limited list of transactions covered by the instrument.

Structure of the MLF

12. At its third session, the Working Group considered preliminary drafting suggestions for the instrument, the structure of which follows the UNCITRAL Model Law on Secured Transactions:

- Chapter I – Scope and general provisions
- Chapter II – Transfers of receivables
- Chapter III – Making a transfer of a receivable effective against third parties
- Chapter VI – Rights and Obligations of the Parties
- Chapter VII – Collection and Enforcement
- Chapter VIII – Conflict of Laws

Registration rules

13. The MLF will provide for a debtor-based registry for the registration of both outright transfers and security interests related to factoring transactions. The MLF will provide a simplified set of core registry provisions, including the following rules:

- (i) the registry does not perform substantive verification of information
- (ii) the registry will provide for the registration of notices as opposed to the registration of agreements or invoices
- (iii) a registry can charge reasonable fees to ensure its efficient operation
- (iv) any party can register data that identifies the transferor and transferee, and provides a brief description of the receivables
- (v) a single registration can cover one or more transfers

- (vi) a registration can be made in advance of the transfer to which it relates
- (vii) a registration is effective from the time the data becomes available to searchers, and
- (viii) any omission or error in the identifier of the transferor that results in the registered notice not being found in a search against the correct identifier of the transferor renders the registration ineffective.

14. Further guidance for implementing States regarding the establishment of factoring registries will be set out in the commentary or in an additional document in the form of a Guide.

Anti-assignment clauses

15. The MLF will provide for a complete override of anti-assignment clauses. In a rare departure from the Receivables Convention, the MLF will not preserve the right of a debtor to claim damages from the transferor for breach of contract in relation to an anti-assignment clause. The anti-assignment clause override will be limited to transactions within the scope of the MLF and apply to any restriction on transfers of supporting rights.

IV. FUTURE STEPS

16. The Working Group will consider a full set of the draft MLF at its fourth session which will be held between 1–3 December 2021. An intersessional meeting to finalise the MLF's scope will be held in September 2021. Two subgroups on registration and transition have also been recently established to prepare draft rules on these critical matters.

17. It is anticipated that the Working Group will hold its fifth session in advance of the 101st session of the Governing Council in early 2022 to further revise the draft MLF. The Governing Council will have an opportunity to review the draft rules at its 101st session in 2022. Broad consultations will be undertaken throughout 2022 before the instrument is finalised and proposed for adoption by the Governing Council in 2023.

18. Further information regarding the MLF project and all documents from the Working Group meetings are available on the UNIDROIT website at: <https://www.unidroit.org/work-in-progress/factoring-model-law>.

V. ACTION TO BE TAKEN

19. *The Governing Council is invited to take note of the progress made by the Model Law on Factoring Working Group.*