



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

EN

Factoring Model Law Working Group

Fourth session (hybrid)

Rome, 1 – 3 December 2021

UNIDROIT 2022

Study LVIII A – W.G.4 – Doc. 6

English only

February 2022

**SUMMARY REPORT
OF THE FOURTH SESSION
(1 – 3 December 2021)**

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1. The fourth session of the UNIDROIT Working Group to prepare a Model Law on Factoring (the Working Group) took place in hybrid format between 1 and 3 December 2021. The Working Group was attended by 30 participants, comprised of Working Group members, observers including representatives of international and regional organisations as well as the private and public sector, and members of the UNIDROIT Secretariat (a list of participants is available in Annex I).

Item 1: Opening of the session by the Chair

2. *The Chair* opened the session and welcomed all participants to the fourth meeting of the Working Group.

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

3. *The Chair* introduced the Annotated Draft Agenda ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 1](#)) and the organisation of the session.

4. *The Chair* proposed an amendment to the Annotated Draft Agenda so as to begin with Item 3(b), the presentation and discussion of the work of the Registration subgroup, to accommodate for different time zones.

5. *The Working Group adopted the Draft Agenda as amended, available in [Annex II](#), and agreed with the organisation of the session as proposed.*

6. *The Chair* presented a brief summary of the work of the different intersessional subgroups.

Item 3: Discussion of intersessional work

7. *The Chair* drew the Working Group's attention to the first item on the Agenda concerning the Registration subgroup.

(a) Registration subgroup

8. The Chair of the Registration subgroup summarised the work of the subgroup since the previous Working Group meeting. As the Model Law on Factoring (MLF) was aimed at being of use to a variety of States at different stages in their development of factoring laws, the subgroup recommended that the MLF should include all the rules that were needed to have a functioning registration system, rather than just some of them. In order to ensure that this approach would not make the MLF as a whole unbalanced (because a full set of registration rules would be lengthy), the subgroup also suggested that the detailed registration rules be included in an annex to the MLF, rather than in the body of the MLF itself. *The Working Group agreed with this approach.*

9. The Registry rules in the UNCITRAL Model Law on Secured Transactions (MLST) (on which the MLF draft Registry rules were based) contained a number of provisions where options were provided for enacting States to choose between. To keep the MLF's registration rules as manageable in length as possible, the Registration subgroup proposed that the Working Group decide in each case which option would be the most appropriate. While this approach would reduce the flexibility for adopting States, it would also keep the MLF as concise as possible, making it more user friendly. *The Working Group agreed to this approach.*

10. The Chair of the Registration subgroup then drew the attention of the Working Group to Chapter IV of the Preliminary Draft Model Law ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 3](#)).

The proposed wording of draft Article 13 – Establishment of a Registry was explained and discussed, including that a definition of the term “registry” would have to be included in the definitions section. *The Working Group endorsed the proposed wording of draft Article 13.*

11. One participant queried whether it was envisaged for the annex to include only rules of operation or also rules about effectiveness, suggesting that the latter should be part of the main body of the Model Law. Other experts agreed with this in principle. The Chair of the Registration subgroup suggested that this issue be considered in the context of each of the provisions individually. *The Working Group agreed with this approach.*

12. The Chair of the Registration subgroup explained that the subgroup had attempted to design the registry provisions to suit an electronic registry. The Working Group, having agreed to this general approach, discussed the definition of “Amendment notice” in Article 1. One expert suggested that the term “website user interface” might become outdated due to technological change and suggested “electronic user interface” instead. *The Working Group agreed to consider using the more generic term “electronic user interface” to accommodate future technological developments.*

13. The Chair of the Registration subgroup then drew the attention of the Working Group to the changes that had been made to draft Article 2, and in particular to the proposed deletion of paragraph 6. This was the first example of another set of changes to the MLST registry rules that was being proposed by the subgroup. The registry rules in the MLST included a number of provisions that described what the registry itself must or must not do. The subgroup recommended that these provisions not be replicated in the MLF registry rules, but that they instead be set out in the guide to enactment to keep the MLF registry rules to a manageable length. One participant spoke in favour of retaining paragraph 6 in the Model Law in order to accommodate different stakeholders and government agencies who had repeatedly stressed the importance of including this type of rule. While another expert concurred with this position, others proposed that these types of issues would be better addressed in a separate guide to enactment, specifically designed for the registry. *The Working Group agreed to the proposition of preparing a separate guide to enactment specifically for the registry.*

14. The Working Group considered draft Articles 3, 4 and 5. On Article 5, there was agreement that the term “website interface” would have to be revisited throughout the draft and be replaced by “electronic interface” consistently as appropriate. One expert raised the issue that the term “form” might be misleading as it reminded of a physical, paper-based form. The experts agreed that the term “form” be bracketed until a more suitable expression had been found. *The Working Group had no further comments on the changes made in draft Articles 3, 4 and 5.*

15. The Chair of the Registration subgroup then moved onto the revisions made to draft Article 6. One expert pointed out that the term “field” might raise the same issues as the term “form”, and that it should be replaced by a more generic term. Another participant pointed out that the term “form” might lead to the misinterpretation by government agencies. The expert also noted that the title of Article 6 ought to be adapted and to delete “reject” in paragraph 1. The Chair of the Registration subgroup explained that the contents of deleted paragraphs 3 and 4 were to be part of the separate guide to enactment for the registry. The same applied to deleted Article 7. *The Working Group agreed to these changes.*

16. The Working Group next discussed the term “identifier” in draft Articles 7 and 8 (formerly 8 and 9 respectively). One expert argued that no more information was needed besides an “identifier” given that laws governing registration systems only required a single identifier, typically an identification number, of the grantor/transferor. Others cautioned that not all countries had publicly available systems of identification (such as national identity numbers) for all individuals and that this could lead to privacy issues, at least as far as private individuals were concerned. Further discussion

suggested that in most factoring transactions transferors would be companies, for which there would always be a publicly available number, such as a VAT number in Europe. The Chair of the Registration subgroup explained that the guide to enactment for the registry might include explanations, similarly to the MLST, as suggested in comment A20 to draft Article 8 of the MLF. *The Working Group agreed to move the bracketed language in draft Article 7(a) on additional information into the enactment guide for the registry.*

17. The Chair of the Registration subgroup next drew the Working Group's attention to draft Article 9. One expert questioned whether paragraph 1 had any practical application, as there were hardly any scenarios in which the factor was a natural person. Other experts pointed to examples of natural persons being investors in receivables, and suggested to keep the provision as it did not cause any problems and might be useful. *The Working Group agreed that the identifiers for transferees should be broad enough to accommodate natural as well as legal persons, and that the wording of Article 9 should otherwise be amended in accordance with the changes made to draft Article 8.*

18. The Working Group turned to draft Article 10. The Chair of the Registration subgroup started by drawing the Working Group's attention to comment A25, and queried whether the effect of paragraph 1 could be that a transferee would need to set out its eligibility criteria for receivables in its initial notice. Experts agreed that this should not be necessary, and that a short explanation could be included in the guide to enactment for the registry.

19. One expert suggested deleting the word "transferred" from the title of draft Article 10 because it should also apply to future receivables. *The Working Group agreed to the suggested change.*

20. *The Working Group agreed to delete former draft Article 12 from the MLF as paragraph 1 reflected the probable position under an enacting State's domestic laws, and paragraph 2 was thought to be unnecessary in the context of electronic registries. The same was decided regarding draft Article 11, paragraphs 2 and 3, as the points they addressed would be explained in the guide to enactment for the registry. The Working Group further agreed on Option A of Article 11 (former Article 13).*

21. The Working Group next considered draft Article 12, for which the Registration subgroup suggested settling on Option C. However, a number of experts expressed a preference for Option B based on how it better reflected existing practice in many countries and appeared to be the simpler option. Others noted that keeping a maximum limit as an optional provision or as part of the enactment guide might be useful. *The Working Group agreed to amend Article 12 so that it also accommodated the optionality of Option B, with an explanation of the pros and cons in the enactment guide for the registry.*

22. *The Working Group approved the form of draft Article 13, and decided to follow the Registration subgroup's proposed deletions of former draft Articles 15, 16, 18 and 19 and the inclusion of their core contents in the enactment guide for the registry.*

23. The Chair of the Registration subgroup next drew the Working Group's attention to the changes that had been made to draft Article 14, especially to paragraph 2(c) and paragraphs 5 and 6. One expert suggested changing the wording of paragraph 2(c) to reflect that, in the case of an outright transfer of receivables, a cancellation would typically be registered when the receivables had been collected, not when they has been transferred back to the assignor. Regarding paragraphs 5 and 6 this expert expressed his preference for the approach taken in the MLST rather than the new approach taken by the Registration subgroup, as not all courts (particularly in less developed countries) were equipped to provide orders as envisaged in the current wording of paragraphs 5 and 6. Another expert agreed with this argument, however also expressed concern regarding the

vagueness of the procedure described in the MLST. Yet another expert queried which party should bear the burden of an imperfect system of court relief, to which other experts expressed the view that the factor needed to be protected. *The Working Group agreed to return to the wording of the MLST.*

24. The Chair of the Registration subgroup turned to draft Article 15. The subgroup favoured Option A as amended, as this was thought to be the phrasing that best reflected the operation of electronic registries. Notably, it allowed for an amendment or cancellation to be effective even without the authorisation of the transferee, on the basis that it was the transferee's responsibility in an electronic registration system to safeguard its own secure access credentials. One expert pointed out that the deletion of the reference to former Article 16 had caused some uncertainty, especially in the situation of a subsequent transfer of receivables, and suggested that the wording should be changed to reflect that not only the person who was identified in the initial notice, but also any person who had obtained the credentials, should be covered by the provision. Another expert concurred about this point, suggesting that the word "initial" be deleted from the provision. However, it was noted that this would leave the term "notice" unclear as it would be used without qualification in two different meanings in the same sentence. *The Working Group agreed that the Registration subgroup would suggest a new draft provision reflecting the points raised in this discussion and that the situation of a subsequent transfer of receivables would be explained in the guide to enactment.*

25. The Chair of the Registration subgroup drew the Working Group's attention to draft Articles 16 and 17 and noted that the proposed wording of Article 17 provided for an exact match system as opposed to a close match system. One expert expressly concurred, and suggested that the content of comment A43 (regarding the nature of an "exact match" system) be included in the guide to enactment for the registry. Following the suggestion of a participant, *the Working Group decided to delete the word "written" from Article 17 in order to avoid ambiguity about this referring to paper form; otherwise the Working Group agreed with the proposed draft of Articles 16 and 17. It also agreed with the proposed changes to draft Article 18.*

26. On draft Article 19, one expert suggested that proposed paragraph 3 was not needed, because a buyer of a receivable (as referred to in that paragraph) would also be a transferee of the receivable (as referred to in the proposed paragraph 2). In other words, the fact pattern covered in proposed paragraph 3 was already covered by proposed paragraph 2. Another participant queried whether draft Article 19 could not be removed from the body of the Model Law altogether and included in the enactment guide for the registry. Furthermore, it was noted that the term "buyer" in paragraph 3 could be problematic in the context of the MLF, and suggested that paragraph 3 could be deleted altogether and paragraph 2 revised to refer to "transferee". *The Working Group agreed to remove draft Article 19, paragraph 3.*

27. On draft Article 20, the Chair of the Registration subgroup noted that both options A and B had stemmed from the MLST. Some experts concurred that, similar to draft Article 19, paragraph 3, it was not clear how this provision had any practical relevance in the context of transfers of receivables, proposing to delete the whole article from the draft. One participant disagreed and supported Option B on the basis that some transfers might not fall within the scope of the factoring law and therefore not be registerable and hence not visible in the registry. Nevertheless, the participant suggested moving Option B into the enactment guide as opposed to the body of the Model Law. The Chair of the Registration subgroup suggested that the Working Group should first decide whether or not the MLF would provide for a buyer of a receivable who was not also a transferee before revisiting the issue. *The Working Group decided in favour of option B in principle, while changing the wording from "subject to the security right" to "subject to the transfer". The article was retained in brackets for later discussion.*

28. *The Working Group agreed to the proposed draft Articles 21, 22 and 23 as well as the deletion of former draft Article 28, the content of which would be included in the enactment guide to the registry.*

29. One expert suggested deleting the proposed draft Article 24, arguing that it had no practical relevance, while others agreed that general law in countries would likely be sufficient to oblige the registry to correct errors as envisaged in paragraph 1. Nevertheless, some experts stressed that the obligation to inform the parties and paragraphs 2 and 3 might have independent usefulness. *The Working Group decided to retain draft Article 24, with revisions to paragraph 1.*

30. The Working Group next discussed draft Article 25 and the practical relevance of including a provision that addressed the registrar's liability for errors. One expert pointed out the insurance related implications of assigning liability to the registry. Some experts noted that the advantage of option B was that it made the fundamental decision of assigning some degree of liability to the registry, leaving it to the enacting States to decide on the extent of the liability. While some experts supported Option B, others suggested that the issue be dealt with in the enactment guide for the registry, as the current provision did not specify whom the liability would be owed to. *The Working Group decided to remove draft Article 25 altogether and to address the issue of liability in the enactment guide for the registry.*

31. The Working Group discussed two points regarding draft Article 26: whether or not paragraph 4 should be deleted from the MLF, and whether or not the provision should state that the fees should be on a cost recovery basis. *On the first point, the Working Group decided to delete paragraph 4 and address the matter in the enactment guide for the registry.* On the second point, one expert argued against having an explicit cost recovery provision in the MLF and the guide to enactment, and suggested that any included language should refer to "low fees" without being too specific. Other experts agreed with this in principle, and suggested different formulations, including "no more than" or providing blanks for the maximum amounts and explaining that the goal was to keep fees as low as possible. The Working Group further discussed whether it was the legislator or the registries that established the fees, and where provisions regarding fees could be found in practice. *The Working Group reached the consensus that fees should be kept low to encourage the use of the registry, and the issue could be dealt with in the guide to enactment for the registry, while retaining paragraphs 1 and 2 to have a legislative basis for fees.*

32. One expert queried why the registry was not called a "receivables registry" in the MLF. Some experts responded that, as receivables were the only assets dealt with in the MLF, there was no need to specify the registry any further in the context of the Model Law. Nothing prevented the registrar from renaming the registry in practice. *The Working Group agreed to keep the name as proposed in the draft.*

(b) Intersessional meeting on scope

33. *The Chair* summarised the intersessional meeting on scope. One of the core questions the intersessional meeting had sought to answer was how the scope of the MLF should be delineated. Two approaches had been discussed; (i) whether the definition of "receivable" in draft Article 2 of should explicitly describe the types of transactions to which it would apply in the (so that there was no need to separately list exclusions), or (ii) whether the definition of "receivable" should be broad in nature with a set of separately listed the exclusions. The prevailing view had been the former, i.e. that the MLF should specifically describe the transactions that were to be covered, since the alternative, of listing all transactions outside the scope, would make the law longer and more complex, and entail a greater risk of missing types of transactions that ought to be excluded.

34. Turning to the current definition of "receivable", *the Chair* highlighted its first two important features: "contractual right" and "sum of money". It was explained that limiting the scope of the MLF

to “contractual rights” excluded tort receivables, tax receivables, as well as other non-contractual receivables. *The Chair* next drew the Working Group’s attention to the bracketed exclusion “other than a contract for the sale or lease of immovable property” in draft Article 2, paragraph 4(i) as discussed in paragraph 16 of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)).

35. Turning to those contracts that would be included in the MLF, *the Chair* drew the Working Group’s attention to Article 1, paragraph 4(i)–(iii). He explained that at the intersessional meeting on scope, the prevailing view had been the narrow notion of “receivable” as currently reflected in draft Article 2, listing all rights to payment that fell under the term “receivable”.

36. One expert queried whether the concept of “money” in draft Article 2, paragraph 4 would include digital currencies or other non-fiat currencies. Another expert drew the Working Group’s attention to paragraph 86 of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)), which stated that an explanation for the meaning of “money” should be part of the guide to enactment. The expert suggested that including a stand-alone definition of “money” in the Model Law might not stand the test of time and might be incompatible with adopting States’ domestic laws regarding money. *The Chair* agreed, and stressed that defining “money” in the MLF might be perceived as almost presumptuous. Another expert proposed not to use the notion of “money” in the Model Law and instead solely refer to “means of contractual rights to payment”. Another expert pointed out that the notion of “money” might be necessary to exclude other obligations to deliver, such as payment by commodity or by performance. Acknowledging this difficulty, another expert proposed to consider using the term “funds” instead. Another expert pointed to the fact that under civil law jurisdictions, “payment” included performance, e.g. under a construction contract. The expert argued that “funds” was also a laden term with similar difficulties as “money”, and that therefore did not provide a solution to the problem at hand. The expert therefore argued in favour of retaining the term “money”. One participant explained that under Chinese law, digital coins had not been legally recognised for years, but they would constitute digital property under the new Chinese Civil Code. Another participant argued in favour of describing the issue surrounding the term “money” in the enactment guide, while leaving the task of adopting a precise definition of “money”, especially with regard to digital currencies, to each implementing State. Other experts agreed with this approach, stressing that the concept could be better explained in the enactment guide to provide for flexibility with regard to both future developments and domestic contexts. *The Working Group decided to leave the details of the contents of the description of “money” to the enactment guide for a later stage of the drafting process, and to retain the wording “sum of money” in Article 2.*

37. One expert voiced a query concerning draft Article 2 paragraph 4(i) and (ii), which in his view covered a part of what might be called “trade receivables” in the context of MLST, but left out other things such as insurance premiums. He asked if this limitation was intended when drafting the provision, and raised the question of why credit card transactions – a specific type of loan – were included in paragraph 4(iii), but not other types of loans. *The Chair* explained that the participants of the intersessional meeting on scope had reached this result in discussing the notion of “trade receivables”, which remained open for additions and suggestions from the Working Group. Experts concurred that the use of the “services” in paragraph 4(i) included insurance services, as those were supplied on a contractual basis.

38. A query was raised whether loans were receivables, as in some jurisdictions paragraph 4(i) might be read to include lending activities, and second, whether the notion of “a contract for supply of services” included financial services. It was pointed out that the definition had been adapted from Article 13 (3) of the MLST, which expressly provided for the exclusion of “financial services”, which had not, however, been transposed into the draft of the MLF. It was noted that the matter was discussed in paragraph 20 of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)). It was also argued that the scope of draft Article 2, paragraph 4(ii) might be worth revisiting to get a clear understanding with regard to software products and other digital contents.

39. While the notion that “services” should not be read to include financial services, especially loans, received support, as they did not fit the traditional concept of a service, credit card loans should be an exception to this, as they were commonly the subject of factoring transactions. *The Chair* concurred with this approach, and then drew the Working Group’s attention back to the issue of whether insurance contracts should be included. *The Working Group agreed that insurance contracts should fall under the scope and should therefore be part of the definition in Article 2, paragraph 4.*

40. Expressions in favour of specifying whether financial services and loans should be included in the body of the Model Law itself, rather than in the guide to enactment received some support, as did the notion that the phrase “supply of services” could be read to already include insurance services as well as loans. Solutions to offer some clarification, either in the body of the Model Law or the guide to enactment were proposed, such as to add “..., including...” and then to list those types of services that should, as a matter of policy, be included. While in practice all types of receivables discussed in the session were factored, it was contended that the MLF would have a guiding role and the Working Group could by its decision expressly include or exclude certain types of receivables. The fact that the concept of “service contract” might be understood so differently in jurisdictions and international instruments was an argument in favour of the need to provide an explanation, and *the Chair* agreed that what constituted “services” remained unclear in the current draft. While it was maintained that both loans and insurance contracts should be included in the scope, there was a debate on whether this could be achieved without the proposed addition of “including”, or by adding “including financial services” to clarify which types of contracts were covered by “service contracts”, given that financial services, especially insurance services, were treated differently across jurisdictions.

41. The latter wording “including financial services” received some support as it would still leave countries a sufficient amount of flexibility when adopting the MLF to include different types of trade receivables. However, this proposed addition would likely make Article 2, paragraph 4(iii) regarding credit card receivables superfluous. It was noted that there was an important relationship between the definition and draft Article 8, especially with regard to anti-assignment clauses. *The Chair summarised the discussion so far, and noted that the views put forward up to this point suggested that “..., including financial services” should be added to Article 2 paragraph 4(i) and that Article 2 paragraph 4(iii) should be deleted.*

42. Addressing the issue of intellectual property under draft Article 2, paragraph 4(ii), it was argued that the notion already contained those of “proprietary information” and “industrial property”, which could therefore be deleted. It was also maintained that, as to the different kinds of transfers of intellectual property (sale, lease or license) mentioned in the Article, intellectual property laws typically did not refer to sale or lease, rather only to transfer, assignment and licensing of intellectual property, and therefore the existing language might be replaced with “transfer, assignment and licensing”.

43. *The Secretary-General*, in response, clarified that in many civil law jurisdictions, the three terms “intellectual property”, “industrial property” and “proprietary information” had separate meanings. If the reference were to be merely “intellectual property”, an explanation in the guide to enactment would be necessary to clarify the coverage of the abovementioned categories of property rights. On the issue of loans, *the Chair* stated that, at least for some categories of loans, namely credit card payments, it was uncontroversial that they were being factored in practice. An addition of “including financial services” to paragraph 4(i), as proposed, would leave room for individual jurisdictions to decide whether, under their respective legal systems, other types of loans should also be covered. It was queried whether this would not trigger the requirement for registration for third-party effectiveness. One participant raised the issue of medical receivables. *The Chair* clarified that medical receivables should be captured by the current language, as they arose from a contract for the supply of services.

44. One expert made two further comments on loans. First, the draft MLF should apply to securitisation transactions, which often involved the assignment of loans. Second, banks were not concerned with the fact that registration was necessary for effectiveness in the same way as for receivables in Canada, and US banks located in Canada had not expressed any concerns about this practice. It was explained that while financial assets did not account for a large percentage of overall factoring volumes, they were still part of factoring practice in the United States, particularly credit card receivables.

45. Another expert suggested that covering the transfer of all loans (not just for financial purposes) would unduly expand the scope of the MLF. An exclusion would be needed for transfers on financial markets. The expert argued that if loans were included in the MLF, it should be ensured that certain financial products should not be included.

46. Agreement was expressed on the language on IP being somewhat dated, and two possible solutions proposed: either to keep the language and expand on it in the guide to enactment, or modify the language in the body of the Model Law. It was contended that including an explanation in the guide to enactment would better accommodate future developments, noting that database contents were not considered intellectual property in the US whereas the EU treated them as legal constructs *sui generis*.

47. Another proposed solution to address the issue of financial services in the section on anti-assignment clauses and the section on third-party effectiveness, was to leave “financial services” in Article 2, and add nuance in the sections on anti-assignment and on perfection. It was proposed to gather input from stakeholders on the issue. *The Working Group agreed to bracket the proposed language “including financial services” and revisit the issue at a later stage.*

48. *The Chair* asked the Working Group whether there was consensus on the need to redraft Article 2, paragraph 4(ii) on the part concerning intellectual property. Support was expressed for the need, at the very least, for more explanatory language.

49. Regarding intellectual property, it was argued that the MLF should be designed to ensure that the renting/licensing of software be included as there was a practical need for it. The factoring of receivables related to intangible assets presented a growing field of business and therefore needed to be addressed in a forward-looking MLF, and the same applied to database services. Receivables arising from renting/licensing of software should likewise be covered by the Model Law. Following this remark, *the Chair* queried whether databases and software should be separate categories in the MLF or if they should fall under “services” in Article 2, paragraph 4(i). Intersessional work on the terms and coverage of intellectual property rights, and on how to conceptualise it for the purposes of the MLF, was suggested, with the involvement of experts on intellectual property. *The Working Group agreed that software and databases were to be covered, but the drafting to include them would be further examined.*

50. *The Working Group also reached the consensus that the issue of credit card transactions was to be reconsidered once a decision on financial services had been reached.*

51. *The Chair* turned to the topic of consumer receivables. The Working Group had previously decided to include consumers as assignors, debtors and assignees. While agreement was expressed that consumers could be assignees on peer-to-peer platforms, uncertainty was raised as to whether consumers would also be assignors. Doubts were also raised on the practical relevance of cases in which a person acted as a consumer while assigning, based on the observation that consumers never acted as assignors, and only in very rare cases as assignees. When acting as transferors, it was maintained that private actors were essentially acting as businesses, not as consumers. *The Working Group did not reach a conclusion on this point.*

52. *The Chair* next drew the Working Group's attention to draft Article 1 – Scope of Application, particularly paragraphs 3–5, of the MLF. A query was raised on whether the sale of a company including its receivables should fall under the scope of the MLF. *The Chair* clarified that the Working Group had decided to include those transactions in the scope during the last Working Group meeting ([UNIDROIT 2021 – Study LVIII A – W.G.3 – Doc. 4](#)).

53. *The Chair* drew the Working Group's attention to the four exclusions from the scope of the MLF set out in Article 1. While it was observed that these exclusions were not expressed as exclusions but rather as "non-overrides", it was pointed out that they mirrored the phrasing of the MLST. Referencing draft Article 1, paragraph 5, one expert interpreted it to mean that negotiable instruments were covered but unaffected which, in his view, was not in accordance with the Working Group's earlier decision to exclude negotiable instruments. In the context of paragraph 3, it was suggested that it was unclear what the reference to a "transferor" was intended to cover in the context of consumer protection, and it was therefore suggested that the provision should only refer to the "debtor". The same expert also suggested that paragraphs 3 and 4 could be moved to the guide to enactment or the final provisions, as they were not positive statements of law.

54. *The Chair*, referring to the previous discussion, contended that consumers could in fact be part of a transaction at any point. One expert proposed to rephrase paragraph 3 from "rights and obligations of a transferor or a debtor" to "rights and obligations of a person". On paragraph 5, it was noted that the decision taken at the previous Working Group meeting referenced in the Comparison Table ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 4](#)) was that while negotiable instruments would be excluded from the MLF's scope, in the case of a conflict between the MLF and another negotiable instrument law, the latter would prevail. It was explained that a decision on the exclusion or inclusion of negotiable instruments could only be made once a decision had been reached regarding the definition of "receivables", especially on the scope of financial receivables. The repercussions that the decision on negotiable instruments would have for other parts of the MLF were also pointed out. *The Working Group decided to keep paragraph 3, replacing "of a transferor or a debtor" with "of a person", and to postpone the decision on paragraph 5.*

55. *The Chair* next drew the Working Group's attention to paragraphs 15–17 of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)), which addressed the previously decided exclusion of real property rights, and opened the floor for comments. In the ensuing discussion it was argued that the need to define exclusions would be reduced if the MLF's scope were limited to "factoring", which in itself was a concept that needed to be clarified for the purposes of the Model Law. Any discussion about exclusions would indeed only be worthwhile once the Working Group had reached a final decision on whether the MLF should have a broad or a focussed definition of "receivable". That decision would have ramifications for the entire text of the Model Law, so a decision in this regard was preferable sooner rather than later. *The Chair* agreed that this was a discussion to be had soon, however suggested first discussing the notion of financial receivables.

56. Discussions on the concept of "factoring" continued and it was suggested to first get a clear understanding of the material scope of the MLF, and address the terminology in a subsequent phase, as it was key to understand which business transactions should be covered by the MLF (e.g. auctioning of receivables on platforms, reverse factoring). Adopting States would benefit from the MLF being concise and in line with the business practice. If the MLF included many types of transactions, it might lead to confusion among the target audience, potentially leading them to reject the MLF altogether.

57. On a conceptual point, it was also maintained that there were two different ways of limiting the scope of the law: either by regulating the *type of activity* or by regulating the *types of receivables*. It was also agreed that the core function of the MLF would be to introduce clarity into an otherwise often confused debate and practice. It was suggested that a definition of "factoring" was hardly attainable. It was further suggested that the fact that "factoring" was not actually used in the MLF

would not preclude the use of the term to market the instrument. The breadth of the idea of securitisation, i.e. the inclusion of financial receivables, most importantly loans, as opposed to sticking to a narrow definition of trade receivables, was seen as a major fault line. It was also pointed out that the scope should not be defined in relation to a definition of “factoring”, but rather by using a precise definition of “receivable”.

58. Referring to the previous day’s discussion, it was queried if loans and insurance receivables were factored in practice, and why credit card receivables were factored but not other types of loans. *The Chair* explained that credit card receivables were widely factored in practice, pointing out that if the Working Group opened up the scope to financial services with the reference to “including financial services” this would open a whole world of other issues. It was expressed that the concept of “financial receivables” could be problematic, and the Working Group had to address specific cases like financial advisers and their claims for payment from their customers. *The Chair* suggested to bracket the text “including financial services”. It was pointed out, however, that while credit card receivables were a logical inclusion in the MLF, in contrast financial contracts governed by netting arrangements or loans were not, as they were ultimately between two actors in the financial industry. *The Working Group decided to delete the phrase “including financial services” and retain the provision regarding credit card receivables.*

59. *The Chair* then drew the Working Group’s attention to paragraph 20 of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) and proposed to discuss each of the exclusions one by one. In reference to paragraph 20 (a) regarding transactions on regulated exchanges, several experts questioned the usefulness of the exclusion, querying in one instance if it was in fact an exclusion of receivables or an exclusion of a type of dealing in receivables. Another issue that was raised was that the current wording of the exclusion in lit. (a) that was ambiguous. *The Working Group agreed to delete (a) in the draft.*

60. *The Working Group, following a brief discussion, decided not to include paragraph 20, lit. (b) regarding netting agreements, (c) on foreign exchange transactions, and (d) on inter-bank payments. The Working Group further agreed to delete the remaining literae (e) to (g).*

61. *The Working Group further decided on the previous issue of financial services to include an explanation – either in a footnote in the Model Law or in the guide to enactment – explaining the types of services that should not be included by “supply of services” in Article 2, paragraph 4 of the MLF, especially with regard to the exclusion of financial services, such as loans.*

(c) Transition subgroup

62. *The Chair* asked the Chair of the subgroup on transition to present the subgroup’s intersessional work.

63. *The Chair of the subgroup on transition* referenced the transition rules in the MLST as the starting point for the subgroup’s work. He drew the Working Group’s attention to Document 5 ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 5](#)). He then explained that the document contained (i) a description of the different scenarios that the subgroup believed to be in need of regulation and, (ii) draft provisions. The document was further divided into two types of transition issues: practical and legal. He stressed the need for a practical road map for States from the moment of legislative adoption to entry into force of the new legal regime. The first type of transition rule applied between adoption and entry into force to allow all stakeholders sufficient time to adapt to the new regime and to set up the necessary operational frameworks. This transition period was particularly necessary for adopting States that had no modern secured transactions regime already in place when adopting the MLF.

64. Next, the Chair of the subgroup described the challenges that related to transactions entered into before adoption of the MLF that were still ongoing at the time of the MLF entering into effect. These transactions could loosely be grouped into four categories ((i) transaction effective under old and new law; (ii) effective only under old, not under new law; (iii) effective only under new, not under old law; and (iv) not effective under either law). Scenarios in which an agreement was entered into before the effective date of the factoring law while the individual transaction was concluded afterwards could further complicate this situation; even more so when including different types of agreements (automatic transfers under the agreement vs. transfers upon acceptance of the factor). Creating model rules for all these scenarios would be challenging, in particular because, while the Working Group understood what States were transitioning to (namely the MLF), they did not know in each case what States were transitioning from (i.e. the previous legal framework). However, it was noted that not all of the theoretical scenarios were realistic. He pointed to a number of overarching issues that had to be addressed: effectiveness between the parties; third-party effectiveness; priority rules; enforcement; issues surrounding the debtor's rights and obligations, particularly whom it owed them to. He explained that each of these issues had been addressed in an individual annex to Document 5 ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 5](#)).

65. The Working Group discussed Document 5. It was noted that Annex A's discussion of effectiveness between the parties related to both discrete transfers and transfers under a master agreement. One subgroup member queried the nature of master factoring agreements, with reference to Annex A, scenario 3. Scenario 3 illustrated that a master agreement could either be (i) a contract with no further need for offer and acceptance or, (ii) a master factoring agreement that only defined parameters under which an additional offer and acceptance were necessary for a transfer to occur. The Chair of the subgroup added that the MLF's treatment of these two scenarios was a core issue. It was explained that the MLF could either (i) accommodate the different ways in which adopting States conceptualised transfer agreements, or (ii) simply present one version of provisions and leave it to the enacting States to make them fit within their respective frameworks.

66. The Chair of the subgroup drew the Working Group's attention to scenario 4. On the one hand it was argued that it was not in fact a problematic case, as any ineffective contract under old law could be cured by having a new contract effective under the new MLF. On the other hand, it was maintained that Article 104 of the MLST meant precisely that the effectiveness of a prior security right be determined solely by the prior law. The Chair of the subgroup pointed out that this debate depended on the definition of "prior security right", which under Article 102, paragraph 1(b) of the MLST was defined generally as an agreement entered into before the new law came into force. In turn, the fact that an ineffective transfer could always be cured by redoing it in accordance with presently applicable law was repeated as an approach. This was supported by other experts, who maintained that the focus should not so much be on the distinction between master agreement and other agreements but rather on which of the agreements – regardless of their title – actually caused the transfer to happen.

67. The Chair of the subgroup underlined how input from practitioners might be useful to determine what roles master agreements actually played in different legal systems, and whether provisions would be necessary in the MLF. It was noted that, in one expert's practical experience, the master agreement typically did not include the transfer itself. The Chair of the subgroup noted that a scenario in which a transfer would be valid under the old national law and invalid under a new national law implementing the MLF was unlikely, given the simple requirements of the MLF for valid transactions.

68. A query was raised whether there were any practical situations in which long term (over 60 or 120 days) receivables, specifically with anti-assignment clauses were to be relevant in scenario 5. One participant stated that the normal period in the trade receivables industry was somewhere between 90 and 180 days. In the securitisation scenario, however, the due date of the receivables might be much later. Another participant pointed to telecom and technology sector receivables,

where anti-assignment clauses were taken care of by using an amendment to the underlying sales agreement before the assignment took place. Practically the issue of anti-assignment clauses under the old law would therefore likely be taken care of before the receivable is financed. The Chair of the subgroup highlighted that scenario 5 needed to be aligned with Annex E, which addressed anti-assignment clauses. More importantly, he described two possible ways of going forward in the drafting: either presenting a curated and limited number of transition provisions for the States to adopt or, alternatively, present a much larger collection of transition provisions to mirror all scenarios that could theoretically arise.

69. The Chair of the subgroup next drew the Working Group's attention to Annex B regarding effectiveness against third parties, and specifically the scenario in which the right of the transferee was effective against third parties under the old law but would not be effective under the MLF, as it required registration. In this scenario, he queried whether a transition period should be introduced to allow for registration under the new system following the MLST approach. Another question would be how long the transition period should be. He proposed recommending a short period rather than a long one in order to achieve certainty as quickly as possible after entry into force of a new law, also taking the short-term nature of most factoring transactions into consideration. One expert agreed with the fundamental idea of having a grace period, and pointed out that a solution should also include the scenario in which an existing registry under the old legal framework be incorporated or somehow linked with the new registry, perhaps making re-registration unnecessary. It was suggested that the issue might need to be addressed in the guide to enactment. The Chair of the subgroup invited the Working Group members to send in proposals for explanations that should be included in the guide to enactment on this point. *The Working Group decided that the MLF should provide for a grace period similar to the MLST.*

70. On the recommendation of the length of the grace period, one expert pointed out that the guide to enactment to the MLST set it at one to two years, which the Working Group could take as a starting point. He added that it ought to also be decided in relation to the length of the previous transition period between adoption and entering into force of a law implementing the MLF. Another expert agreed and spoke in favour of one year as opposed to two. Upon request of the Chair of the subgroup in this respect, practitioner participants shared that a year would be a reasonable amount of time in their experience. *The Working Group agreed on the recommendation of one year as a grace period.*

71. The Chair of the subgroup next drew the Working Group's attention to Annex C regarding priority, stating that once again, problems could arise if the new law had rules on priority diverging from those of the old law. As an exception to MLST Article 102, paragraph 2, Article 106 of the MLST had been taken by the subgroup as the starting point. As a first question to the Working Group, he queried if the MLF should replicate the rule set out in Article 106, and as a second issue, he queried whether there was a more effective way to communicate the goal of this provision than the one taken by the MLST. It was pointed out that the wording of Article 106, paragraphs 1 (b) and 2 were slightly ill-fitting, as paragraph 2 defined what had been introduced as a negative condition in paragraph 1(b). This was arguably a point that should be addressed later as a drafting matter. As an additional point, a clarification was provided on the reference to "none of these rights" in MLST Article 106, paragraph 1(b) as meaning "prior rights". *The Working Group agreed to this approach.*

72. The Chair of the subgroup next turned to Annex D dealing with enforcement, and stated that the subgroup had not seen any benefit in including a parallel provision to Article 103, paragraph 2 of the MLST. An argument was made that, while in the overwhelming number of cases an equivalent to Article 103, paragraph 2 of the MLST was not needed, a similar provision could be relevant in very special circumstances, and therefore ought to be kept in some form. *The Working Group decided in favour of including a provision similar to MLST Article 103, paragraph 2 in the MLF.*

73. The Chair of the subgroup drew the Working Group's attention to Annex E concerning the question of to whom the debtor's obligation was owed after a transfer that should not have taken place due to restrictions on assignments. In this situation, the transfer was either ineffective or effective between the assignor and the assignee, but the obligation was still only owed to the assignor. Adopting Article 102, paragraph 2 of the MLST into the MLF would mean that an anti-assignment clause, or a legal provision to that effect, might be overridden, which the Chair of the subgroup argued was not the desired result as the debtor should be protected. However it was pointed out that this problem would only arise in a very limited number of cases, namely in relation to receivables contracts entered into before adoption of the MLF that remained on foot after the MLF came into force. The application of an expiry date on anti-assignment clauses made under the old law was discussed, to avoid them continuing for a long period of time in contradiction with the new law. On a related point, when adopting a rule on anti-assignment clauses on receivables, it was mentioned that the same would also apply to supporting rights, which should be made clear in the guide to enactment. The Chair of the subgroup argued that the relevant point in time to determine to whom the debt was owed was whenever a new receivable came into being, not when the original agreement was made. This approach was supported, and the need to shorten the period during which the old law had substantive effect once the new law had become effective was underlined. Another expert pointed to Article 5 of the draft MLF, which could be read to give the debtor the right to refuse payment to anyone but the assignor. *Another expert clarified that regulations regarding the effectiveness of anti-assignment clauses in the new law would override Article 5, a view with which a majority of the Working Group agreed and to be made clear in the guide to enactment.*

Item 4: Consideration of substantive matters

(a) Unresolved matters identified in the Issues Paper

74. *The Chair* referenced Section II of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)), which contained issues requiring further consideration.

Proceeds

75. *The Chair* first drew the Working Group's attention to Section II.D of the Issues Paper on proceeds.

76. The Chair asked the Working Group to confirm which types of proceeds should be included in the scope of the MLF. One expert questioned whether the term "cash proceeds", as referenced in paragraph 38 of the Issues Paper, also included cryptocurrencies. Several experts supported the view that cryptocurrencies would be covered by the notion of "cash proceeds". Another query was raised as to the meaning of "proceeds" and whether it would cover (i) only proceeds of the receivable or (ii) also situations where the receivable itself is proceeds (e.g. the receivable being proceeds of inventory). It was maintained that the latter should not be considered proceeds under the MLF. It was noted, however, that the latter issue would still need to be considered in relation to priority. The Chair noted that there would always be some conflict between the MLF and other laws that could not be fully resolved in the MLF.

77. Returning to the meaning of "proceeds", one expert explained that the concept of "cash proceeds" came from insolvency law, and should form the basis for the term's use in the MLF. It was suggested that having the MLF apply to non-cash proceeds might be useful. From a practical point of view, it was underscored that proceeds from factoring arrangements were almost always cash. It was suggested that a financier's right to access supporting rights should not be deemed proceeds in the MLST, as opposed to the Receivables Convention. It was noted that claims under letters of credit would not normally constitute proceeds. It was argued that, even if there were some cases of non-cash proceeds, it might still not be desirable to include them in the MLF, as it might result in the MLF

registry becoming a collateral registry, which would lead to complications in the adopting States. *The Working Group decided to limit the scope of the notion of proceeds to cash proceeds (including proceeds of proceeds).*

78. *The Chair* then directed the discussion to the drafting regarding proceeds. It was suggested that the MLF should not adopt the definition in Article 5(j) of the Receivable Convention, “whatever is received in respect of the assigned receivable”, on the basis that it was too broad. It was noted that Article 5(j) of the Convention expressly excluded returned goods, however in some circumstances the Convention treated them in parallel to proceeds (e.g. in Article 14). It was further suggested that Article 19 of the MLST be used as a model for the MLF’s proceeds provision. Article 19 addressed whether or not a party had to take specific steps in order to perfect a security interest in cash proceeds and thus make it effective against third parties. It covered proceeds in the form of money, receivables, negotiable instruments, or rights to funds credited to a bank account. It was noted that the MLST gave the factor a property right in returned goods, whereas the Receivables Convention gave the factor a contractual right. A clarification was offered on how “rights to payment of funds credited to a bank account” could be an example of “proceeds of proceeds”. *The Working Group agreed to develop a notion of proceeds based on the list contained in Article 19 of the MLST.*

Notification

79. *The Chair* next pointed to Section II.E of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) on Notification and invited the Working Group to discuss the issue. He queried whether the Working Group agreed with not including the identities of the transferor and transferee in the notice to the debtor, as proposed in paragraph 48 of the Issues Paper. While it was suggested that the MLF should make a clearer distinction between a notification and a payment instruction, it was noted that in practice, a notification was required in almost all cases. It was clarified that the distinction between notification and payment instruction originated from the Receivables Convention. While a notification was typically used when the identity of the transferee was known, a payment instruction was typically used in the context of import factoring, when a payment had to be made by the debtor to an account of a yet unknown transferee. If the Working Group decided to provide that disclosure of the identity of the parties was not mandatory, it was argued that the section on payment would have to be adapted to clarify the conditions under which the debtor would have to make a payment. It was also noted that the parallel provision in Article 62 of the MLST required the disclosure of the identity of the transferee, but not the transferor, and that this would be a sensible approach for the MLF.

80. The Working Group also discussed whether the identity of the transferor should be disclosed in order to clarify to whom the debt was owed in the first place. This matter was addressed in Chapter VI, Article 7, paragraph 7 of the draft MLF, which gave the debtor the right to request proof of the transferee’s right. It was argued that a distinction should be drawn between good business practice and legal requirement. While it might be good business practice to inform the debtor of the identity of the transferor, this should not be a legal requirement, as long as the debtor had a right to request information from the transferee. It was suggested to keep the rules regarding notification as simple as possible to make them manageable. It was further queried how these rules would also apply to future receivables, which could only be described in a generic way. *The Chair* noted that identifying the transferee should be unproblematic while making identification of the transferor a legal requirement appeared to be more contentious.

81. It was suggested to expand Chapter VI, Article 7, paragraph 7 of the draft MLF to allow the debtor to request information about the transferor. It was noted that in the United States and Canada, notifications described the transferor, the transferee and the receivable. In Europe, the transferor typically informed the debtor about the identity of the transferee. It was also explained that in practice the transferor provided the notification to the debtor, although it could also be done

by the transferee. *The Working Group agreed that the ultimate transferee as well as the receivable should be the required information for an effective notification.*

82. Where there was a chain of transfers of a receivable, one expert suggested that the last transferor should be the party to provide notification to the debtor. In practice, it was pointed out that the first transferor would typically provide the notification, while all the other transferors had the right to do the same. One expert suggested that for chains of transfers, the notification should include information about the first transferor. It was also suggested that the guide to enactment could provide additional explanation on notification requirements in complex chain of transfers situations. *The Chair* argued that notifying someone of a transfer of a receivable should by definition identify the particular receivable(s), so there was no need to spell this out in the Model Law. However, it was argued that the receivable could not be identified sufficiently without naming the original creditor, and any prudent debtor would require such information before paying. Moreover, a prudent debtor might even require more information about the chain of transfers. Depending on the situation, it was also noted that there might be clearer and more reasonable ways of identifying the receivable than specifying the identity of the original creditor. Another expert pointed out that the wording of Chapter VI, Article 7, paragraph 7 had been drafted for a scenario with a single transfer, not a chain of transfers, and suggested addressing this matter at a subsequent meeting.

83. One participant explained that the acceptance of a notification was also an issue to be addressed, as it was regulated differently across jurisdictions. *The Chair* proposed addressing this at a later stage of the drafting process. It was noted that either the MLF or the guide to enactment would need to include a definition of “notification” and of “payment instruction”. One expert suggested that Article 7, paragraph 7 be moved up, though it was pointed out that the definition of “debtor” would solve some of the issues.

Future Receivables

84. *The Chair* next drew the Working Group’s attention to Section II.F of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) regarding Future Receivables, and suggested adopting option 2 of the three definitions for “future receivable” proposed in paragraph 55. *The Working Group decided to adopt the second option for the definition of “future receivables”.* Following the suggestion of one expert, *the Working Group decided to use the term “existence” instead of “effect” in the definition.*

Definition of “debtor”

85. *The Chair* next drew the Working Group’s attention to Section II.G of the Issues Paper and the definition of “debtor” in relation to future receivables.

86. One expert noted that the MLST defined a debtor of receivables as a person who *owed* payment of a receivable and suggested that the MLST definition could not apply to future receivables, as they did not exist yet. Another expert argued that if the receivable was not yet owed then there was no debtor and the notifications provisions would thus not apply.

87. On the issue of notification of future receivables, it was noted that a yet unknown debtor could not be notified. It was suggested that the guide to enactment should explain that the notion of “debtor” also included a potential debtor. One expert suggested that the issue of notification when the debtor did not exist yet could be addressed by adding “..., in which case the debtor refers to the person who will be the debtor” to Chapter I, Article 6, paragraph 2 of the draft MLF. Another expert responded that the proposed change to Article 6 would not be necessary as this was already implied in the meaning of “debtor” and that the matter might be better dealt with in the guide to enactment. It was suggested that, given the different degrees of literalism in different jurisdictions, it might be useful to offer some sample language (as suggested for Article 6) in the enactment guide for those

jurisdictions that might consider the notion of “debtor” to be ill-defined. *The Working Group agreed that the term “debtor” should remain as drafted in the Model Law itself but should be explained in the guide to enactment, including some sample text for jurisdictions that conceptualised “debtor” in a more literal way.*

88. The Working Group discussed whether “debtor” should include “guarantor” (paragraph 65 of the Issues Paper and Chapter 1, Article 2, paragraph 1 of the draft MLF). It was noted that it was not common practice for guarantors to receive notification and that guarantors were typically requested to pay by a separate letter or other form of communication. While the notion that guarantors did not require additional protection was supported, it was suggested to leave the guarantor out of the definition of debtor and address the rights and responsibilities of the guarantor on an issue-by-issue basis. The Working Group was reminded that cases in which the guarantor had to pay were the exception rather than the rule. Guarantors would remain protected under the law applicable to guarantees in any case. This raised a wider issue as to the degree the draft MLF should cover aspects of guarantees law, which varied across jurisdictions. It was noted that the draft MLF ought to not give the impression that guarantors had different rights under the MLF than under the applicable guarantee law. On a related note, it was stressed that the role of the guarantor should be clarified in the draft MLF. *The Chair tentatively summarised that the prevailing stance was to not include “guarantor” in the definition of “debtor”, however leaving the issue open and to be revisited at a later stage.*

Debtor discharge

89. *The Chair* then drew the Working Group’s attention to Section II.H of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) on debtor discharge and Chapter VI, Articles 5 and 7 of the draft MLF.

90. Referencing Chapter VI, Article 7, paragraph 4, it was noted that the term “made” should be deleted to avoid possible confusion that it might also refer to notification. Whether or not the debtor would reliably be in a position to know by whom the transfer had been made under Article 7, paragraph 4 was discussed, as the notification would only contain information about the transferee and the receivable, not necessarily about the transferor. This was what Article 7, paragraph 7 had tried to address, and it was noted that these provisions might be too complicated for a low-value transaction. It was suggested that there might be simpler ways of drafting the provisions to make the distinction between successive and parallel assignments more readily ascertainable in Article 7, paragraphs 4–7, similarly to the approach adopted in the Receivables Convention. Scepticism was expressed on the possibility of finding a better wording while retaining the policy goals entailed in the Article, which was to avoid double-financing by not letting the transferor recall the payment instruction without the consent of the transferee once it had given notification to a debtor. New wording was suggested for paragraph 4: “If the debtor receives notification from the transferee that the same transferor has made more than one transfer of the same receivable, it is discharged by paying ...”. The Working Group was reminded that, following its previous decision, the notification did not have to include the name of the transferor, so the debtor would have no apparent way of knowing whether the transfer was part of a chain of transfers and whom to pay. It was argued that the proposed re-wording would cover the same scenario as paragraph 5. It was pointed out that paragraph 8 should be understood to mean that if a person paid whoever the right person was under domestic law, it was discharged, while paragraphs 4 and 5 should be read as debtor protection rules in the cases where the debtor paid the wrong person under domestic law. Moving paragraph 8 to the beginning of the Article was also put forward as a suggestion for clarity.

91. An expert queried whether the word “made” in paragraph 4 related to “transfer” (i.e. meaning “transfers made by the same person”, namely the transferor, while different people could give the notifications). If this was not how the paragraph should be read (i.e. if it meant “notifications given

be the same person”), it would lead to a situation whereby the debtor – having been notified of multiple transfers of the same receivable – would assume that such a notification could only come from the transferee, not the transferor (who would otherwise implicitly have double-pledged). As the Working Group had decided that the identity of the transferor did not need to be disclosed, this would leave the debtor unable to know whether their case would fall under paragraph 4 or paragraph 5, thus whether to pay to the first or the last transferee. It was agreed that the ambiguity stemming from the word “made” should be resolved and rephrasing was suggested along the following lines: “if the debtor has received multiple notices of assignment with respect to the same receivable, it is also discharged by paying the first purported transferee in the case of multiple notices from the transferor and by paying the last transferee in the case of a chain of transfers”. Another expert argued that this did not resolve the issue that had been raised previously where the debtor might not know which of the two scenarios applied. Different wording was then proposed: “if the debtor receives a notification of a transfer, it is entitled to pay the transferee; if the debtor receives notification of more than one transfer, then it can still pay the first transferee, unless the second transferee is able to demonstrate that it has a better claim”. While the Chair stressed that this approach would put a lot of weight on the transferee trying to prove that it has a superior claim, it was argued that priority should be given to the first transferee. Given that in practice a transferee that had received payment from the debtor could be forced to pay the creditor/transferee with a superior claim, the importance of the issue was questioned.

92. *The Working Group established that the rules should reinforce debtor protection. Therefore, where the debtor paid the “right” transferee, it should be discharged. Otherwise, it should nonetheless be discharged if a) in the case of a chain of transfers it paid the last transferee in the chain, or b) in the case of multiple transfers of the same receivable by the transferor, it paid the first transferee. This presupposed that the debtor was entitled to the information as set out in Chapter VI, Article 7, paragraph 7.*

93. While underscoring the importance of also protecting the factor in each of these scenarios, agreement in principle with the proposed policy was expressed. *The Chair* reiterated that the new Article 7, while the same in content, should put the different scenarios in a logical order of practical likelihood and relevance. The issue of how the debtor was to know whether it was a case of a chain of transfers or multiple transfers by the same transferor remained to be resolved. It was cautioned that the provisions should not be redrafted to resemble a good faith defence for the debtor, which the Working Group had decided against at the third Working Group session. It was also pointed out that paragraph 4 appeared to assume that the debtor knew the transferor, which contradicted the decision the Working Group had taken the previous day that the notification did not have to name the transferor. Regarding paragraph 5, it was also pointed out that the paragraph assumed that the transferee had given the notification and that while the notification ought to identify the transferee, it was not clear that it also had to identify the person giving the notification. On the same article, it was noted that the MLF did not require the notification to specify the date of the transfer, making it difficult for the debtor to determine which was the last transfer in a chain of transfers. *The Chair* clarified that nothing prevented the identification of the transferor even if it was not required. Moreover, the notification would typically not come from the transferor in the scenario of a chain of transfers. It was suggested that Article 7 might be broadened to accommodate the points raised, and that Articles 4 and 5 in practice would likely be provisions that would be relevant after a debtor had already paid rather than a guide to a debtor about whom to pay. It was noted that while in developed factoring markets erroneous payments to one transferor instead of another got resolved between the factors, this approach might prove more difficult in developing factoring markets. Articles 4 and 5 appeared ambiguous about whether they referred to the person who gave notice or the person who performed the transfer, while the MLST made it clear that it referred to the person who performed the transfer. While a suggestion was made to solve the issue by focusing on what the notice contained rather than who issued it, a connection was also drawn with Article 6, paragraph 1, in which the requirements for an effective notification were set out. Such requirements had to strike a balance between being detailed enough to be useful to the debtor and not so detailed as to

invite mistakes leading to the ineffectiveness of the notice. Arguably, the purpose of Article 6, paragraph 1 was to allow the debtor to ignore an insufficient notice. *The Working Group agreed that the relevant articles should be redrafted and reconsidered at the next meeting.*

Anti-assignment clauses

94. *The Chair* next drew the Working Group's attention to Section II.I of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) on anti-assignment clauses (AACs) and introduced the topic.

95. Referencing paragraph 76 of the Issues Paper and Chapter II, Article 9, paragraph 2 of the draft MLF, the Chair remarked that the policy question to discuss was whether the MLF should further extend the override of AACs to supporting obligations.

96. Referring to draft Article 9, paragraph 1, it was argued that the provision would not apply well in the case of a letter of credit or an independent guarantee. The first sentence would not apply because a transferee would not acquire the ultimate benefit of a letter of credit automatically, as their transfer would require the consent of the issuer. The second sentence would not work in practice either because letters of credit were, for the most part, not governed by (domestic) law. There was general support for the need to redraft the paragraph, and it was suggested that the enactment guide provide further explanation, specifying that the provision was optional and could be left out by enacting States. Acknowledging that most States did not have letter of credit statutes like the United States, the Working Group discussed whether the provision was sufficiently useful in other scenarios to outweigh the fact that it did not work in the case of letters of credit. It was pointed out that forfeiting under domestic and ICC rules was common in China. A proposal was made to remove the word "or supports" from paragraph 1, and to replace it with "guarantees". The issue of credit insurance supporting a payment however would not fall under either of the proposed terms. The term "secondary obligation" was therefore offered as an alternative, as it was commonly used in the United States to cover guarantees, suretyship contracts, credit insurance, and co-signing, however this raised scepticism as most credit insurances policies required the consent of the insurer for an assignment. It was contended that the deletion of "supports" would suffice because the term "secure" already included the concept of "guarantee". It was then suggested to re-draft the provision in a way that worked for most jurisdictions and include an explanation of what the chosen wording was aiming to do in the guide to enactment, leaving it to the adopting States to find a wording that was suitable for their particular jurisdiction. The proposed solution nevertheless elicited a comment that the issue would arise in almost all jurisdictions, and that merely flagging it in the guide to enactment while retaining an ill-fitting provision in the body of the MLF was not a good approach, making it preferable to delete "or supports" from the provision. While the suggestion solved the letter of credit problem, it was argued that this change might remove more from the scope of the provision than intended. Instead, having an explanation in the provision that nothing in the provision was intended to conflict with applicable letter of credit rules might be preferable. Other experts concurred with this suggestion. *The Working Group agreed that the aim was to not contradict the adopting States' letter of credit law; this should be done by explaining this goal in the body of the MLF and/or the guide to enactment. The exact wording should be left to the next round of drafting.*

97. The next question raised was whether draft Chapter II, Article 9 needed a provision parallel to Article 8, paragraph 2. A suggestion was made to reverse the order of Articles 8 and 9. Regarding the function of Article 9, it was noted that the enactment guide should provide a detailed explanation of the language used and its goals. *The Working Group agreed to reverse the order of draft Articles 8 and 9.*

98. As to Chapter II, Article 8, paragraph 1, it was queried whether sentence 2 had any practical application and suggested that all possible scenarios might already be covered by sentence 1. While

the aim of the provision was to clarify that the transfer would be effective and the transferor would have no liability to the debtor of the receivable, effectively making the situation equal to a case where the anti-assignment clause concerning a receivable had been overridden, it was underscored how the redrafting exercise would have to ensure that the wording only applied to agreements between the transferor and the debtor, citing negative experiences from the UK. The question of what the wording “any transferee” might cover was also raised. Referring to the guide to enactment to the MLST, it was pointed out that it drew a distinction between the following situations: a) an agreement between the initial creditor and the debtor of the receivable; b) where the initial creditor transferred a receivable to another person and that person created a security right; and c) an agreement between the initial creditor and the initial secured creditor. It was suggested that the Working Group might wish to consider those scenarios and determine if Article 8 was not to apply to any one of them, which could be done in an intersessional meeting. *The Working Group agreed to this procedure.*

Comments submitted by Sir Roy Goode

99. *The Chair* next proposed to not address the remaining two items in the Issues Paper (J. Disposition of collateral and distribution of proceeds, and K. Digital currencies) at this point, and to instead consider the comments submitted by Sir Roy Goode.

100. The Working Group considered the first comment that while the Model Law was called a Model Law on Factoring, it did not contain any description, let alone definition of the term. It was remarked that the comment implied an understanding of “factoring” to mean notification receivables financing, as opposed to the Working Group’s understanding that it was to cover also invoice discounting. It was argued that the term “factoring” should be retained in the title to underline the Model Law’s claim to be universal, whereas there was some agreement that indeed the title ‘Model Law on Factoring’ might be inappropriate as (1) it covered more financing products than factoring (e.g. securitisation), and (2) the word “factoring” was neither used nor defined anywhere in the Model Law. It was therefore observed that either renaming the draft or narrowing its ambit was important.

101. As there were no further comments, *the Chair* opened the next issue regarding the use of the term “transfer” for discussion. While the term “transfer” under English law was noted to include novations as well as assignments, it was also maintained that the MLF included a definition that was sufficient to delineate its meaning, and argued that many common law jurisdictions and the MLST also used the term. Therefore, as the MLF was going to be a precursor for a jurisdiction adopting the MLST as a complete framework for secured transactions, the same terminology should be used in both instruments if possible. The fact that “transfer” had been chosen as the more jurisdiction-neutral term compared to “assignment” was also pointed out. The Working Group next briefly discussed the terminological difference between the verbs “factor” and “transfer”, to address whether the term “factor” could be defined and introduced to solve the issue. While it was pointed out that the term “transfer” had no definition in the MLF, which would however not be problematic, it was argued that any terminology decisions were in a way only preliminary, as national legislators would have to use their own language when implementing the MLF in non-English speaking jurisdictions.

102. The proposed addition to Article 1, paragraph 1 (“... whether outright or by way of security”) was addressed next. Some experts cautioned that the proposed addition might not be necessary and that it would mix the scope provision with the definition. While this was acknowledged, it was however suggested to include the proposed wording in Article 2. It was noted that, while the title of the instrument was Model Law on Factoring, the Model Law in fact applied to a security right in receivables, which was not seen as factoring by the industry. Concerns were voiced that the proposed wording would open the risk of overstressing the notion of transfer and making the instrument internally inconsistent. One expert proposed to have an explanation in the enactment guide, further elaborating types of security transfers that might be covered, similarly to the Receivables Convention. *The Working Group agreed not to adopt the proposed rewording.*

103. The Working Group then discussed the proposed changes to the definitions section. It was pointed out that in China, the notion of “proceeds” might lead to confusion among Chinese practitioners and that it was advisable to clarify the definition further. The notion of “proceeds”, it was agreed, had a very limited scope under civil law, but under the definition provided in the MLF should be manageable for practitioners.

104. *The Working Group agreed to delete draft Article 3, paragraph 3.*

105. The Working Group next considered the suggestion to substitute “predictability” for “good faith” in draft Article 5, paragraph 1. It was proposed that Article 5, paragraph 2 should be deleted altogether, while other experts were in favour of materially retaining Article 5, perhaps by moving it to the guide to enactment. The reference to “good faith” was said to add little to the paragraph, and it was made clear that while Chinese law had a clear concept of good faith, when implementing international instruments into domestic law, the concept of “international practice” or “business practice” might be a better option. *The Chair* suggested to rename the Article “Rule on Interpretation” if the Working Group decided to keep any or all of Article 5. It was suggested that reference to international origins and the need to promote uniformity might be inserted in a preamble to the MLF. *The Working Group agreed to delete draft Article 5, paragraph 2 as well as “good faith” from paragraph 1, and to move the reference to the international origin and the need to promote uniformity to the preamble.*

106. Concerning draft Article 6, paragraph 3, one expert commented that the proposal was not in line with a registration system. There was no opposition to this stance in the Working Group.

107. *On draft Chapter VI, Article 7, paragraph 2, the Working Group rejected the proposed change, as the Group had previously decided to provide for no exceptions.*

108. Regarding the proposals on draft Chapter VI, Articles 6, 7 and 8, in light of an explanation of the comments in the context of English law, one expert noted that the proposed changes were already included in the MLF.

109. *On the necessity of draft Chapter VI, Article 10, paragraph 1, the Working Group concluded that the provision should remain as was.*

110. *On the suggestion regarding draft Chapter VI, Article 11, the Working Group did not see the need to add any new language.*

111. *On the suggested deletions of draft Chapter VII, Article 3, paragraphs 2 and 3, the Working Group decided to retain the provisions.* Some experts argued that the provision was not strictly necessary, but did not do any harm and might be helpful to clarify the process.

112. One expert pointed out that draft Chapter VII, Article 2, paragraph 4 should be deleted in consistency with the decision to exclude bank deposits from the definition of receivables. *The Working Group agreed with this proposal.*

113. One expert suggested adding the notion of “security transfer” into the definition of “transfer” in Chapter 1, Article 2. *The Working Group agreed.*

114. *The Chair* finally drew the Working Group’s attention to Section II.J of the Issues Paper ([UNIDROIT 2021 – Study LVIII A – W.G.4 – Doc. 2](#)) on disposition of collateral and distribution of proceeds. With few contentious points to be noted, the Working Group went through the discussion swiftly, with one expert reminding the Group that “default” needed to be defined.

115. An enquiry was made as to the approach to the drafting of the priority section. *The Chair* replied that it ought to be prepared for the next session, but this schedule depended on a number of external factors beyond the Working Group's control. Another query that was raised concerned the scope of the priority section. It was suggested to deviate from the MLST, so the priority rules would apply to competing assignees, judgement creditors, and insolvency administrators.

(b) Preliminary draft Model Law on Factoring

116. The Working Group did not address this item.

Item 5: Organisation of future work

117. *The Working Group decided to tentatively schedule the next meeting for 2 – 4 May 2022.*

Item 6: Any other business

118. The Chair asked if anyone had any other business to discuss, which was not the case.

Item 7: Closing of the session

119. In the absence of any other business, *the Chair* thanked the Working Group for the very productive meeting and declared the session closed.

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ANNEX II**AGENDA**

1. Opening of the session by the Chair
2. Adoption of the agenda and organisation of the session
3. Discussion of intersessional work
 - (a) Intersessional meeting on scope
 - (b) Registration subgroup
 - (c) Transition subgroup
4. Consideration of substantive matters:
 - (a) Unresolved matters identified in the Issues Paper (Unidroit 2021 – Study LVIII A – W.G.4 – Doc. 2)
 - (b) Preliminary draft Model Law on Factoring (Unidroit 2021 - Study LVIII A – W.G.4 – Doc. 3)
5. Organisation of future work
6. Any other business
7. Closing of the session