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**Factoring Model Law Working Group**

***Fifth session (hybrid)***  
**Rome, 16 – 18 May 2022**

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**SUMMARY REPORT**  
**OF THE FIFTH SESSION**  
**(Hybrid, 16 – 18 May 2022)**

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1. The fifth session of the Working Group (the Working Group) to prepare a Model Law on Factoring (MLF) took place in hybrid format between 16 and 18 May 2022. The Working Group was attended by 37 participants, comprised of (i) 10 Working Group Members, (ii) 17 observers from 6 international, regional and intergovernmental organisations, 4 industry associations and academia and (iii) 10 members of the UNIDROIT Secretariat (the list of participants is available in Annex II).

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

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

3. The Chair declared the session open.

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

4. The Working Group adopted the draft Agenda (UNIDROIT 2022 – Study LVIII A – W.G.5 – Doc. 1, available in Annex I).

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

5. The Working Group adopted the Summary Report of the Fourth Session (UNIDROIT 2022 – Study LVIII A – W.G.4 – Doc. 6).

**Item 4: Consideration of substantive matters**

**1. Matters identified in the Issues Paper (Study LVIII A – W.G.5 – Doc. 2)**

**(a) Chapter V – Priority rules (Study LVIII A – W.G.5 – Doc. 4)**

6. *The Chair* opened the floor for comments on the preliminary priority rules prepared by the Secretariat in document [Study LVIII A – W.G.5 – Doc. 4](#).

7. With reference to the title of Chapter V ('priority of a transfer'), *one expert* noted that the draft MLF broadly used the term 'transfer' to describe a process, similar to 'assignment', whereas in Chapter V 'transfer' was replacing the term 'security right' from the UNCITRAL Model Law on Secured Transactions (MLST). The expert explained that in the context of Chapter V, the legally precise corresponding term to 'security right' would be 'the rights of a transferee of a receivable'. However, the expert suggested that the simpler term 'transfer' should be used to make the instrument more user-friendly. *Another expert* concurred on the basis that the United Nations Convention for the Assignment of Receivables in International Trade (Receivables Convention) used the term 'assignment' to refer to both the process and the rights of an assignee of a receivable.

8. *Another expert* suggested that while it would be preferable to use the word 'transfer' instead of 'the rights of a transferee of a receivable', literalists in some jurisdictions might not favour such an approach. It was suggested that the definition of 'transfer' in Article 2(1) of the draft MLF could provide that in certain contexts 'transfer' also meant 'the rights of a transferee arising from a transfer'. *Other experts* agreed that the best approach would be to use the term 'transfer' but also include an expanded definition.

9. At a later stage, the Working Group agreed to the use of the term 'transfer' in Chapters V and IX and further agreed that the definition of 'transfer' in Article 2(1) should be expanded in certain contexts to include 'the rights of a transferee arising from a transfer'.

10. *The Chair* then opened the floor for comments on Article 29 (competing transfers). *One expert* explained that the corresponding provision in the MLST established priority rules relating to three different situations, on the basis that third party effectiveness could be achieved in various ways. The expert suggested that as the MLF would allow for priority and third party effectiveness solely through registration, Article 29 should be simplified to provide that the priority for competing transfers of the same receivable was determined by order of registration. *Several experts* supported this approach, whereas *other experts* noted that while the policy position was correct, there might be a pedagogic purpose for retaining broader drafting consistent with the MLST. *After further discussion, the Working Group decided to simplify the text of Article 29, and add further commentary in the Guide to Enactment that would accompany the MLF explaining that priority and third party effectiveness under the MLF would be achieved solely on the basis of registration, regardless of how priority had been established under the existing domestic law (registration, notification, control or otherwise). The Working Group also decided to delete 'by the same transferor' in the title and text of Article 29, and 'without regard to the order of transfers' in the first sentence.*

11. *The Chair* then opened the floor for comments on Article 30 (competing transfers created by different transferors). *One expert* suggested that Article 30 was not applicable to the factoring context and should be deleted. The expert explained that under the MLST, Article 30 provided a priority rule for the situation whereby Party A creates a security right in favour of Party B, then Party A transfers the collateral to Party C, who then creates a security right in the collateral in favour of Party D. The expert concluded that this situation could not arise in the context of the transfer of receivables. *Another expert* suggested that it would be theoretically possible for a situation to arise in the factoring of receivables where there would be a security transfer to Party A and then an outright transfer of the same receivable to Party B, which then effectuated another transfer to Party C. The expert concluded that Article 30 could address the priority conflict between Party A and Party C, however such situations were only likely to arise where there were long-term receivables and were not likely to arise often in practice. A private sector representative noted that such a scenario would likely only arise in an international factoring context. Several other experts suggested that Article 30 was unnecessary and should be deleted. *The Working Group decided to delete Article 30.*

12. The Working Group decided to delete Article 31 (competing security rights in the case of a change in the method of third-party effectiveness), on the basis that third party effectiveness under the MLF would be determined solely on the basis of registration.

13. *The Chair* opened the floor for comments on Article 32 (proceeds). One expert explained that Article 32 dealt with competing interests in proceeds. It was suggested that it was important for the MLF to ensure that the priority of a transferee's interest in a receivable extended to the proceeds of that receivable, but that the MLF rule should be limited by the implementing State's broader secured transactions law to the extent that it governed interests in proceeds. Another expert agreed, and suggested that Article 32 be redrafted to simply state that 'priority under this law extends to proceeds of the transferred receivable'. *Another expert* agreed, noting that the phrase 'priority under this law' would ensure that Article 32 would not unduly interfere with broader priority rules in relation to the implementing State's secured transactions law. *The Working Group agreed to amend Article 32 to provide that 'priority under this law extends to proceeds of the transferred receivable'.*

14. *The Chair* opened the floor for comments on Article 33 (competing security rights in tangible assets comingled in a mass or transformed into a product), noting that the Secretariat had suggested that the article could be deleted on the basis that the corresponding article of the MLST dealt with

issues that were not applicable to factoring. *An observer* supported deletion of Article 33. *The Working Group agreed to delete Article 33.*

15. *The Chair* opened the floor for comments on Article 34 (security rights competing with rights of buyers or other transferees, lessees or licensees of an encumbered asset). *Several experts* suggested that the Article could be deleted as it covered matters that were not applicable to factoring arrangements. *One observer* queried whether Article 34(2) should be retained, which allowed a transferee to authorise the outright transfer or security transfer to a third party. *One expert* noted that the rule in Article 34(2) was correct, but further suggested that it was not necessary to include in the MLF as Article 3(1) would allow parties to a factoring agreement to achieve the same result. *The expert* suggested that the matter should instead be addressed in the part of the Guide to Enactment that dealt with party autonomy and Article 3. *The Working Group decided to delete Article 34 on the basis that it was not applicable to factoring arrangements.*

16. *The Chair* opened the floor for comments on Article 35 (impact of the transferor's insolvency on the priority of a transfer). *One expert* explained that the substantive rule in relation to the impact of the transferor's insolvency on the priority of a transfer was correct. However, the expert explained that the phrase used in the MLST 'the insolvency law to be specified by the enacting State' would be likely to result in the enacting State specifying their own insolvency law, even though the enacting State's insolvency law might not be the applicable insolvency law under the relevant conflict of law rules. With reference to footnote 18 in the document, the expert suggested that it would be preferable for Article 35 to refer to 'the applicable insolvency law'. Several experts agreed with the proposed approach. An observer noted that the MLST had provided for a specific cross-reference to the insolvency law of the enacting State in order to allow a factor to know where to look to determine its priority. *The Working Group agreed to replace 'the insolvency law to be specified by the enacting State' in Article 35 with 'the applicable insolvency law', and to explain the matter in the Guide to Enactment.*

17. *The Chair* opened the floor for comments on Article 36 (transfers competing with preferential claims). *An observer* noted that the purpose of Article 36 in the MLST was to require enacting States to clarify whether there were any other domestic laws under which preferential claims had priority over a security right. *An expert* suggested that the vast majority of transfers under the MLF would be outright transfers rather than security transfers and as a result Article 36 would only have limited applicability. *Another expert* agreed, but also suggested that it was necessary to retain the Article on the basis that in some States such as Canada, there would be certain preferential claims that would still attach to a transferred receivable and have priority over a transferee's registered interest. *A third expert* noted that Article 36 dealt only with preferential claims outside of insolvency and that the language of the provision could be improved. *A further expert* agreed, noting that the term 'preferential claim' was usually used in the context of insolvency and thus might be confusing when used to refer to claims outside of insolvency. *Another expert* agreed, and suggested that Article 36 should be redrafted to refer to 'claims arising from the operation of law' rather than referring to 'transfers competing with preferential claims'. *An observer representing industry* noted that the treatment of 'preferential claims' was a confusing matter for international factors and their clients and encouraged the Working Group to find a solution that would not make factoring transactions more complicated. *An observer representing UNCITRAL* noted that the intention of the MLST was to try to limit any preferential claims that would have priority over a security interest to the greatest extent possible. The observer suggested that the MLF should similarly encourage implementing States to avoid or limit preferential claims to the greatest extent possible. *The Secretariat* suggested that the entirety of Article 36 could be placed in square brackets in the MLF in order to suggest to enacting States that they should consider not including the article at all. *The Working Group decided to place Article 36 in square brackets in the MLF and replace 'preferential claims' with 'claims arising by operation of law'.*

18. *The Chair* opened the floor for comments on Article 37 (transfers competing with rights of judgment creditors). *One expert* noted that Article 37(2) provided a specific priority rule that limited the priority enjoyed by a transferee over a judgment creditor in relation to security transfers. Noting that the MLF was more concerned with outright transfers than security transfers, the expert queried whether it was necessary to include the relatively complex priority rule in Article 37(2). *Another expert* suggested that it was necessary to retain Article 37(2) on the basis that the MLF was to apply to both outright transfers and security transfers. However, the expert suggested that the paragraph could be slightly restructured to make it clear that it was limited to security transfers and thus would not be relevant for parties that were only concerned with outright transfers. *The Working Group decided to retain Article 37 and add the words 'in the case of a security transfer, if the transfer' at the beginning of the paragraph.*

19. *The Chair* opened the floor for comments on Articles 38 - 42. With reference to footnote 23 in the document, the Chair noted that these articles in the MLST related to acquisition security rights in equipment, consumer goods and IP rather than receivables and thus were not relevant for the MLF. *One observer* noted that Article 38 also dealt with security rights in intellectual property and rights of licensees under a licence of intellectual property and queried whether these matters would be covered by the MLF. *One expert* clarified that the MLF would apply to receivables arising from intellectual property but not to the transfer or financing of intellectual property itself. *Another expert* agreed, noting that Article 38 was concerned with the rights of licensee of intellectual property (the party being given the right to use the intellectual property) in relation to the IP itself, whereas the MLF would only be concerned with the rights of a licensor in relation to receivables arising from the licensing of their intellectual property. *The Working Group decided to delete Articles 38 - 42 on the basis that they dealt with matters not related to factoring.*

20. *The Chair* opened the floor for comments on Article 43 (subordination) and asked the Working Group whether it was necessary to include the article in the MLF, on the basis that a party could already subordinate the priority of its rights under Article 3(1). *One expert* said that there would be no harm in including Article 43 on the basis that the MLF would also have a pedagogical function. *Another expert* agreed that Article 3(1) would allow parties to subordinate their rights, regardless of whether Article 43 was included or not. The expert queried how subordinations occurred in the factoring context in practice. *A third expert* responded that normally a factor would request a release rather than a subordination. The expert further explained that where a transferor had granted a security interest in favour of its bank over all of its present and future receivables but wanted to factor its receivables, the factor would request a partial release signed by the bank providing that where the factor purchased receivables, the bank's security interest over the receivables would automatically be released without the need for any further documentation or action. *An observer representing industry* confirmed that subordinations were rarely used in practice. *Several experts* suggested that while subordination was unlikely to be utilised often in relation to outright transfers, they were used more frequently for security transfers and that Article 43 should thus be retained. *The Working Group agreed to retain Article 43.*

21. *The Chair* opened the floor for comments on Article 44 (future advances and future receivables) and noted that footnote 28 proposed new drafting for paragraph 2. *One expert* supported the new drafting and suggested the addition of two commas to further clarify its operation. *Another expert* noted that paragraph 1 dealt with security transfers and paragraph 2 dealt with outright transfers, and suggested reversing the order of the two paragraphs on the basis that the MLF was more concerned with outright transfers rather than security transfers. *An observer representing UNCITRAL* agreed with the policy approach of Article 44, but noted that the new proposed drafting in footnote 28 was more general than the rule in Article 44(2) in relation to future receivables and might require further consideration. *The Working Group decided to replace Article 44(2) with the alternative drafting contained in footnote 28 with the insertion of an additional two commas and reverse the order of paragraphs 1 and 2.*

22. The Chair opened the floor for comments on Article 45 (irrelevance of knowledge), and noted that footnote 29 proposed slightly different drafting. An observer noted that Article 45 had been difficult to draft during the preparation of the MLST and advised against amending it. An expert supported including the new drafting proposed in footnote 29, but suggested that it be slightly amended to refer to the 'existence of another transfer'. *The Working Group agreed to shorten the title of Article 45 to 'irrelevance of knowledge' and replace the article with the text with the alternative drafting in footnote 29 and include the additional language proposed by an expert.*

23. The Working Group decided to delete Article 46 (negotiable instruments) on the basis that the MLF did not apply to negotiable instruments.

24. *The Chair* opened the floor for comments on Article 47 (rights to payment of funds credited to a bank account) and Article 48 (money). *One expert* suggested that Articles 47 and 48 could be deleted, because the MLF only applied to bank accounts and money as proceeds of receivables but not receivables themselves. *Another expert* queried whether the priority that a party had in relation to a receivable extended to its proceeds. *A third expert* responded that Article 32 provided that a party's priority over a receivable extended to the proceeds of that receivable and as such Articles 47 and 48 could be deleted. *Yet another expert* queried whether the MLF should retain the rule in Article 47(5) or whether the matter would be dealt with by the enacting State's general law. *The Chair* responded that the issue would be addressed by the general law of the enacting State and that Article 47(5) would not need to be retained. *An observer representing industry* noted that deposit account control agreements were an essential element of financing receivables and suggested that industry should be further consulted before Article 47 was deleted. *Several experts* agreed that the ability of factors to access the proceeds of their receivables as funds credited to bank accounts was essential, but suggested that the inclusion of Article 47 was not necessary, as Article 47 dealt with security interests in a right to payment of funds credited to a bank account, which was beyond the scope of the MLF. The experts suggested that the issue instead be addressed in the Guide to Enactment. *Another observer* agreed that the Guide to Enactment could clarify that parties would be able to enter into a control agreement with respect to a bank account, the effects of which would be governed by another law. *The observer representing industry* emphasised that industry should be further consulted on whether the MLF should contain additional rules on control agreements over bank accounts. *The Working Group agreed to the deletion of Articles 47 and 48, subject to further consultations with industry regarding whether the MLF should contain specific rules in relation to control agreements over bank accounts.*

25. The Chair opened the floor for comments on Article 49 (negotiable documents and tangible assets covered by negotiable documents), Article 50 (intellectual property) and Article 51 (non-intermediated securities). *The Working Group agreed to delete Articles 49, 50 and 51 on the basis that they dealt with matters outside the scope of the MLF.*

26. *An observer representing UNCITRAL* suggested that at a later stage the Working Group might wish to give further consideration to the definition of 'priority' in the MLF. *Another observer* agreed, and explained that the definition of 'priority' inadvertently also included the concept of 'third-party effectiveness'. The observer further explained that the current definition of 'priority' would be inappropriate for the MLF, as, unlike the Receivables Convention from which that definition was taken, the MLF contained distinct substantive rules on third-party effectiveness and priority.

## **(b) Treatment of Intellectual Property**

27. With reference to paragraphs 7 – 11 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* opened up the floor for comments on the treatment of intellectual property in the draft MLF. *One expert* summarised the research provided in the Issues Paper. The expert explained that (i) the historical terminology 'sale, lease or licence of industrial/intellectual property' had become outdated and (ii) suggested that the MLF follow the language in the Agreement on Trade-Related Aspects of

Intellectual Property (TRIPS Agreement), which uses ‘intellectual property’ as an umbrella term for copyright, trademarks geographical indications, industrial designs, patents, topographies of integrated circuits and trade secrets’. The expert concluded that the definition of ‘receivable’ in Article 2(1) of the draft MLF should refer to the contractual right to payment of a sum of money arising from the ‘assignment or licence of intellectual property.’

28. *An observer* supported the proposal made by the expert, noting that it was important that the MLF did not refer to ‘intellectual property law’ or ‘domestic intellectual property law’, and that the preferred terminology in UNCITRAL instruments was ‘the law related to intellectual property’, which could be understood to refer to both national or international law and may be included in separate domestic statutes. The observer explained that this approach had been adopted on the basis of submissions made by the World Intellectual Property Organisation (WIPO). *An expert* agreed with the observer, and noted that this matter was addressed by utilising the general ‘intellectual property’ formulation in Article 2(1) as consistent with the TRIPS agreement. *Another expert* suggested that this explanation be included in the Guide to Enactment.

29. The Working Group decided that the definition of ‘receivable’ in Article 2(1) of the draft MLF should refer to the contractual right to payment of a sum of money arising from the ‘assignment or licence of intellectual property.’

### **(c) Transition**

30. With reference to paragraphs 12 – 15 of document [Study LVIII A – W.G.5 – Doc. 2](#) and Chapter IX of the draft MLF in document [Study LVIII A – W.G.5 – Doc. 3](#), *the Chair* explained that the transition provisions had been prepared by the Secretariat based on the intersessional work of the Transition Subgroup in 2021 and the policy decisions adopted by the Working Group at its fourth session in December 2021.

31. *The Chair* opened the floor for comments on Article 41 (amendment and repeal of other laws) as contained in [Study LVIII A – W.G.5 – Doc. 3](#). *The Working Group agreed to the proposed drafting of Article 41.*

32. *The Chair* opened the floor for comments on Article 42 (general applicability of this Law). *One expert* referenced the Working Group’s earlier decision that in the context of Chapter IX, ‘transfer’ would be broadly defined to also include ‘the rights of a transferee arising from a transfer’. *The Working Group adopted the proposed drafting for Article 42.*

33. *The Chair* opened the floor for comments on Article 43 (applicability of prior law to matters that are the subject of proceedings commenced before entry into force of this Law). The Working Group discussed two issues: (i) whether the phrase ‘any step’ in paragraph 2 was sufficiently clear in relation to what a party would need to do to enforce a prior transfer, and (ii) whether ‘enforcing’ a prior transfer was the right term in the context of factoring. In relation to the first issue, several experts noted that the ‘any step’ language in paragraph 2 taken from the MLST was vague in relation to exactly what was required from a party. The Working Group agreed that ‘any step’ was broad enough to extend beyond judicial action, but decided against (i) attempting to include a comprehensive list in the MLF of what actions would constitute ‘any step’ nor (ii) adding the phrase ‘judicial or otherwise’ after ‘any step’. It was noted that what constituted ‘any step’ would vary depending on the prior law in the enacting State. *The Working Group decided to retain the phrase ‘any step’ in Article 43(2), and further decided that the Guide to Enactment should include additional analysis on the range of actions that might satisfy this provision in different contexts.* In relation to the second issue, the Working Group decided that ‘enforcing’ a security right was correct for the MLST context, but that in relation to factoring arrangements, the provision should be expanded to encompass both ‘collection’ and ‘enforcement’. It was noted that in the outright transfer context, the factor would likely try to collect the receivable, but in the security transfer context, the factor would



likely try to enforce their security interest. *The Working Group decided to amend Article 43(2) to provide for both collection and enforcement of a prior transfer.*

34. *The Chair* opened the floor for comments on Article 44 (applicability of prior law to creation of a prior transfer). With reference to footnotes 48 and 49 in the document, *one expert* noted that phrase ‘prior security right was created’ taken from Article 104 of the MLST was unsatisfactory language in the context of a prior transfer. The expert explained that while the MLST did have creation requirements, the draft MLF did not have creation requirements, and suggested that the Working Group should consider reformulating Article 44. *Another expert* suggested that it would be preferable for Article 44 to use the language ‘is effective between the parties’ rather than ‘was created’. *Several experts* supported the proposed approach. *At a later stage, the Working Group decided to replace the notion of ‘creation’ with ‘effectiveness between the parties’ in the title and paragraphs 1 and 2 of Article 44.*

35. *The Chair* opened the floor for comments on Article 45 (transitional rules for determining the third-party effectiveness of a prior transfer). *One expert* noted that there were no references to ‘creation’ in Article 45 so there was no need to amend the language in the article. *The Working Group adopted the proposed drafting of Article 45.*

36. *The Chair* opened the floor for comments on Article 46 (application of prior law to the priority of a prior transfer as against the rights of competing claimants arising under prior law). *One expert* noted that the new proposed language for paragraph 1(b) was unclear, and suggested adding the word ‘neither’ before ‘the prior transfer’ in the first line. *Another expert* noted that the article would require further consideration once the definition of ‘priority’ had been decided. *The Working Group agreed to the proposed drafting of the Article 46, including the additional word proposed by an expert.*

37. The Working Group approved the proposed drafting of Article 47 (entry into force of this Law).

38. *Several experts* suggested that the Working Group should give further consideration to the interaction between Article 42 and Article 18 (principle of debtor protection) and whether the MLF should also include additional transition rules in relation to debtor rights and anti-assignment clauses.

#### **(d) Notification**

39. With reference to paragraphs 16 – 24 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* opened the floor for comments on the MLF’s approach to debtor notification. The Working Group discussed four issues: (i) whether the debtor should be entitled to request adequate proof of the transferor’s priority under Article 20(7), (ii) whether the ‘reasonable period of time’ for the transferor to provide adequate proof of the transferor’s priority should be defined or should instead apply from the time that the debtor made the request, (iii) whether Article 20(7) should be redrafted to better accommodate a chain of transfers situation; and (iv) whether the final sentence regarding the nature of ‘adequate proof’ should be improved.

40. In relation to the first issue and with reference to footnote 30 of the draft MLF, *one expert* noted that at WG4, the Working Group had suggested that the debtor should be able to request proof not only that the transferee has a claim to the receivable but also that they had priority over other claims. The expert explained that while in the MLST context a senior creditor would still retain its security right over an asset that was repossessed by a junior creditor, in the MLF context if a junior creditor collected a receivable, there would not be anything for the senior creditor to collect. The expert recalled that this was the basis on which the Working Group had considered also allowing the debtor to request information on the transferee’s priority. *Other experts* noted that while this was an issue, requiring the debtor to also investigate the priority of a transferee’s claim in order to be

discharged under Article 20 would interfere with the principle of debtor protection. *One observer representing industry* urged the Working Group to keep the drafting simple by allowing the debtor to discharge its obligations by paying according to the payment instruction provided by a transferee. *The Working Group decided not to allow the debtor to request proof regarding a transferee's priority in relation to a transfer and to remove the words 'and priority' from Article 20(7).*

41. In relation to the second issue, during discussions *one observer* suggested that the MLF should define 'reasonable time' in paragraph 7, with reference to the International Chamber of Commerce's Uniform Customs and Practices for Documentary Credits (ICC UCP) which regarded five days as a 'reasonable time'. *The Chair* suggested that it was better not to define 'reasonable time' by listing a specific number of days, as that would depend on industry practice and could vary on a case by case basis. *Another observer* confirmed that the Receivables Convention Commentary prepared by the UNCITRAL Secretariat confirmed that the definition of 'reasonable time' should be left to the courts to decide. *An observer representing industry* queried whether the debtor should also be under an obligation to make a request for adequate proof within a 'reasonable time', and cautioned that the MLF would cause problems for the industry if debtors were able to delay the payment due date for a receivable by requesting adequate proof. *The Working Group affirmed that a request for further information under Article 20(7) would not extend the date that the payment of the receivable was due and that as such there was no need to require the debtor to make a request for adequate proof within a 'reasonable time'. The Working Group further decided that there was no need to define 'reasonable time' in the MLF.*

42. In relation to the third issue, the Working Group discussed various drafting approaches that would allow the debtor to ascertain whether there had been multiple transfers of the same receivable or a chain of transfers, and consequently whether the debtor would be discharged by paying in accordance with the first payment instruction received under Article 20(4) or the last notification received under Article 20(5). *One observer* suggested that the drafting of Article 17(7) of the Receivables Convention provided a clearer rule by allowing the debtor to request adequate proof regarding the initial assignor, initial assignee and any intermediate assignment. Several experts agreed. *The Working Group agreed that paragraph 7 should be conformed to the language of Article 17(7) of the Receivables Convention.*

43. In relation to the fourth issue, the Working Group discussed whether the final sentence of paragraph 7 (providing that adequate proof of a transfer included writing from the transferor indicating that the transfer had been made) should be deleted and whether the matter should instead be dealt with in the Guide to Enactment. *One expert* explained that the sentence reflected Article 17(7) of the Receivables Convention and had been included in that treaty to make it clear that adequate proof of a transfer could emanate from either the transferor or transferee and to ensure that adequate written proof emanating from the transferor would be deemed sufficient. *The Working Group decided to retain the final sentence of Article 20(7), subject to minor edits to improve its clarity.*

#### **(e) Debtor discharge by payment**

44. With reference to paragraphs 29 - 37 of document [Study LVIII A – W.G.5 – Doc. 2](#) and Article 29 of the draft MLF, *the Chair* opened the floor for comments on matters related to debtor discharge. The Working Group discussed at length whether Article 20(2) should be redrafted to better clarify how the debtor would be discharged by paying either in accordance with (i) a notification and payment instruction received in writing from either the transferor or transferee, or (ii) a subsequent payment instruction received in writing from only the transferee. It was noted that the existing drafting of Article 20(2) had several deficiencies which could be improved by (i) more clearly distinguishing between an initial notification and a subsequent payment instruction, and (ii) separating out the requirement that a subsequent payment instruction must be received in writing by the debtor in a separate paragraph. *Several experts* noted that it was important for Article 20(2)

to reflect the rule in Article 16(1) which provided that a notification of a transfer and an accompanying payment instruction could be sent to the debtor by either the transferor or transferee, but a subsequent payment instruction could only be sent by the transferee. Several drafting proposals were made. *The Chair* noted that the Working Group had reached agreement on the underlying policy and requested the Secretariat to prepare a new draft of Article 20(2) for the Working Group's consideration.

45. At a later stage during the Working Group session, the Secretariat submitted revised versions of Article 19 and Article 20(2).<sup>1</sup> The new drafting added a paragraph to Article 19 (notification of the debtor clarifying that both notifications and payment instructions had to be made in writing, rather than dealing with the writing requirement in Article 20(2)). Article 20(2) had been redrafted to clarify that the debtor was discharged by paying in compliance with the notification or by paying in compliance with a subsequent payment instruction sent by the transferee.

46. *The Chair* opened the floor for comments on the Secretariat's proposed revisions. *One expert* supported the revisions, but suggested that the second 'or' in the redrafted Article 20(2) could be read to allow a debtor to freely choose whether to pay as instructed in the initial notification or in a subsequent payment instruction, which would obviously be an incorrect result. The expert suggested that instead Article 20(2) could provide 'the debtor is discharged only by paying the transferee or as otherwise instructed in the notification, *subject to any* payment instruction subsequently received by the debtor from the transferee'. *The Working Group agreed to the revision proposed by the expert.*

47. *One expert* queried whether it was necessary for a payment instruction to be in writing and queried whether a transferee should be able to give an oral payment instruction to the debtor. *Another expert* noted that the writing requirement for payment instructions had already been included in the initial draft of Article 20(2) and was consistent with the Receivables Convention and thus should be retained. *An observer representing industry* explained that it was standard practice for factors to provide payment instructions in writing.

48. *An observer representing UNCITRAL* noted that Article 16(1) already provided that a subsequent payment instruction could only be sent by the transferee and thus there was no need for the matter to also be reflected in Article 20(2), but concluded that there was no harm in having the issue reflected in both articles.

49. The Working Group approved the revised versions of Article 19 and Article 20(2), subject to the additional change proposed by an expert.

#### **(f) Definition of 'debtor'**

50. With reference to paragraphs 25 – 28 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* opened the floor for comments on the definition of 'debtor'. The Working Group discussed at great length whether the definition of 'debtor' in Article 2(1) should also include the bracketed language 'a guarantor or other person secondarily liable for payment of the receivable'.

51. During discussions, it was noted that the definition of 'debtor' in the draft MLF reflected the definition of the 'debtor of the receivable' in Article 2(i) of the MLST but there was no corresponding

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<sup>1</sup> The revised drafting proposed by the Secretariat was as follows:

#### **Article 19**

1. A notification of a transfer and a payment instruction must be in writing.
2. (existing 19(1)).

#### **Article 20**

2. After the debtor receives notification of the transfer pursuant to Article 19, subject to paragraphs 3 to 8, the debtor is discharged only by paying the transferee or as otherwise instructed in the notification or in a subsequent payment instruction received by the debtor from the transferee.

definition in the Receivables Convention. Instead, the Receivables Convention defined debtor in Article 2(1) as a third person owing payment of a receivable, but did not make any reference to guarantors. The Working Group identified a number of complex issues related to the treatment of guarantors, including (i) whether a guarantor would be treated as a party that was primarily (jointly and severally) liable or secondarily liable for the debtor's obligation would depend on other law, (ii) different issues arose in relation to dependent and independent guarantors and that it would be inadvisable for the MLF to interfere with independent guarantors; and (iii) while some parts of the debtor rules in the draft MLF could apply to guarantors, debtor's rights tended to be different from guarantor's rights and it would be inappropriate for all of the MLF debtor rules to apply to guarantors.

52. *Several experts and observers* proposed that the bracketed language be removed from the definition of 'debtor', on the basis that (i) it was not possible to know how the domestic law in each implementing State would treat guarantors, (ii) the MLF should not curtail any domestic law rules that protected guarantors in enacting States, (iii) it was not advisable to apply all of the debtor rules to guarantors; and (iv) nor was it advisable to introduce a number of specific rules for guarantors throughout the MLF which would add significant complexity. It was suggested that if there were any parts of the MLF that required specific rules for parties that were secondarily liable, then the Working Group could consider them on a case by case basis. *The Chair* noted that Article 3(1) of the draft MLF allowed parties to vary or derogate from provisions of the Law by agreement, which would allow parties to a factoring transaction to appropriately vary the rules applying to debtors to also apply to guarantors or secondarily liable parties as appropriate and in conformity with the broader domestic law in the relevant State. *Several other experts* noted that they were not opposed to the removal of the bracketed language from the definition of 'debtor', however the Working Group should consider how this would impact the operation of the MLF on an article-by-article basis. *One observer representing UNCITRAL* noted that Article 27(3)(a) of the draft MLF provided that a transferee must give notice of its intention to sell a receivable to the transferor and 'any person who owes the obligation secured by the security transfer'. *The Working Group tentatively decided to delete the bracketed language 'including a guarantor or other person secondarily liable for payment of the receivable' from the definition of 'debtor' in Article 2 of the draft MLF, and to conduct an article by article consideration of whether any additional rules would need to be added to other parts of the MLF in relation to secondary obligors. The Working Group agreed that comprehensive guidance should be given to implementing States in the Guide to Enactment regarding the treatment of debtors under the MLF and the applicable domestic law regulating guarantors and secondary obligors.*

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

53. With reference to paragraphs 38 – 45 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* opened the floor for comments on anti-assignment clauses (AACs).

54. In relation to Article 9 (contractual limitations on the transfer of receivables), the Chair suggested that the Working Group might wish to consider limiting Article 9 to address the most common situation in which an anti-assignment clause would arise: in an agreement between the initial creditor and the debtor of the receivable. *Several experts* agreed with the proposed limitation and suggested that the Article 9(1) be replaced with the text in footnote 19 of the draft MLF. *The Working Group decided to replace Article 9(1) with the following text: 'a transfer of a receivable is effective notwithstanding any agreement between the debtor and a transferor limiting in any way a transferor's right to transfer the receivable'.*

55. The Working Group discussed a number of related issues, including (i) whether the AAC override in Article 9 should be limited to agreements between the debtor and 'the initial' transferor or 'a' transferor, (ii) whether the rule should be limited to security transfers or apply to both outright transfers and security transfers, and (iii) whether Article 9(2) should exempt both transferors and transferees from liability for breach of an AAC. *In relation to the first matter, the Working Group reaffirmed that Article 9(1) should refer to 'a' transferor rather than the 'initial transferor' in order to*

*provide for a broader AAC override. In relation to the second matter, the Working Group decided not to limit Article 9 to security transfers. In relation to the third matter, the Working Group decided to retain protection for the transferee from liability for breach of an AAC, on the basis that in the Anglo-Saxon legal tradition a transferee could incur liability if they induced the transferor to breach an AAC.*

56. *The Chair* opened the floor for comments on Article 8 (Personal or property rights securing or supporting payment of a receivable). The Working Group discussed the article at great length. The Working Group confirmed that there was policy agreement on the underlying concept in paragraph 1: the benefit of any personal or property right should automatically transfer with a receivable without a new act of transfer, unless a new act of transfer is required by other law.

57. The Working Group raised various concerns regarding Article 8 in relation to (i) uncertainties regarding the exact scope of 'benefit of any personal or property right', (ii) issues related to third party consent, and (iii) uncertainty as to the article's application to independent undertakings (in particular, uncertainty in relation to letters of credit and whether paragraph 1 would cover both the transfer of a letter of credit and proceeds drawn from a letter of credit).

58. In relation to the use of the term 'benefit of any personal or property right', *one expert* noted that the language had been taken from Article 14 of the MLST, whereas Article 10 of the Receivables Convention referred to the transfer of the personal or property security right itself and specifically provided for the transfer of proceeds separately. *Several experts and observers* suggested that the MLST 'benefit of any personal or property right' language was the preferable approach for the MLF as it provided broader protection for the factor and covered proceeds. *One observer* explained that in relation to credit insurance, if the third party insurer refused to transfer the credit insurance to the transferee, the insurer would have to pay the proceeds of the credit insurance to the transferor, who would then be obliged under Article 8(1) sentence 2 to transfer 'the benefit' of that credit insurance to the transferee. The observer suggested that this was the right policy approach and that Article 8 only required minor editing revisions for clarity.

59. Several different solutions were proposed by different experts, including: (i) restructuring Article 8 to make the second sentence of paragraph 1 into a new paragraph 3 and thus restricting the AAC override in paragraph 2 to dependent guarantees (provided in paragraph 1 sentence one), (ii) utilising the corresponding language in Article 10 of the Receivables Convention to redraft the article, or (iii) deleting the article in its entirety, or parts of the article. The Working Group decided that none of the solutions proposed would adequately resolve the various issues.

60. In relation to the proposed deletion of Article 8, *one observer* noted that the transferor would likely be obliged to transfer the benefit of any personal or property right that secures or supports payment of a receivable under Article 4 (general standards of conduct), and thus the second sentence of Article 8(1) might not be needed. While conceding that the rule in Article 8 would often already exist in the enacting State's domestic law and would almost invariably also be reflected in the factoring agreement, *several experts and observers* noted the importance of retaining the provision on the basis that (i) it provided legal certainty and protection for factors, (ii) it would serve a pedagogical function for implementing States, (iii) its removal would be inconsistent with the MLST and the Receivables Convention and (iv) its inclusion caused no harm.

61. The Chair asked the Secretariat to prepare a revised draft of Article 8 for the Working Group's consideration. Later in the session, *the Secretariat* submitted a revised version of Article 8 for the Working Group's consideration.<sup>2</sup> It was explained that the proposed revision attempted to use the

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<sup>2</sup> The revised version of Article 8 prepared by the Secretariat during WG5 was as follows:  
**Article 8 – Personal or property rights securing or supporting payment of a receivable**

1. A transferee of a receivable has the benefit of any personal or property right that secures or supports payment of the receivable without a new act of transfer. If the transferee would only have the benefit of that right under

concept of 'a benefit of a right' uniformly throughout the article. It was suggested that several of the matters raised by the Working Group (issues related to third party consent and the treatment of letters of credit) could not be fully resolved, but ultimately were no more problematic than how they were treated in the MLST.

62. *One expert* suggested that the word 'only' in Article 8(1) sentence 2 be moved later in the sentence to '...under the law governing it *only* with a new act...'. The expert also suggested that Article 8(2) should begin with 'a transferee *has the benefit* of a right...' rather than 'a transferee *obtains a benefit* of a right'. *The Working Group agreed with the proposed drafting revisions.*

63. *One expert* agreed with the substance of the proposed revisions, but noted that the language in Article 8(2) '... limits in any way the transferor's right to transfer the receivable or the transferee to have the benefit of that right' was not correct. Another expert suggested that the provision could be slightly revised to provide '... limits in any way the transferor's right to transfer the receivable or *the ability* of the transferee to have the benefit of that right'. *The Working Group agreed with the proposed drafting revision.*

64. The Working Group approved the revised Article 8, subject to the additional changes made by the experts.

#### **(h) Proceeds**

65. With reference to paragraphs 46 – 52 of document [Study LVIII A – W.G.5 – Doc. 2](#), the Chair opened the floor for comments on proceeds. The Working Group discussed four issues: (i) whether Article 1 of the draft MLF should include a general scope provision in relation to proceeds based on Article 1(4) of the MLST,<sup>3</sup> (ii) whether the definition of 'proceeds' in Article 2(1) of the draft MLF should include receivables received in respect of the initial receivable, (iii) whether new receivables created through the refinancing of the initial receivable should be considered as proceeds, and (iv) how interest payments should be treated.

66. In relation to the first matter, *one expert* explained that the MLST had a very broad definition of proceeds and that Article 1(4) was necessary to ensure that the broad definition of proceeds did not inadvertently bring types of assets that had been specifically excluded from the MLST's scope (for example, intermediated securities) back within the scope of the instrument. The expert stated that the MLF had a much narrower definition of proceeds and thus did not need a provision that mirrored Article 1(4) of the MLST. *The Working Group decided to delete Article 1(2) from the draft MLF.*

67. In relation to the second matter, *several experts* suggested that it was difficult to identify realistic examples under which receivables (as defined in the draft MLF) would be proceeds of a receivable. It was noted that the definition of 'proceeds' in the draft MLF included 'proceeds of proceeds' which sufficiently addressed situations in which proceeds of a receivable were then used as payment to create a new receivable, and thus there was no need for the draft MLF to include receivables in the definition of proceeds. *The Working Group decided to delete 'receivable' from the definition of 'proceeds' in Article 2(1) of the draft MLF.*

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*the law governing it with a new act of transfer, the transferor is obliged to transfer the benefit of that right to the transferee.*

*2. A transferee obtains the benefit of a right notwithstanding any agreement, between the transferor and the debtor or other person granting the right that secures or supports payment of the receivable, that limits in any way the transferor's right to transfer the receivable or for the transferee to obtain the benefit of that right.*

<sup>3</sup> Article 1(4) of the MLST provides: *This Law does not apply to security rights in proceeds of encumbered assets if the proceeds are a type of asset to which this Law does not apply, to the extent that [any other law to be specified by the enacting State] applies to security rights in those types of asset and governs the matters addressed in this Law.*

68. In relation to the third matter, the Working Group discussed at length how to characterise the refinancing of receivables. *One expert* noted that it was important that the MLF apply to situations where a security transfer of a receivable was refinanced and the prior security transfer had thus been extinguished and substituted with a new refinancing agreement between the transferor and the transferee. The expert explained that the new security transfer would not be a 'receivable' as defined in the draft MLF because it did not relate to a contract for the supply of goods or services, nor would it easily be characterised as proceeds of the initial security transfer. *Several experts* agreed that it was difficult to characterise the refinancing transaction as either a continuation of the initial receivable, or as proceeds of that receivable. It was noted that in many legal systems the refinancing transaction would be a new payment obligation and thus a novation of the original agreement and might be outside the scope of the MLF. *One observer representing industry* noted that (i) if a trade receivable was changed into a note receivable then it would be treated as a completely different liability under accounting standards and (ii) that it was nonetheless important for the new payment obligation to fall within the scope of the MLF. *The Chair* agreed that regardless of how the new payment obligation was characterised, it was important for it to be covered by the MLF. *Several experts* suggested that it would be better to either amend the definition of 'receivable' to address the refinancing situation or address the matter in the Guide to Enactment rather than address it as 'proceeds' of a receivable. *At a later stage, the Working Group decided to amend the definition of receivable in Article 2(1) of the draft MLF to clarify that a receivable would not cease to be a receivable if it was consolidated or refinanced by the parties to it and to provide further guidance on the matter in the Guide to Enactment.*

69. In relation to the fourth matter, *one expert* queried how the right to the payment of interest would be treated under the MLF. The expert noted that the right to the payment of interest had two parts, encompassing (i) a clause in the general agreement on the right to the payment of interest, and (ii) the right to the exact payment of interest that has arisen from the general agreement. *Another expert* explained that a right to the payment of interest that is provided in an agreement is part of the receivable itself. *A third expert* noted that the definition of 'receivable' included the right to payment of a sum of money arising from a contract for goods or services, which would include the right to payment of interest related to that contract. *The Working Group affirmed that the right to payment of interest under a contract for the supply of goods and services would be covered by the definition of 'receivable' in Article 2(1) of the draft MLF.*

#### **(i) Disposition of collateral and distribution of proceeds**

70. With reference to paragraphs 53 – 56 of document [Study LVIII A – W.G.5 – Doc. 2](#) and Article 27 (right of a transferee to dispose of/sell a receivable) and Article 28 (distribution of proceeds of a sale/disposition of a receivable and transferor's liability for any deficiency), *the Chair* opened the floor for comments on disposition of collateral and distribution of proceeds. With reference to footnote 36 in the draft MLF, *the Working Group decided that all references to 'disposition' should be removed from Articles 27 and 28.*

71. The Working Group discussed whether it was necessary to retain Article 29(1) and (2) (Post-default rights). *Several experts* suggested that the paragraphs were not necessary as they did not provide any rights to the parties nor did they override the broader domestic law of enacting States, and thus only served a pedagogical function. *Another expert* noted that the provisions had been included in the MLST and suggested that while they could be deleted they would serve the same function in both instruments. The expert concluded that the substance of the paragraphs could instead be addressed in the Guide to Enactment with the explanation that a transferee selling a receivable under Article 27 would be required to do so in a commercially reasonable manner (Article 4). *A third expert* noted that if paragraphs 1 and 2 were removed, it would be problematic to leave paragraph 3 as the only remaining part of Article 29. *Several other experts* noted that paragraph 3 had to be retained because it limited the rights of the transferor to undertake certain actions before default. *Yet another expert* suggested that paragraph 3 could be moved to Article 27

which dealt with the transferee's right to sell a receivable, or alternatively to retain it as a separate 'non-waiveability' article.

72. The Working Group discussed the use of the term 'the transferor and any person who owes the obligation secured by the security transfer' in Article 27. *One expert* suggested that it was important that this language also be included in Article 28(3) instead of just 'transferor'. *Another expert* suggested that the language could be retained, but the Guide to Enactment should clarify that the purpose was not to interfere with the law of guarantees in the enacting State and that the rule would only be necessary to include in the MLF if the law of guarantees did not achieve this result. *The Working Group agreed that Article 28(3) should use the phrase 'the transferor and any person who owes the obligation secured by the security transfer' contained in Article 27.*

73. At a later stage, the Working Group decided to delete Article 27(2) and Article 28(1), but retain the rest of the provisions subject to further amendments.

#### **(j) Registration**

74. With reference to paragraphs 57 – 70 of document [Study LVIII A – W.G.5 – Doc. 2](#) and Chapter IV and Annexe A of the draft MLF, *the Chair* noted that there were several substantive decisions that the Working Group needed to make, whereas the minor drafting issues noted in the document could be deferred.

75. In relation to Article 13 (establishment of the Registry), *several experts* suggested that the bracketed language 'and the effect of registration or non-registration of a notice with respect to a receivable' could be removed from the article. *Another expert* suggested that the title of the Article could be shortened to 'the Registry'. *The Working Group agreed that the title and text of Article 13 could be streamlined and the bracketed language removed.*

76. In relation to Annexe A Article 20 (post-registration transfer of a transferred receivable), *one expert* reminded the Working Group that at WG4, the Working Group had decided to delete Option A, but had placed Option B in brackets for further discussion. The expert explained that Option B was the correct policy for the MLF because any sale of a receivable under the MLF was going to be a transfer and the priority rules based on registration of that transfer should apply. *Another expert* agreed, but queried whether it was necessary to include the article at all. *The Working Group agreed to delete Article 20 and include the substance of Option B in the Guide to Enactment.*

#### **(k) Title of the instrument**

77. With reference to paragraphs 65 – 68 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* opened the floor for comments on the title of the instrument. The Chair recalled that at WG4, one observer had raised concerns with the preliminary title 'the UNIDROIT Model Law on Factoring' because the draft instrument did not define or use the term 'factoring' and covered financing methods that went beyond the traditional notion of factoring.

78. *An observer representing industry* encouraged the Working Group to retain the title of the instrument as the 'UNIDROIT Model Law on Factoring'. The observer explained that even though the instrument would address both outright transfers of receivables and security transfers and thus would be broader than traditional factoring, 80% of the transactions under the future instrument would be outright transfers and that 'factoring' was the best terminology to use. The observer concluded that retaining 'factoring' in the title of the instrument would be crucial in allowing the factoring industry to play a significant role in promoting the instrument once it had been adopted.

79. *The majority of experts* supported the instrument being formally titled the 'UNIDROIT Model Law on Factoring', on the basis that it was important matter that would aid in the marketing and



promotion of the instrument. *One expert* suggested that 'UNIDROIT Model Law on Receivables Finance' might be a preferable title, as users might not realise that the instrument also applied to security transfers if it was called the 'UNIDROIT Model Law on Factoring'. *One observer* suggested that the title of the MLF should be reviewed, because, in view of the broad definitions of the terms 'transfer', 'receivable' and 'proceeds', the scope of the MLF was much broader than factoring and covered potentially a broad range of receivables finance transactions. *Another expert* responded that it had become common practice for States to use the term 'factoring' when undertaking domestic law reform that covered both outright transfers and security transfers so the accepted meaning of 'factoring' had become broader than its traditional meaning. *A third expert* noted that the Guide to Enactment should clearly explain the relationship between the title and the scope of the instrument. *The Working Group decided that the instrument would be called 'the UNIDROIT Model Law on Factoring' and that the meaning of 'factoring' would be explained in the Guide to Enactment.*

### **(I) Preamble**

80. With reference to paragraphs 69 – 70 of document [Study LVIII A – W.G.5 – Doc. 2](#), *the Chair* noted that it would be premature for the Working Group to consider the preamble, and that the matter would most likely be dealt with by either the UNIDROIT Governing Council or the UNIDROIT General Assembly. The Chair explained that it was common for UNIDROIT instruments to contain a preamble that reflected the instrument's principles and goals. *The Working Group deferred its consideration of the MLF's preamble.*

## **2. Draft Model Law (Study LVIII A – W.G.5 – Doc. 3)**

81. Having addressed the unresolved matters identified in the Issues Paper, the Working Group commenced its review of the draft Model Law contained in document [Study LVIII A – W.G.5 – Doc. 3](#).

### Article 1 (Scope of Application)

82. Concerning Article 1(5), *one expert* reaffirmed that the draft MLF only applied to negotiable instruments as proceeds but there would nonetheless be value in retaining the provision. *The Working Group agreed to remove the square brackets around Article 1(5).*

### Article 2 (Definitions)

83. In relation to the definition of 'default', *several experts* emphasised that 'default' should be limited to defaults on obligations secured by a security transfer, and that the draft MLF should be reviewed to ensure it was not used in any other contexts. *One expert* suggested that the Guide to Enactment should clarify that the MLF had a restrictive definition of 'default'.

84. *Several experts* queried whether the MLF needed a definition of 'priority' at all, on the basis that its meaning was self-evident. *The Working Group decided to delete the definition of 'priority' from Article 2.*

85. One observer representing UNCITRAL suggested that the MLF should contain a definition of 'competing claimant', as consistent with 2(e) of the MLST. The Working Group agreed to include a definition of 'competing claimant' in the MLF based on the equivalent definition in the MLST.

86. In relation to the definition of 'future receivable', the Working Group discussed whether the definition should use the word 'existence' or 'effect' when describing the contract giving rise to the receivable. *Several experts* indicated a preference for the word 'existence', on the basis that it would give better protection to the factor and would be easier for judge to assess. *One observer*

*representing UNCITRAL suggested that it might be preferable for the definition of 'future receivable' to state 'whether or not the contract giving rise to the receivable has been entered into at that time'. The Working Group agreed to the language proposed by the observer.*

87. In relation to the definition of 'receivable', the Working Group agreed to simplify the definition by moving 'arising from' from each subsection to the chapeau, and by removing 'a contract for' from subsections (i) and (ii), on the basis that the chapeau already referred to 'a contractual right'. The Working Group also discussed whether the language around subsection (iii) regarding credit card transactions could be improved. One expert suggested that the term 'credit card transaction' could refer to not only the payment obligation between the customer and the issuing bank but also the interchange bank and the merchant. Noting that the term intended to refer to the payment obligation between the customer and the issuing bank, the expert suggested that it would be preferable for subsection (iii) to refer to 'the payment obligation for the use of a credit card'. The Working Group decided to retain 'the payment obligation for a credit card transaction' to ensure consistency with the term used in Article 13(3)(c) of the MLST. The Working Group also discussed whether receivables arising from contractual rights to payment for a sum of money relating to data should be included in the definition of 'receivable'. One expert cautioned that the matter should be dealt with separately to the treatment of payment rights arising from the assignment or licence of intellectual property under subsection (ii) and that the two issues should not be intermingled. An observer representing UNCITRAL noted that the definition of 'data' was currently being debated at UNCITRAL and the draft MLF should not attempt to define it. An expert noted that the EU legislation on data protection considered 'data' to fall into three categories: goods, services and digital content. The Working Group agreed that the treatment of 'data' required further consideration and decided to review the matter once consultations on the draft MLF had taken place.

88. In relation to the definition of 'security transfer', *an observer representing UNCITRAL suggested that it would be preferable to use the word 'right' instead of 'interest' as Article 14 referred to the 'rights and obligations of the transferor and the transferee'. The Working Group agreed to use the substitute 'right' for 'interest' in the definition of 'security transfer'.*

89. In relation to the definition of 'transfer agreement', *one expert queried whether the definition made it sufficiently clear that it included master agreements which provided that receivables could be sold by the factor from time to time without the need for the factor to formally accept the request if it paid the purchase price. An observer representing UNCITRAL queried why the definition of 'transfer agreement' contained the substantive requirements for transfer agreements and suggested that it might be preferable to provide for them in Article 6 (requirements for the transfer of a receivable). The Working Group decided to move the formal requirements for transfer agreements to Article 6, and to use 'evidenced by' rather than 'in' in subsection (a).*

#### Article 3 (Party Autonomy)

90. The Working Group approved Article 3 in the draft MLF, subject to further consideration of the articles that could not be derogated from or varied by agreement.

#### Article 4 (General Standards of Conduct)

91. The Working Group approved Article 4 in the draft MLF.

#### Article 5 (International Origin)

92. The Working Group confirmed that Article 5 should be deleted and that the substance of Article 5(2) should be addressed in the preamble to the MLF.

#### Article 6 (Requirements for the transfer of a receivable)

93. *The Secretary-General* queried what was meant by the transferor having ‘the power to transfer’ the receivable, noting that it could be possible for a transferor to have the right to a receivable but not have the power to transfer it. *Several experts* noted that the meaning of the phrase had been carefully negotiated in relation to other secured transactions instruments and suggested that it would be prudent for the MLF to retain it. *The Working Group decided to retain ‘the power to transfer’ language in Article 6(1), and explain the matter further in the Guide to Enactment.*

94. The Working Group agreed to remove the square brackets around ‘all of its receivables’ in Article 6(2)(c).

95. The Working Group agreed that Article 6(4) could be deleted, as the substance of the rule could be merged with the definition of ‘transfer agreement’ which was to be added to Article 6.

#### Article 7 (Proceeds)

96. The Working Group approved Article 7 in the draft MLF.

#### Article 8 (Personal or property rights securing or supporting payment of a receivable)

97. The Working Group approved Article 8 in the draft MLF, subject to its earlier decisions.<sup>4</sup>

#### Article 9 (Contractual limitations on the transfer of receivables)

98. The Working Group approved Article 9 in the draft MLF, subject to its earlier decisions.<sup>5</sup>

#### Article 10 (Registration)

99. The Working Group decided to delete Article 10(2) on the basis that it was not necessary and introduced unnecessary complexity.

#### Article 11 (Proceeds)

100. The Working Group approved Article 11 in the draft MLF.

#### Article 12 (Continuity in third-party effectiveness upon a change of the applicable law to this Law)

101. The Working Group approved Article 12 in the draft MLF.

#### Article 13 (The Registry)

102. The Working Group approved Article 13 in the draft MLF, subject to its earlier decisions.

#### Article 14 (Rights and obligations of the transferor and the transferee)

103. *One expert* queried why Article 14(2) included the phrase ‘unless otherwise agreed’, which implicitly applied to all rules in the MLF that were not specifically identified in Article 3 (party autonomy). *Another expert* responded that Article 14(2) was limited only to transfer agreements. *The Working Group approved Article 14 in the draft MLF.*

#### Article 15 (Representations of the transferor)

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<sup>4</sup> See discussion on ‘anti-assignment clauses’ above.

<sup>5</sup> See discussion on ‘anti-assignment clauses’ above.

104. *One expert* noted Article 15 provided that a transferor of a receivable had to represent that a debtor did not and would not have any defences or rights of set-off. The expert explained that the transferor could not know what would happen in the future and queried whether the language should be changed. *Several experts* noted that this language was consistent with the Receivables Convention and suggested that it should not be changed. *The Working Group approved Article 15 in the draft MLF.*

#### Article 16 (Right to notify the debtor)

105. *One observer representing UNCITRAL* queried whether Article 16 should also include that a payment instruction must be in writing, as consistent with Article 19. Several experts noted that all of the notification requirements in Article 19 could also be included in Article 16, but suggested that doing so would be unnecessary. *Another expert* suggested that a cross-reference could be inserted in Article 16. *No decision was made in this regard. The Working Group approved Article 16 in the draft MLF.*

#### Article 17 (Right to payment)

106. As a policy matter, the Working Group confirmed that a transferee should be entitled to any goods that may be returned in respect of a receivable that had not been paid. The Working Group also discussed the nature of Article 17 and whether paragraph 1(c) provided a substantive priority rule. It was concluded that Article 17(1)(c) was not a priority rule, rather it simply clarified that a transferee had the right to collect from a third party who was paid a receivable over which the transferee had priority. It was noted that Article 17 reflected the content of Article 14 of Receivables Convention and Article 59 of the MLST. The Working Group decided to retain Article 17, subject to minor redrafting to improve its clarity.

#### Article 18 (Principle of debtor protection)

107. The Working Group decided to include the term 'contract giving rise to the receivable' instead of 'original contract'. The Working Group decided to remove the square brackets around 'without the consent of the debtor' in paragraph 1 and also add 'without the consent of the debtor' to the end of the chapeau in paragraph 2.

#### Article 19 (Notification of the debtor)

108. *One expert* raised a concern regarding the use of the term 'prior transfer' on the basis that (i) 'prior transfer' was a defined term with a different meaning in Article 41(1) for the purposes of Chapter IX (transition) which might cause confusion, and (ii) the exact meaning of 'prior transfer' in Article 19. *The Working Group agreed to change 'prior transfer' to 'previous transfer' in Article 19 and explain the exact meaning of 'previous transfer' in the Guide to Enactment.*

### **Item 5: Organisation of future work**

109. *The Secretariat* noted that the Working Group's sixth session would be held between either 28 – 30 November 2022 or 5 – 7 December 2022 and that the sixth session would be a hybrid session allowing for either remote or in-person participation.

### **Item 6: Any other business**

110. No other business was raised.

**Item 7: Closing of the session**

111. *The Chair* thanked all participants for their contributions to the fifth session. *The Chair* declared the session closed.

**ANNEX I****AGENDA**

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

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