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MODEL LAW ON FACTORING CONSULTATION SUBMISSIONS

(prepared by the UNIDROIT Secretariat)

Introduction

1. This document provides the entirety of the 28 submissions provided by stakeholders as part of the consultation undertaken on the draft Model Law on Factoring (MLF).

2. At the close of its fifth session, the Working Group decided that the draft MLF was sufficiently developed to undertake public consultations and referred the draft instrument to the Governing Council for consideration. At its 101st session (Rome, June 2022), the Governing Council approved the draft MLF for the purposes of launching a public consultation on the draft instrument, and mandated the Secretariat to facilitate such consultation.

3. UNIDROIT conducted a three-month consultation on the draft MLF between July and October 2022. The public consultation had three aspects:

i. The launch of a dedicated webpage on the UNIDROIT website that allows interested parties to access the draft Model Law on Factoring and facilitate the submission of comments (https://www.unidroit.org/instruments/factoring/model-law-onlineconsultation/).

ii. The circulation of the draft Model Law on Factoring directly to interested parties, including UNIDROIT stakeholders, project stakeholders and industry stakeholders.

iii. The organisation of consultation events to discuss the content of the draft instrument with stakeholders.

4. As part of the public consultation, on 12 October 2022 UNIDROIT held a virtual Question and Answer session on the MLF. Approximately 50 stakeholders from the factoring industry, government and academia participated in the virtual event. The event recording is available on the Institute's YouTube channel [1]. The draft MLF was also promoted at a series of events organised by the FCI for stakeholders in Africa, Europe and Latin America.

5. The summary table of submissions below sets out the 28 submissions received, which are then included in this document in their entirety. This document should be considered alongside document Study LVIII A – W.G.6 – Doc. 4, which provides a summary of the 195 comments received, ordered by chapter.

[1] https://www.youtube.com/watch?v=9uian_qiWig&ab_channel=UNIDROIT.

SUMMARY TABLE OF SUBMISSIONS

#	Author (name)	Author (title/organisation)	Country	Length of submission (pages)	Submission date
1	Ms Meiling Huang & Jing Zhang	Zhongnan University of Economics and Law	China	5	16.09.22
2	Ms Xu Jun (on behalf of ICC China)	Vice Chair, ICC Banking Commission Steering Committee Director Senior Manager, Global Transaction Banking Dept. Bank of China, Jiangsu Branch	China	4	15.10.22
3	Mr Spyridon Bazinas	Kozolchyk National Law Center (NatLaw)	USA	1.5	17.10.22
4	Sir Roy Goode	Emeritus Professor of Law, University of Oxford	UK	0.5	17.10.22
5	Mr Yamashita Masamichi	Embassy of Japan in Italy	Japan	2	19.10.22
6	Ms Elham Mabrouk		Egypt	31	19.10.22
7	Mr Zhiping ZHANG	Director & Partner of Filong Law Firm, Li REN, Partner of Filong Law Firm	China	3	20.10.22
8	Ms Xu Jun (on behalf of members of Global Supply Chain Finance Forum (GSCFF))	Global Supply Chain Finance Forum (GSCFF))	China	0.5	20.10.22
9	Mr Vitor Graça	Secretario-Geral, Portuguese Association for Leasing, Factoring and Renting (ALF)	Portugal	3	20.10.22
10	Mr José P. Sala Mercado		Argentina	1	20.10.22
11	Mr Demetris Zacharoudes (via Ms Teresa van de Putte	Manager Factoring Services, Hellenic Bank Public Company Ltd.	Cyprus	1	20.10.22
12	Ms Alecsandra Valasuteanu	Head of Factoring, Vice President, Transactions and Payments, Corporate Investment Banking, Unicredit Bank	Romania	2	20.10.22
13	Mr Héctor Manuel Gómez Flores	Senior Vice President Export Financing, Banco Nacional de Comercio Exterior S.N.C.	Mexico	0.5	20.10.22
14	FCI Legal Committee		The Netherlands	45	20.10.22
15	Mr Federico Torrealba	Socio/Partner, Facio&Cañas	Costa Rica	11	21.10.22
16	Mr Alessandro Carretta	Secretary general Assifact	Italy	3	21.10.22
17	Mr Kypriani Stavrinaki	Counsellor of Embassy (DHM), Embassy of the Republic of Cyprus to Italy	Cyprus	1	21.10.22
18	Ms Sheelagh Mccracken	Professor of Finance Law, The University of Sydney Law School	Australia	8	21.10.22

19	Ms Joanna Herczyńska	Embassy of Poland in Italy	Poland	1	21.10.22
20	Iyare Otabor-Olubor	Lecturer in Commercial Law, College of Business and Social Sciences	UK	1	21.10.22
21	Mr José Manuel Gómez Sarmiento	Vicepresidente, Vicepresidencia Juridica, Asobancaria	Colombia	2 (Spanish)	21.10.22
22	Mr Richard Kohn	Goldberg Kohn Ltd	USA	2	21.10.22
23	Mr Miloš Levrinc	JUDr.PhD, Právnická fakulta Univerzity Mateja Bela v Banskej Bystrici, Katedra medzinárodného, európskeho práva a právnej komunikácie	Slovak Republic	2	21.10.22
24	Ms Béla Szegedi-Székely	Head of Legal & Compliance, Raiffesen Factor Bank AG	Austria	2	22.10.22
25	Mr Pedro Mendoza	UNIDROIT Correspondent	Guatemala	26	22.10.22
26	Mr Bernardo BRO. Rodríguez Ossa	Parra Rodríguez Abogados Pra	Colombia	0.5	24.10.22
27	Mr David Moran Bovio	Universidad de Cádiz	Spain	2	27.10.22
28	Mr Lucas Paviolo	Embassy of Argentina in Italy	Argentina	10	08.11.22

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(Submitted by Ms Meiling Huang & Jing Zhang)

1. About the definition of future receivables

1.1. Related provisions

Art. 2(1)(d): *"Future receivable" means a receivable that arises after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time*.

Art. 5(4): *A transfer agreement may provide for the transfer of a future receivable, but the transfer is effective only when the transferor acquires rights in the receivable or the power to transfer it*.

Art. 19(1): *The priority of a transfer of a receivable that is described in a notice registered in the Registry is determined by the time of registration, whether the receivable is acquired by the transferor, or comes into existence, before or after the time of registration*.

1.2. Analysis

The two listed provisions are not fully consistent with an understanding of future receivables. In art. 2(1)(d), the term "arises" implies that future receivables are claims which are not yet created . However, "acquires" in art. 5(4) indicates that what matters is whether the assignor obtains the receivable or the power to assign it. A receivable that has been created but owned by a third party is also a future receivable in relation to the assignor; the assignor can assign it as a future receivable, and the assignment is effective only when the assignor acquires it.

In other words, acquisition of a receivable and "existence" of a receivable differ (see art. 19(1)). An existent receivable not acquired by the assignor is also a future receivable. In Dutch law, for example, there is a distinction between relative future property (*relatief toekomstige goederen*) and absolute future property (*absoluut toekomstige goederen*). Under this distinction, an existent receivable might be a relative future property but not an absolute future property.

For comprehensiveness, it is better to adopt the "acquisition" criterion than to follow the "existence" criterion, because saying that a non-existent receivable is acquired by the assignor is incorrect.

1.3. Suggestions

Art. 2(1)(d): *"Future receivable" means a receivable that is acquired after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time.*

Art. 19(1): *The priority of a transfer of a receivable that is described in a notice registered in the Registry is determined by the time of registration, whether the receivable is acquired by the transferor before or after the time of registration*.

2. About the definition of receivables

2.1. Related provision

Art. 2(1)(f): *"Receivable" means a contractual right to payment of a sum of money arising from: (i) the supply or lease of goods or services; (ii) the assignment or licence of intellectual property; or (iii) the payment obligation for a credit card transaction*.

2.2. Analysis

The listed definition is too narrow to cover monetary claims out of contracts. For example, there is no convincing reason why monetary claims arising from the sale or lease of real property are not a receivable (comparison with arts. 2(a) and 9(3)(a) UN Convention on the Assignment). Moreover, compared with the concept of "account" in Article 9 UCC, "应收账款" (receivables) under Chinese law, and the corresponding concept under PPSAs, art. 2(1)(f) defines receivables too narrowly.

A possible approach is to first define receivables as monetary claims arising from contracts or contractual payments, and then exclude some special types of pecuniary contractual claims, such as negotiable instruments and deposit accounts.

2.3. Suggestions

Art. 2(1)(f): *"Receivable" means a right to payment of a sum of money arising from contracts but does not include: (i) rights of payment embodied in a negotiable instrument; (ii) deposit accounts; (iii) letter of credits;….*

Note: The exclusion list shall be considered carefully and may be extended.

3. About the definition of security transfer

3.1. Related provision

Art. 2(1)(h): *"Security transfer" means a transfer of a receivable by agreement, or the creation of a right in a receivable by agreement, to secure payment or other performance of an obligation, regardless of the way in which the parties have described the transaction, the status of the transferor or transferee or the nature of the secured obligation.*

3.2. Analysis

This definition goes too far. A security transfer or transfer for security is in its legal form a transfer. Creation of a security right does not necessarily take this form and shall not be covered by 'security transfer'. For example, a pledge of receivables creates a limited right of pledge, but it is by no means a transfer. Even under the functional approach, taken by Article 9 UCC and PPSAs in Canada, Australia and New Zealand, pledge and security transfer are two things, though they both give rise to a security right (interest). For example, according to s. 12(2) Australian PPSA, "pledge" is one of the transactions that can create a security interest. It is correct to say that security transfer creates a security right under the functional approach, but saying security transfer "*means… the creation of a right in a receivable by agreement…*" is not proper. The latter saying is just incorrect under the civil law system,

taking a formal approach, and not fully correct under Article 9 UCC and PPSAs following the functional approach.

To allow the rules concerning security transfer to be applicable to a pledge of receivables, a rule permitting analogous application suffices. Perhaps this rule can be arranged in Article 1.

3.3. Suggestions

Art. 2(1)(h): *"Security transfer" means a transfer of a receivable by agreement to secure payment or other performance of an obligation, regardless of whether it creates a security right in the receivable, the way in which the parties have described the transaction, the status of the transferor or transferee or the nature of the secured obligation.*

Art. 1(1): *This Law applies to transfers of receivables. Provisions applicable to security transfer in this Law are applicable analogously to pledge of receivables.*

4. About the definition of transfer agreement

4.1. Related provisions

Art. 2(1)(j): *"Transfer agreement" means an agreement providing for the transfer of a receivable that meets the requirements in Article 5(1).*

Art. 5(1): *An agreement is only effective as a transfer agreement if it:*

a. is evidenced by a writing that is signed by the transferor;

b. identifies the transferor and the transferee; and

c. describes the receivable in a manner that reasonably allows its identification. A description of receivables in a transfer agreement will be sufficient if it indicates that the receivables consist of all of the transferor's receivables, or all of the transferor's receivables within a generic category.

4.2. Analysis

The definition of transfer agreement fails to distinguish two different issues: (1) what is transfer agreement; and (2) what are the requirements for a transfer agreement to be effective. For example, an oral agreement of transfer is also an agreement, though it may not be effective or enforceable. The distinction has practical benefits. For example, an oral agreement can be effective by performance in many jurisdictions ("*performance cures defects in formality*").

Another issue that needs to be noted is art. 5(1)(c). Specificity is necessary for the transfer of receivables *per se*, but not for the underlying agreement of transfer. For example, if two parties intend to transfer one of two specific receivables, the agreement is a choice contract that can be performed after a choice. It seems that art. 5(1) views a transfer agreement as a proprietary agreement (*dingliche Einigung*).

4.3. Suggestions

Art. 2(1)(j): *"Transfer agreement" means an agreement providing for the transfer of a receivable*.

5. About the anti-assignment clause

5.1. Related provision

Art. 8(2): *Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.*

5.2. Analysis

It seems that the listed paragraph goes too far in protecting the assignability of receivables. It has been commonly accepted that receivables can be assigned regardless of whether there is an anti-assignment clause (English law remains different). This means that a proprietary remedy is impossible for the debtor. However, there is sufficient reason to deny obligatory remedies, namely contractual remedies. This is unfair to the debtor who reaches a valid agreement with the transferor. Party autonomy needs to be respected here.

5.3. Suggestions

Art. 8(2): *The transferor may be liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.*

6. About the enforcement of security transfer

6.1. Related provisions

Arts. 33-35

6.2. Analysis

The listed provisions recognize one means of enforcement, i.e., the sale of receivables and distribution of the proceeds out thereof. Art. 36 therefore confirms that the transferee is entitled to other rights either provided in the transfer agreement or any other law. It is still desirable to pin down other means of enforcement of the security transfer. In particular, it is strongly advised that the Model Law definitely allow the transferee to obtain the receivable in satisfaction of the secured obligation.

Moreover, the consequence of performance of the secured obligation needs to be clarified. In general, there are two approaches: one is that the transferee bears a duty to return the receivables to the transferor, and the other is that the receivables return to the transferor automatically. On account of the purpose for which the transfer is made, the second approach is desirable and more beneficial to the transferor.

6.3. Suggestions

Adding a provision before art. 33 in Section B "Security Transfer": *After the secured obligation, for which a security transfer is made, is performed by the transferor, the receivable returns to the transferor automatically.*

Adding a provision after art. 35 in Section B “Security Transfer”: *After default, the transferor and transferee may agree on definite acquisition of the receivable by the transferee in satisfaction of the secured obligation*.

Meiling Huang Jing Zhang
Zhongnan University of Economics and Law

ANNEXE 2 – COMMENTS BY ICC CHINA

1.Suggest to include the definition of "Factoring".
Reasons: The context of MLF only refers to the transfers of receivables without indicating the definition of "factoring", except the name of the law. Therefore, it seems to be a model law on transfers of receivables.
UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (OTTAWA, 28 MAY 1988) and *FACTORING MODEL LAW* prepared by International Factors Group (now integrated into FCI)(Version February 2014) both include the definition of "factoring contract".
In addition, other similar laws drafted by UNIDROIT, such as *UNIDROIT MODEL LAW ON LEASING*, has clearly included the definition of "lease".
Therefore, in consideration of the reference to the existent factoring laws while drafting the MLF and similar laws, it is suggested to include the definition of "factoring".

2.Article 34: Sequence of numbers are not correct, Number 2 is missing.

3.About the definition of future receivable
MLF defines that "Future receivable" means a receivable that arises after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time.
According to the definition, even if a future receivable has no underlying legal relationship at all and only the possibility of future claims, it can be transferred in factoring business. In practice, there are different views regarding whether such future receivables without underlying legal relationship are reasonably predictable and relatively certain. It is suggested that the Model Factoring Law consider setting a clearer scope for the definition of "future receivable".

4. About credit card transaction
Is it appropriate to include the payment obligation for a credit card transaction in the scope of receivable?
In Article 2, under 1 (f) (iii), " the payment obligation for a credit card transaction" falls within the scope of receivables. However, under the credit card transaction, the relationship between the issuer and the cardholder may be under an entrustment contract or a legal relationship of borrowing and lending, which is not based on the receivables arising from the sale of goods, the provision of labor services and other businesses in the normal business process of traditional enterprises, nor the creditor's rights arising from the sales of enterprises. By including the payment obligations arising from the credit card transaction in the scope of receivable in the factoring business, it may conflict with the laws of some countries. In addition, it is also questionable as to whether it is feasible in factoring business.

5. About Priority of competing transfers of the same receivable
According to Article 13, "Priority between competing transfers of the same receivable is determined by the order of registration."
However, in practice, creditors of receivables may enter into multiple factoring contracts for the same account receivable, resulting in multiple factoring parties claiming rights, but all factoring contracts are not registered, or even without notice of transfer. Under such circumstances, how to determine the priority? MLF does not address such issue.

6. About the issue of Transfer Notification
Article 23 stipulates that the transferor, the transferee or both may send the debt or notification of a transfer and a payment instruction.
Article 26 specifies the requirements for the transfer notice, for example: "must be in writing"; "It reasonably identifies the receivable and the transferee, and is in a language that is reasonably

expected to inform the debtor about its contents"; "It is sufficient if the notification of the transfer or a payment instruction is in the language of the contract giving rise to the receivable."
It also stipulates that, if the notification of transfer meets the requirements, such notification is effective when received by the debtor. However, in practice, disputes may arise as to how to determine the completion of the notification. For example, when a company is acting as the debtor, which person/role in the company should be notified to? Besides mailing, may the notification be done through on-site handover? When the debtor receives the notification, how should it be proved from the point of the assignee or creditor? It is suggested that the Factoring Model Law consider the above issues and provide guidance.

7. About the issue whether the modification of the underlying contract may affect the transferee?

It is difficult to understand the statement in Article 30 2 (b) that "The receivable is not fully earned by performance". In addition, the sentence "in the context of that contract, a reasonable transferee would consent to the modification" is too speculative. In judicial practice, it may lead to different determinations. It is suggested that this clause be further clarified according to practice.

ANNEXE 3 – COMMENTS OF THE KOZOLCHYK NATIONAL LAW CENTER (NATLAW) ON THE PRIVATE INTERNATIONAL LAW PROVISIONS OF THE UNIDROIT DRAFT MODEL LAW ON FACTORING

(submitted by Mr Spyridon Bazinas)

Article 37 — Mutual rights and obligations of the parties

1. The heading and the formulation of this article, which deals with the law applicable to the contractual relationship between the transferor and the transferee and the contractual relationship between the transferor and the debtor of the receivable, should be reconsidered to more accurately reflect its contents and to ensure that the debtor of the receivable is not inadvertently presented as a party to the transfer agreement.

Article 38 — Effectiveness and priority of transfers

2. The policy of this article should be reconsidered to avoid differences with art 4 of the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effects of assignments of claims (2018/0044 (COD). This Proposal contains a different rule for transfers of receivables in securitization transactions, that is, the law chosen by the assignor and the assignee (Art. 4(3)). Otherwise, it would be extremely difficult for States-Members of the European Union and countries in Africa, Asia or Latin America that follow the law of one or the other European country, to enact the Draft Model Law on Factoring.

Article 40 — Enforcement of transfers

3. The essence of Article 40, that is referring enforcement of a transferred receivable to the law governing priority under Article 38. However, it is not clear why Article 40 which is presented as a separate article. Consideration should be given to the possibility of merging Articles 38 and 40.

Article 41 — Proceeds

4. Under Article 41, the law applicable to the third-party effectiveness and priority of a transfer of money, negotiable instruments or bank deposits as proceeds of receivables under Article 6, is the law applicable to the third-party effectiveness and priority of the transfer of the receivable from which those proceeds arose. This risks undermining the certainty and predictability of the law applicable to the rights of people who dealt with holders of money or negotiable instruments in the State in which they are located and holders of bank accounts in the State whose law is normally applicable to bank accounts. Thus, Article 41 should be reconsidered. These matters should be referred to the law applicable to proceeds of the same kind as the proceeds of the transferred receivables, that is, to the law applicable to rights in money, negotiable instruments or bank accounts.

Article 45 — Overriding mandatory rules and public policy (ordre public)

5. Article 45 deals with overriding mandatary rules but not with public policy. In addition, Article 45 does not deal with the law applicable to the question whether a court in the forum may take into account the overriding mandatary rules and the public policy of a State other than the forum State. Therefore, the text of this Article should be reconsidered with a view to aligning it more closely with Article 11 of the Hague Principles Choice of Law in International Commercial Contracts.

ANNEXE 4 – COMMENTS FROM EMERITUS PROFESSOR SIR ROY GOODE

I should like to congratulate all those involved in this project, and particularly the Working Group and the UNIDROIT Secretariat for the high quality of the drafting. I have only a few points:

Article 5(3) – add "(d) all of its receivables except for specified items or types" (cf Luxembourg Protocol to CTC, art 5)

Article 13 To avoid doubt add "whether or not the registrant had knowledge of a previously registered transfer.

Article 18(2) Will subordinations be registrable? If so, an assignee will take subject to the subordination.

Article 35(1)(b) The payment to two or more subordinate competing claimants should be in order of priority.

ANNEXE 5 – COMMENTS BY THE GOVERNMENT OF JAPAN

1. Japan appreciates the opportunity to express its comments concerning the draft Factoring Model Law. We would also like to express our sincere gratitude to the Working Group and the UNIDROIT Secretariat for their efforts in the preparation of the draft Model Law.

2. Japan supports the development of the Factoring Model Law. We are confident that the creation of the Model Law will benefit those States contemplating reforms of their factoring laws. As we are aware of the factoring sector being involved in the process of the drafting, the Model Law will ultimately benefit the factoring sector as it will enhance legal certainty of transactions, including cross-border factoring.

3. We would like to make a following suggestion concerning the conflict-of-law rules. We are aware the United Nations Convention on the Assignment of Receivables in International Trade and the UNCITRAL Model Law on Secured Transactions that provide for Location of Assignor/Grantor (central administration) as the connecting factor that determines the law applicable to "proprietary issues", such as third-party effectiveness and priority. However, we also understand that the Factoring Model Law is designed to apply to a broader range of transactions than the traditional factoring, including transfers of receivables in financial markets, such as in securitization, other than the exclusions expressly set forth therein. We wonder where an exception to this general rule may be considered for certain types of transactions for which the "law governing the claim" might be more appropriate. Party autonomy is also recognized by the UNCITRAL Model Law with respect to the law applicable to non-intermediated debt securities as an exception to the location of the grantor. We feel that the "location of the assignor" rule cannot resolve the conflict-of-law issues in case where the financial transaction involves multiple creditors in different States as the transferor. Furthermore, Japanese law provides for a "law governing the claim" as the connecting factor that determines the law applicable to proprietary issues.[2] We find this rule to be a practical solution for the financiers, as part of their due diligence, the financiers will always check the law governing the claim in question, in some types of financial transactions.

4. Our suggestion is the following;
   Article 38
   - Consider adding a following option.
   "Except as provided in Article 39, the law applicable to the effectiveness and priority of a transfer of a receivable [the State to specify a narrow range of transfers in specific transactions] is the law governing the Claim."

   - Rationale
   This would be consistent with the Japanese law and does not defer to the practices established in financial transactions.

We thank you for this opportunity to comment and look forward to the final draft of the Model Law.

[2] Article 23 of Act on General Rules for Application of Laws provides that "The effect of an assignment of a claim, against the obligor and a third party, is governed by the law applicable to the claim assigned".

ANNEXE 6 – FINAL OBSERVATION FROM MS ELHAM ABDELHALIM MOHAMED MABROUK

1- Observations on the Model Law of Factoring (MLF) after compared with the Egyptian Factoring Law (EFL)

Model Law of Factoring (MLF)	Egyptian Factoring Law (EFL) No. 176 for the year 2018	Comments
Article 1 **Scope of application**		
1. This Law applies to transfers of receivables.	According to the definition of the Factoring mentioned in Article (1), Para (2): 'Factoring" is: the purchase of **current and future financial** rights arising from sales transactions and provision of services. - According to Article (1) para (18): The Seller ("Transferor") is: the Seller of goods or the provider of services from which **financial rights** arise. - According to Article (1) para (20): Factoring Contract is: A contract concluded between the transferee and the Transferor, whereby the transferee purchases current and future financial rights arising from sale of goods and provision of services. In the EFL; the term "current and future financial rights" goes consistently\in line with with the assignment rules provided for in the Egyptian Civil Code which govern the transfer of financial rights.	
Definition of Receivable: Regarding; (iii) the payment obligation for a credit card transaction.	EFL didn't address this case\ was silent in this regard.	MLF should tackle the risks that may be involved in credit card transactions, for example the debtor might change\loose his credit card after which the bank should ask the debtor's prior consent to

Model Law of Factoring (MLF)	Egyptian Factoring Law (EFL) No. 176 for the year 2018	Comments
		withdraw the debt amount from his new credit card in order to fulfill the transfer transaction.
	According to Article (1): The contract between the transferor and the debtor is defined as:" The original contract of the sale of goods or provision of services concluded between the transferor and the debtor"	The MLF didn't define the contract giving rise to a receivable that is made between the transferor and the debtor in Article (1) thereof; as it should be defined in the aforesaid Article to avoid redundancy throughout the Law's provisions
Article (2)		
(d) "Future receivable" means a receivable that arises after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time.	According to Article (1) Para-No. (22) Current Financial Rights: means the rights already exist at the time of concluding the transfer contract. - Para (23): Future Financial Rights: means the rights arising after the implementation of the transfer contract.	Definition of current receivables should be provided for in the MLF.
(e):"Proceeds" of a receivable means any: (i) money; (ii) negotiable instrument; or (iii) right to payment of funds credited to a bank account,	According to Article (37): The right to sell must meet the following conditions; that it must be: arisen from business transactions resulted from the activity of both the transferor and the debtor,not from cash loan transactions. free of any current or future rights of others. Not be restricted or conditional, unless otherwise agreed by the debtor and transferor. the debtor may be a final consumer, after fulfilment of the aforementioned (No. 2 and 3 Conditions) and in accordance with the rules issued by the Egyptian Financial Regulatory Authority (FRA).	

Model Law of Factoring (MLF)	Egyptian Factoring Law (EFL) No. 176 for the year 2018	Comments
(f) "Receivable" means a contractual right to payment of a sum of money arising from: (i) the supply or lease of goods or services; (ii) the assignment or license of intellectual property; or (iii) the payment obligation for a credit card transaction. A receivable does not cease to be a receivable as defined by this section if it is consolidated or refinanced by the parties to it.	According to the Law, factoring will cover only; the sale of goods or the provision of services to debtors. the transfer the financial rights arising from the membership dues of sports clubs (this case added by FRA's Resolution No. 197 for the year 2018 transfer the financial rights arise from sale of goods and provision of services for noncommercial purposes except for real estates (added by the FRA's resolution No. 84 for the year 2021) the rights arise from buying on margin transactions executed by brokerage companies. (Added by the FRA's resolution No. 25 for the year 2021).	The last sentence in Para (f) is not clear and confusing.
(g) "Registry" means the registration system for this Law established by [the relevant authority in the enacting State.	According to Article (43): Guarantees may be agreed between the transferor and the transferee to fulfill its financial rights, and transferor or its debtors may submit a mortgage, whether official or possessory(*pawn*), or register the rights of certain movables in the Record of Movable Guarantees promulgated by the Law No. 115 of 2015 or provid solidarity guarantee. **Definition of movables/assets i.e. (the submitted guarantees):** As per Article (1) of the Law No. 115 for the year 2015, said above, the movable/asset is defined as follows: "Every tangible movable whether existing or future, or existing intangible assets, owned by the debtor, the guarantor or the creditor, submitted to guarantee an obligation, a debt, a finance or a credit facility, in	

Model Law of Factoring (MLF)	Egyptian Factoring Law (EFL) No. 176 for the year 2018	Comments
	accordance with the provisions of the Executive Regulations." Article (2) of the Law No. 115 of 2015 states that the provisions thereof are applied on secured rights by a movable possessed by the debtor/guarantor, as agreed by the parties in the guaranteeing agreement to be registered. Moreover, the Law outlines the assets/movables, that represent the collaterals, to include, enter alia, the following : Bank deposits and accounts, including deposits and current accounts Movable assets ancillary to land Intellectual Property rights and patents Fungible assets (Oil, metal, food, etc…) Receivables and credit notes Timber, agriculture productions, crops and animals	
Article (5) **Requirements for the transfer of a receivable**		
1. An agreement is only effective as a transfer agreement if it: a. is evidenced by a writing that is signed by the transferor; b. identifies the transferor and the transferee; and c. describes the receivable in a manner that reasonably allows its identification. A	According to Article (45): The Transfer contract should include at least the following rules\terms: Conditions of determining the rights accepted by the transferee and the minimum supporting documents. The rules on which the rights are transferred, including the extent to which the existence of the right is guaranteed, the debtor's financial ability to pay, and the obligation of the transferor or transferee to notify the debtor or to obtain its consent in accordance with the rules issued by FRA.	In the code either to determine minimum detailed information about the transfer contract or to be specified according to the law of the state. The phrase; "… Describes the receivable in a manner that reasonably allows its identification…" is not sufficient here, cause the information to be included in the transfer contract should be determined according to the law of the state. Accordingly, it is better to add the phrase "to be specified by the law of the enacting state".

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description of receivables in a transfer agreement will be sufficient if it indicates that the receivables consist of all of the transferor's receivables, or all of the transferor's receivables within a generic category.	kinds of the relevant services provided by the transferee such as collection of the cash proceeds, follow-up, financing, providing information, counseling, and any financial and administrative services. Duration of the contract, terms of its renewal and expiration. Settlement of the relevant accounts. Any other guarantees provided by the transferor to the transferee, as well as those associated with the transferred rights, if any. Parties' rights and obligations Whether or not the the transferee has the right of recourse against the transferor in case of non-payment by the debtor. the settlement of disputes rules arising out of the contract.	
A transferor may transfer: (a) a part of or an undivided interest in receivables; (b) a generic category of receivables; and (c) all of its receivables.	There is no provisions or rules in EFL also, there is no rules issued by the FRA to govern the transfer of all or a part of the financial rights. Practically, Factoring companies agree to finance all, or part of the financial rights included in the debtors' contracts, but they must keep all original copies of these contracts with a custodian (it could be bank or company) in an escrow account. So, the relevant financial rights to contracts usually transferred from a transferor to only one transferee, even if they were divided or partitioned. so, in case the transferor decideded to transfer the remaining parts of the financial rights arise from a same sale contract, he	According to Egyptian Legislation the rights relevant to the contract shall be transferred only once, even of the transferor had transferred a part thereof, and there is no multiple transfer to rights relevant to the same contract, so in this context MLF should refer to the law of each enacting state regarding the transfer of the receivables

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	shall not have the right to transfer the rest of the financial rights relevant to the same contract until the first concluded transferring agreement is lapsed. Note: The "FRA" prohibits to transfer the rights related to one contract even if it is relevant to another period different from the period in the transferred contract.	
Article (7) **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 have the benefit of that right under the law governing it only with a new act of transfer, the transferor is obliged to transfer the benefit of that right to the transferee. 2. A transferee has the benefit of a right under paragraph 1 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 the ability of the transferee to have the benefit of that right.	According to Article (42): The rights shall be transferred from the transferor to the transferee with its guarantees, and in case there is an agreement between the transferor and a debtor prohibits the transferor from transferring his rights, in this case the transferor shall not have the right to transfer his rights except after taking the debtor's consent for such transferring. According to Article (43): It may be agreed that the transferor will be a guarantor of the debtor's fulfilment of its obligations at their due dates. and, in any event, the transferor will be liable for its personal acts that would diminish or eliminate the transferred right. Guarantees may be agreed between the transferor and the transferee to fulfil the financial rights, and transferor or the debtors may provide a mortgage, whether official or possessory(*pawn*), or by registering the rights of certain movables in the Record of Movable Guarantees promulgated by the Law No. 115 of 2015 or by providing solidarity guarantee.	The EFL mentioned the same as MLF regarding the guarantees, but it is noticed that MLF does not mention any rules regarding the insurance against the risk of non-payment of debtors, practically in Egypt all financing contracts must be backed by insurance policies.

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	According to Article (50): Insurance against non-payment risks may be agreed to by insurance companies inside or outside Egypt with the approval of the FRAor other entities accepted by FRA as well.	
Article (8) Contractual limitations on the transfer of receivables		
1- 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. 2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.	In EFL did not provide for the case of the rights of the third parties. And according to Article (48): The transferee shall have the right to recourse against the transferor in the following cases: If debtor's failure to fulfill the transferee's rights due to a breach by the transferor of its contractual obligations with the debtor. The termination of the transferred right prior to its transfer to the transferee, or the existence of a preference of a third party. If the transferred right was Non-transferable or previously transferred to another transferee.	According to Article (8): The Transferor shall be obliged to fulfill its obligations under the transfer agreement, and it is responsible for any breach might happened and contradict with what is agreed upon with the debtor in the contract arises the proceeds. The same thing applied according to the Article 1267 of the Italian Civil Code and Article No. (4) of the "*Legge del 21 febbraio 1991,n.52*"
Article (9)		
A transfer of a receivable is effective against third parties only if a notice with respect to the transfer is registered in the Registry.	In EFL there is no need to register the notice of the transfer to be effective against any third parties. Article No. (38) of the EFL: the transfer of rights from the transferor to the transferee shall be applied according to the Egyptian Civil Law. In this context, according to the Egyptian Law we have different kinds of registration procedures according to the type of transferred rights.	According to Egyptian Civil Law there is no need to register the notice itself, and it will be more effective in the MLF to register the guarantees of the receivables which transferred from the transferor to the transferee.

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	Under the law No. 115 for the year 2015 the registration of the right of the guarantee as following: According to article (6): For registering the right of the guarantee in the register, that shall be through the creditor's updating of the electronic form prepared for this purpose, which shall include all the basic information contained in the guaranteed contract, a general or special description of the guarantee and the parties of the guaranteed contract and their capacities to the guarantee and the duration of the guarantee. According to article (11): Imposed on the registration in the record in accordance with the provision of Article (6) of this Law, give effect to the right of guarantee against others. Any interested party may challenge to the judge of urgent matters of rights to the Register without affecting the effectiveness of the guarantee right against it or any third party.	
Article (13) **Competing transfers**		
Priority between competing transfers of the same receivable is determined by the order of registration.	Nothing mentioned in the EFL to organize the competing transfers. According to the EFL no rules govern the registration of rights, and it is not obligatory as well, besides, there are other laws manage priorities rules between transferees such as Egyptian civil code and code No. 115 for the year 2015.	
Article 15 **Impact of the transferor's insolvency on the priority of a transfer**		

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A transfer that is effective against third parties at the time of the commencement of insolvency proceedings in respect of the transferor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to the applicable insolvency law.	According to the EFL no rules govern the priority in the case of the transferor is being bankrupted. According to Article (43) of the EFL: Guarantees may be agreed between the transferor and the transferee to satisfy its rights, including a mortgage, to ensure that it has the first charge in fulfilling the transferee's rights in the event of the transferor's bankruptcy	
Article 16 **Transfers competing with claims arising by operation of law**		
The following claims arising by operation of other law have priority over a transfer that is effective against third parties but only up to [the enacting State to specify the amount for each category of claim]: (a) […]; (b) […].]	According to the EFL no rules govern claims arising by operation of other laws. In case the Transferor register any guarantee in the record according to the Law No. 115 for the year 2015, this registration shall have a priority against any third party, and the transferor shall have a privilege on the guarantee with the priority before other privilege right and mortgage of any third party under any other laws, excluding judicial expenses, fees and expenses of execution on the movable.	The object for including this article is not obvious, and it shall be more effective to stipulate the rights which shall have the priority over the right of the transfer.
Article 17 **Transfers competing with rights of judgment creditors**		
1. The right of a creditor that has obtained a judgment or provisional order ("judgment creditor") has priority over a transfer if, before the transfer is made effective against third parties, the judgment creditor has [taken the steps to be specified by the	According the EFL the Article No. (48) shall cover the transfers competing with rights of judgement creditors, the articles No. (48) stipulated that: The transferee shall have the right to recourse the transferor in the following cases:	

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enacting State for a judgment creditor to acquire rights in the receivable or the steps referred to in the relevant provisions of other law to be specified by the enacting State]. 2. In the case of a security transfer, if the transfer is made effective against third parties before or at the same time the judgment creditor acquires its right in a receivable by taking the steps referred to in paragraph 1, the transfer has priority but that priority is limited to the greater of the credit extended by the transferee: (a) Before the transferee received a notice from the judgment creditor that the judgment creditor has taken the steps referred to in paragraph 1 or within [a short period of time to be specified by the enacting State] thereafter; or (b) Pursuant to an irrevocable commitment of the transferee to extend credit in a fixed amount or an amount to be fixed pursuant to a specified formula, if the commitment was made before the transferee received a notice from the judgment creditor that the judgment creditor had taken the steps referred to in paragraph 1.	If debtor's failure to fulfill the transferee's rights is due to a breach by the transferor of its contractual obligations with the debtor. **The termination of the right prior to its transfer to the transferee, or the existence of a preference for the other person.** No-transferability of rights or previously transferred to another transferee. The exact procedures shall be taken by the judgement creditor is mentioned in the Egyptian Code of Civil and Commercial Procedural.	
Article 18 **Subordination**		
1. A person may at any time subordinate the priority of its rights under this Law in favour		It should refer that A person in this context is A transferee.

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of any existing or future competing claimant. The beneficiary need not be a party to the subordination. 2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.		

Article 19 **Future advances and future receivables**		
1. The priority of a transfer of a receivable that is described in a notice registered in the Registry is determined by the time of registration, whether the receivable is acquired by the transferor, or comes into existence, before or after the time of registration. 2. Subject to Article 17, the priority of a security transfer extends to all obligations secured by the transfer, including obligations incurred after the transfer became effective against third parties.	According to EFL the notification is effective without need to be registered in a specific record. And the same notification shall cover the future financial rights. Moreover, According to Article (39): Notification to the debtor of the transfer of the financial rights from the transferor to the transferee shall be in accordance with the methods and rules issued by the FRA to ensure that the debtor is informed of the transfer. The notification shall include the information about both the transferor and the transferee and the transferred financial rights. The notification shall be effective only in the same language as the sales contract or official language of the debtor's State. Notification of the transfer of financial rights may relate to rights arising after notification. In any event, the transfer of rights is effective and productive of its effect from the date of the transferring agreement. **According to Article (44) The transfer agreement may extend to future financial rights to which the transferor is expected to acquire as a result of its activity, without the need to conclude a new transfer agreement of such rights**	

Article 20 **Irrelevance of knowledge**		
The priority of a transfer is not affected by any knowledge that the transferee may have of another transfer.		I do not understand what the real objective is from adding this article. Is it related to the partial transfer of the financial rights? Also, it contradicts with the overriding universal rule of good faith, especially if a third party proved that the transferee knew about that third party's right vis-à-vis the transferor, as the case may be.
Article 21 Rights and obligations of the transferor and the transferee		
1.The mutual rights and obligations of a transferor and transferee arising from their transfer agreement are determined by the terms and conditions set out in that agreement, including any rules or general conditions referred to therein. 2. The transferor and the transferee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between themselves.	According to article (45) of EFL the transfer contract should include minimum information stipulated in that article. (Previously it mentioned in article 5 above)	MLF should either;determine the minimum detailed information or terms about the transfer contract or to be specified by the law of the enacting state.
Article 22 — Representations of the transferor		
1.----- **2**. The transferor does not represent that the debtor has, or will have, the ability to pay.	According to article (43): It may be agreed that the transferor will be a guarantor of the debtor's fulfilment of its obligations at the time of satisfaction and, in any event, the transferor will be liable for its personal acts that would diminish or eliminate the transferred right.	Point No. 2 should be amended, and the transferor may undertake the fulfillment of the debtors' obligation if they failed to satisfy, as the parties may agree

Article 23 **Right to notify the debtor**		
1. The transferor, the transferee or both may send the debtor notification of a transfer and a payment instruction, but after notification of the transfer has been received by the debtor only the transferee may send a payment instruction. 2. Notification of a transfer or payment instruction sent in breach of an agreement between the transferor and the transferee is not ineffective for the purposes of Article 27, but nothing in this Article affects any obligation or liability of the party in breach for any damages arising as a result of the breach	There is no article in the EFL determine who is responsible for sending the notification of the transfer of the financial rights to the debtor. However, according to Article (39) the legislator referred that the terms and conditions of the notification shall be organized by the competent authority. According to the Article (5) of the FRA's resolution No. (163): The transferee is obliged to notify the debtor about the transfer of financial rights using one of the following ways: 1- Mailing/ Certified mail, with return receipt requested 2- One modern electronic method, including e-mail agreed between the parties in the contract[3]. 3- Any other method transferee deems appropriate and approved by the FRA provided that the debtor is aware of the transfer of financial rights. Notification shall be in the same language as the sales contract and shall produce its effect from the time of its arrival to the debtor. The notification shall include at least the following information: 4. Debtor's information 5. Transferee's information 6. Transferor's information	

[3] The Resolution does not specify exactly the required contract, is it the factoring contract or the sale contract?

	7. Information of the financial rights 8. Date of the transfer of the financial rights. Alert the debtor to notify the transferee of any impediment that prevents the transferee from fulfilling the rights within a period not exceeding fourteen days from the time of arrival of the notification to the debtor.	
Article 24 **Right to payment**		.
1. As between the transferor and the transferee, whether or not notification of a transfer has been sent: (a) If payment with respect to the receivable is made to the transferee, the transferee is entitled to retain the payment; b) If payment with respect to the receivable is made to the transferor, the transferee is entitled to be paid that amount by the transferor; and (c) If payment with respect to the receivable is made to another person over whom the transferee has priority, the transferee is entitled to be paid that amount by the other person. 2. In the case of a receivable that arose under a contract for the supply of goods, the transferee is entitled to any goods that may be returned in respect of the receivable. 3. A	The EFL or the FRA do not organize the collection of proceeds.	All collection methods shall be included in the transfer contract in detailed, and the mentioned process in MLF is practically applied. Clause (C) of para-No. 1 of Article 24 must be amended, the word of "**the transferee is entitled to be paid that amount by the other person**" gives an obligation for a third party who is not a party of the transfer contract to pay to the transferee, as a result we have two options for amending the clause whither to make it an obligation to be fulfilled by the transferor, or a right the transferee can legally use.

transferee may not retain more than the value of its right in the receivable.		
Article 26 **Notification of the debtor**		
1. A notification of a transfer and a payment instruction must be in writing. 2. A notification of a transfer or a payment instruction is effective when received by the debtor if it reasonably identifies the receivable and the transferee and is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if the notification of the transfer or a payment instruction is in the language of the contract giving rise to the receivable. 3. A notification of a transfer or a payment instruction may relate to receivables arising after notification. 4. Notification of a transfer constitutes notification of all previous transfers	-According to Article (52): Subject to the provisions of articles (39 &40) of this Law, the debtor is under an obligation to pay the transferee from the date of the debtor's notification. If the debtor paid to the transferor, the debtor shall not discharge the debt except by paying to the transferee. -According to the EFL article (39) Notification should be either in the language of the sale contract or the official language of debtor's country.	Sending the notification to the debtor in his official language of his state or the language of the sale contract, or the language agreed by the parties to be dealt with, that is more flexible. Clause No. (4): it is more effective if it stipulates that the last transfer notification shall be superseded all previous transfers.
Article 27 **Debtor's discharge by payment**		
	Regarding the notification to the debtor according to the EFL: Article (40) stipulates that "Notification of the transfer of rights shall include warning to the debtor to inform the transferee of any impediment that may prevent the transferee from fulfilling the rights and the	

	circumstances of the right and the risks and difficulties that may prevent the transferee from fulfilling it, under the FRA's resolutions. Otherwise, the debtor has no right to adhere to the defenses arising from those circumstances. If the debtor receives the notice of the transfer of rights from the transferee, it may require the transferee to provide proof of completion of the transfer between the transferor and the transferee **within two weeks** from the date of receipt of such notice, and if the transferee fails to satisfy this request, the debtor will be discharged if it paid to the transferor. Article (41) stipulates that "Rights shall be transferred from the transferor to the transferee with the guarantees prescribed to it. In the event of an agreement between the transferor and the debtor preventing the transferor from transferring its rights, the transferor may transfer its rights only if the debtor agrees to transfer. Article (42) stipulates that: "The debtor may, in the face of the debtor, maintain the defenses that it was able to maintain against the transferor at the time of the effectiveness of the transfer agreement, and it may be agreed that **the transferor will undertake that the debtor does not possess any defenses or rights to conduct the set-off.** Notification to debtors shall be applied in accordance with the provisions of assignment mentioned in the civil code.	

Article 28 **Defenses and rights of set-off of the debtor**		
	Under EFL nothing governs the rights of set off of the debtor except what mentioned in article (42) which mentioned hereinabove.	It is important to mention in the MLF that the transferor is obliged to face any right or set-off might be rendered by the debtor against the transferee. In the practical work, Lawyers insert in a transfer agreement such obligation. Moreover, what mentioned in Article (29) of the MLF should be applied by law and not only if it is agreed in the contract.
Article 30 **Modification of the contract giving rise to a receivable**		
1. A modification of the contract giving rise to a receivable that is made between the transferor and the debtor before the debtor receives notification of the transfer and that affects the transferee's rights is effective as against the transferee, and the **transferee** acquires corresponding rights. 2. A modification that is made between the transferor and the debtor after the debtor receives notification of the transfer and that affects the transferee's rights is ineffective against the transferee unless: (a) The transferee consents to it; or (b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable	According to Article (49) in EFL: The agreement between the transferor and the debtor for amending the sale contract after the notification of the transfer of rights has been sent, the amendment shall be effective against the transferee only in the following cases: a) The transferee's consent b) The rights of the sale contract have not been fully acquired and the amendment does not affect any of the transferee's rights or guarantees.	In the end of the point No. 1 " … rights is effective as against the **transferee**", It is understood from the context of this part that " rights is effective as against the **transferor**".

transferee would consent to the modification. 3. Paragraphs 1 and 2 do not affect any right of the transferor or the transferee arising from breach of an agreement between them.		
Article 31 — Recovery of payments		
Failure of a transferor to perform the contract giving rise to the receivable does not entitle the debtor to recover from the transferee a sum paid by the debtor to the transferor or the transferee.	According to Article (47): The transferee shall not be liable for the specifications of the goods sold or the providing of services under the sale contract as well as the mutual obligations under the sale contract. Moreover, according to Article (54): In case of the transferor failure to fulfil its obligations under the sale contract, the debtor shall not be entitled to refund amounts paid to the transferee, and the debtor may recourse to the transferor in accordance with the sale contract.	
Article 32 **Collection of payment under an outright transfer**		
1. The transferee under an outright transfer of a receivable is entitled to collect the receivable at any time after payment becomes due. 2. The transferee exercising the right to collect under paragraph 1 is also entitled to enforce any personal or property right that secures or supports payment of the receivable.	Practically for performing the second point of this article, the transferee usually assigns the transferor to manage collecting of proceeds and claim the debtors in case of their failure to fulfill their obligations under the terms and conditions of the sale contract.	

3. The right of the transferee to collect under paragraphs 1 and 2 is subject to Articles [25-31].		

Article 34 **Right of the transferee to sell a receivable**		
After default, the transferee under a security transfer is entitled to sell the receivable without applying to a court or other authority.	According to the EFL the transferee has the right to sell the rights he acquired from the transferor only to another factoring company or an entity authorized the same activity inside Egypt or outside Egypt. Subject to the provisions of article (48) of this Law, the transferee shall recourse to the debtor or the transferor or both with the value of financial rights to satisfy its rights. Unless otherwise the transfer contract includes that. Without prejudice to article (66) of this Act, a transferee who wishes to transfer or transfer its rights shall transfer them to one of the entities authorized by the Authority [4]to practice the factoring. The transferee shall be obliged to notify the debtor of the transfer of rights under the provision of article 39 of this Act	
Article 35 **Distribution of the proceeds of collection or sale of a receivable and liability for any deficiency**		
1…, … Except as provided in paragraph 2(c), the transferee must pay any surplus to any subordinate competing claimant that, prior to any distribution of the surplus, notified the transferee of its claim, to the extent of the	- EFL does not include any provision regarding the distribution of proceeds. -Practically, ways of distribution of the proceeds shall be included in the transfer contract. In the absence of agreement between parties the Civil Code provision shall be applied for the distribution of the proceeds.	**Note: where is paragraph 2 (c)?**

[4] Financial Regulatory Authority (FRA)

amount of that claim, and remit any balance remaining to the transferor; and	besides, distribution ways are varied with the kinds of guarantees the transferee has.	
From article 36		
	EFL does not include any provision regarding the post-default rights. Practically, organizing the post default rights shall be included in the transfer contract. If there is no agreement between parties to organize it, the Civil Code provisions shall govern it.	
From 37 until Article 40		
	EFL does not include any provision regarding what mentioned in the four articles. Practically, organizing international transaction shall be governed by Article (19) [5]of the Egyptian Civil Code or by the transfer contract	
From 42 until Article 47		
	EFL does not include any provision regarding what mentioned in those articles, and it governed under the Egyptian Civil Code and bankruptcy law No. 11 for the year 2018.	
From 48 until Article 54		
	EFL does not include any provision regarding what mentioned in those articles Egyptian Civil Code.	

[5] Article (19) Stipulates: The contractual obligations are governed by the domestic law if the domicile is the same for both parties, and, if there is no common domicile, by the law of the country where the contract is concluded. This rule is not applicable if the parties have agreed on another applicable law or that another applicable law results from the circumstances.

2- **Observations on the Annex No. (1) attached to the Model Law of Factoring (MLF)**

Annex (1)		
Clause 2 — Transferor's authorisation for registration	**Suggestions**	**Observation**
1. Registration of an initial notice is ineffective unless authorised by the transferor in writing. 2. Registration of an amendment notice that adds receivables or extends the period of effectiveness of the registration of a notice is ineffective unless authorised by the transferor in writing. 3.Registration of an amendment notice that adds a transferor is ineffective unless authorised by the additional transferor in writing. 4. Authorisation may be given before or after the registration of an initial or amendment notice. 5. A written transfer agreement is sufficient to constitute authorisation by the transferor for the registration of an initial or amendment notice covering a receivable described in that transfer agreement.	Needs to be modified by merging 1,2 & 5 in one point. Authorization in point (4): needs to be cleared or deleted.	There is a repetition in this Article, as points No. 1 & 2 are covered by what mentioned in the point No. 5.
Clause 4 — Advance registration		
A notice may be registered before a transfer or the entry into of a transfer agreement to which the notice relates.	A notice may be registered before or after entry into force of the transfer agreement.	There is a contradiction with what mentioned in Article (2) above. The notice issued from the transferor needs to be supported\backed with a transfer agreement and the notice should be in writing, in all cases. so, I cannot allow the registration for a notice that is not supported by

		signed transfer agreement, so long as the notice satisfy the conditions and terms must be provided in the transfer contract.
Clause 5 — Conditions for access to registry services		
1. Any person may submit a notice to the Registry, if that person: (a) Uses the form made available for that purpose through the Registry's electronic user interface; (b) Identifies itself in the manner specified by the Registry; and (c) Has paid or arranged to pay the prescribed fee. 2. A person may submit an amendment or cancellation notice if that person also satisfies the secure access requirements specified by the Registry. 3. Any person may submit a search request to the Registry if that person: (a) Uses the form made available for that purpose through the Registry's electronic user interface; and (b) Has paid or arranged to pay the prescribed fee.	Deleting the item No. 2	A notice has been defined in Article (1) and it means: an initial, an amendment or a cancellation notice, so what mentioned in item (1) is satisfied and covered all types of the notices.
Clause 6 — Rejection of the registration of a notice or a search request		
1. The Registry must not permit the registration of: (a) A notice if no information is entered in one of the mandatory designated fields; or (b) An amendment notices to extend the period of effectiveness of the registration of a notice if it is not submitted within the period referred to in clause 12(2). 2. The Registry must not accept a search request if no information is entered in one of	Deleting the item No. (b) and rephrase the paragraph No. 1 to cover the missing, wrong, illegal information. in the case the required period contradicts with the period specified by the State Law. If the item (b) covered only the term of the transfer assigned by the transferor and is not exceeded the	The notice is set out in article (1), and the maximum period of registration of the notice is determined according to Article (12) in accordance with the law of the State, hence the electronic registration system supposed to not accept any term is more than the period prescribed by law.

the fields designated for entering a search criterion.	specified period by the State Law in this case the article should be amended to clarify this point.	
Clause 8 — Transferor's identifier		
1…. 2. [The enacting State should specify which components of the transferor's name or other identifier determined in accordance with paragraph 1 must be entered in an initial or amendment notice].	Deleting the point No. (2).	It is preferable to unify the requirements of identifying the transferor for all types of notice. Also, to be consistent with what mentioned in Item (1) of Clause No (9) which identifies the transferee.
Clause 9 — Transferee's identifier		
	Should include the same item as mentioned for the Transferor's identifier in Clause No. (8). " [*The enacting State should specify the manner in which the name or other identifier is determined if the name or other identifier is legally changed after the issuance of the relevant document referred to in paragraph 1*.]"	It is required to add this item to be consistent with what mentioned in Clause No (8) which identifies the transferor.
Clause 12 — Period of effectiveness of the registration of a notice		
3. The period of effectiveness of the registration of an initial notice may be extended more than once. 4. The registration of an amendment notice in accordance with paragraph 2 extends the period of effectiveness for the period specified in the amendment notice beginning from the time when the current period would have expired if the amendment notice had not been registered.	Point No. 3: It is required to cover the period of effectiveness of the registration for the Amendment Notice as well. Point No. 4: to be deleted	Point No. 3: It is better to amend this point to be (**The period of effectiveness of registration of an initial and amendment notices may be extended more than once**) Point No. 4: The Effectiveness of the extension of the registration of a notice shall start from the expiry date of an initial or an amendment notice.

Clause 14 — Compulsory registration of an amendment or cancellation notice		
1-The transferee must register an amendment notice deleting receivables from a description of receivables in a registered notice if: a-… b- The transferor authorised the registration of a notice covering those receivables but the authorisation has been withdrawn and no transfer agreement covering those receivables has been entered into; or	Point 1-b: should be deleted.	It is better to amend point 1-a to include the withdrawal of the authorization of the transferor as well, as registration of a notice is not only made upon a transfer agreement as it is understood in Article (2) Annex (A) that it is allowed to register the notice after taking a written authorization from the transferor.
2- The transferee must register a cancellation notice if: a. The registration of the initial notice was not authorised by the transferor and the transferee has been informed by the transferor that it will not authorise the registration of the initial notice;	Point 2-a: it is required to be deleted	Under Clause (2): "*Registration of an initial notice is ineffective unless authorized by the transferor in writing.*" so why I need to cancel an ineffective initial notice. And it is understood that registration of the initial notice can be made only after obtaining written consent from the transferor.
3.The transferee may not charge or accept a fee or expense for complying with its obligation in accordance with paragraph 1(a), 1(b), 2(a) or 2(b).	Point 3: should be amended to expose a penalty on transferee.	should include a penalty on the transferee as it had registered non- authorized notice by the transferor.
4- If the conditions set out in paragraph 1 or 2 have been met, the transferor may request the transferee in writing, reasonably identifying itself and the related initial notice to register the appropriate amendment or cancellation notice. The transferee may not charge or accept any fee or expense for complying with the transferor's request.	Point 4: to be deleted	Point No. 5 contradicts point No. 4 but in different meaning as it decided to give a transferee a grace period to be specified by the enacting state Law, and in the case that the transferee did not comply with after the expiry of this period the transferor shall have the right to take any judicial or administrative procedure.

Clause 15 — Effectiveness of the registration of an amendment or cancellation notice not authorised by the transferee		
The registration of an amendment or cancellation notice is effective regardless of whether it is authorised by the transferee.	To be written at the end of the Clause (14).	It is better to mention this phrase at the end of the Clause (14) Compulsory registration of an amendment or cancellation notice instead of putting it in a separate clause, as it tackles the same assumption
Clause 16 — Search criteria		
A search of the public registry record may be conducted according to: (a) The identifier of a transferor; or (b) The registration number of an initial notice.	We can add the identifier of the transferee as well.	The identification of the transferee considered one of the required information to register the initial notice according to clause 7 of This Annex.
Clause 22 — Removal of information from the public registry record and archival		
2. Except as provided in paragraph 1, the Registry may not remove information contained in a registered notice from the public registry record.	This paragraph should be amended.	
Clause 23 — Correction of errors made by the Registry		
3- Notwithstanding paragraph 1, a transfer to which the notice relates is subordinate to the right of a competing claimant that acquired a right in the transferred receivable in reliance on a search of the public registry record made before the notice was registered, provided the competing claimant	Red words need to be clarified.	do the notice in this context refer to the notice after amending the erroneously removed information?

did not have knowledge of the erroneous removal of the information at the time it acquired its right.		

Main Notes

1- The EFL does not have any provision to organize Islamic factoring, and it is mentioned by the FRA's resolution No. (95) for the year 2019 for amending the resolution No 163 for the year 2018, and after consulting with the FRA they assured that there is no previous application in Egypt regarding the Islamic factoring till to date.

ANNEXE 7 – COMMENTS ON THE DRAFT MLF - BEIJING FILONG LAW FIRM

(submitted by Mr Zhiping ZHANG)

1. THE ORIGINAL TEXT:

Article 29 — Agreement not to raise defences or rights of set-off

1. A debtor may agree with the transferor in a signed writing not to raise against the transferee the defences and rights of set-off that it could raise in accordance with Article 28.

2. A debtor may not waive defences:
   (a) Arising from fraudulent acts of the transferee; or
   (b) Based on the debtor's incapacity.

3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the transferee is determined by Article 30(2).

THE COMMENT AND PROPOSAL:

The word "effect" marked yellow in this Article appears only once in the entire text, while words with the same meaning are all expressed as "effectiveness" in the Draft. Besides, "effectiveness" is generally used in the UNCITRAL Model Law on Secured Transactions instead of "effect". Therefore, would it be better to align this Article with the rest of the Draft and with the Model Law, i.e., to replace this "effect" with "effectiveness"?

2. THE ORIGINAL TEXT:

Article 45 — Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.

2. This Article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a transfer.

THE COMMENT AND PROPOSAL:

The title of this Article is the same as the title of the corresponding article in the UNCITRAL Model Law on Secured Transactions. However, the term "public policy *(ordre public)*" marked yellow in the title is not mentioned at all in this Article, nor in the whole Draft (in contrast, the UNCITRAL Model Law on Secured Transactions does provide for public policy related provisions). Should the term "public policy *(ordre public)*" be deleted from the title of this Article for the sake of accuracy?

3. THE ORIGINAL TEXT:

Clause 15 — Effectiveness of the registration of an amendment or cancellation notice not authorised by the transferee

The registration of an amendment or cancellation notice is effective regardless of whether it is authorised by the transferee.

THE COMMENT AND PROPOSAL:

It's suggested to be made clear in this Article that an amendment or cancellation of the registration by the transferor without the authorization of the transferee is effective only in the case agreed in Paragraph 5, Article 14 *(If the transferee does not comply with the transferor's request made in accordance with paragraph 4 within [a short period of time to be specified by the enacting State] after its receipt, the transferor may seek an order for the registration of an amendment or cancellation notice through [a summary judicial or administrative procedure to be specified by the enacting State])* in order to avoid this Article being misunderstood as that no authorization by the transferee is required for the registration of amendments or cancellations in any case.

4. THE ORIGINAL TEXT:

Article 22 — Representations of the transferor

1. The transferor of a receivable represents, as at the time of the transfer, that:

(a) The transferor has the right to transfer the receivable;

Article 8 — Contractual limitations on the transfer of receivables

1. 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.

THE COMMENT AND PROPOSAL:

The statement under Paragraph 1 (a) of Article 22 *(the transferor has the right to transfer the receivable)* conflicts with Paragraph 1, Article 8, and it is suggested that Paragraph 1(a) of Article 22 be deleted.

5. THE PROPOSAL:

It is suggested to add a new paragraph after Paragraph 7 of Article 27: <u>If the</u>

debtor receives notification of a transfer from the transferee whom has acted in accordance with Paragraph 7 of Article 27, the debtor shall not be discharged if the debtor continues to pay the receivable to the transferor, and the debtor shall make compensation for any loss thus caused to the transferee.

REASON FOR ADDING PROVISION:

The Draft does not provide for the approach in case the debtor receives notification of the transfer from the transferee but still pays the transferor instead of the transferee the receivable. Therefore, it's recommended that the above provision be added.

6. The serial numbers of some Articles need to be corrected.

(1) THE ORIGINAL TEXT:

Article 34 — Right of the transferee to sell a receivable

1. After default, the transferee under a security transfer is entitled to sell the receivable without applying to a court or other authority.

3. The transferee may select the method, manner, time, place and other aspects of the sale, including whether to sell receivables individually, in groups or altogether.

The serial numbers after Paragraph 1 of this Article are incorrect.

(2) THE ORIGINAL TEXT:

Article 49 — General applicability of this Law

1. For the purposes of this chapter:

(2) "Prior law" means the law applicable under the conflict-of-laws rules of [the enacting State] that applied to prior transfers immediately before the entry into force of this Law; and

(2) "Prior transfer" means a right created by an agreement entered into before the entry into force of this Law that is a transfer within the meaning of this Law and to which this Law would have applied if it had been in force when the right was created.

The serial numbers of this Article are both incorrect.

ANNEXE 8 – COMMENTS FROM MEMBERS OF THE GLOBAL SUPPLY CHAIN FINANCE FORUM (GSCFF)

(submitted by Ms Xu Jun)

Please kindly find the following comments for your possible consideration:

1. Article 4 – consider whether the duty to act in good faith and in a commercially reasonable manner should be left to national law and be capable of derogation by national states.
2. Article 5(1)(a) – consider clarifying that "signed" includes electronic signature/electronic acceptance.
3. Article 22(1)(a) – consistent with the differentiation between right and power made in earlier articles should this be re-worded to say "the transferor has the right or power to transfer the receivable".
4. Article 30(1) – should there be included in the transfer agreement an implied covenant on the part of the transferor that they will not modify the contract (in so far as such modification affects the rights in the receivable transferred) between the point of transfer and the point of notification to the debtor, without the prior written consent of the transferee?

ANNEXE 9 – COMMENTS FROM THE PORTUGUESE ASSOCIATION FOR LEASING, FACTORING AND RENTING (ALF)

(submitted by Mr Vitor Graça)

The Portuguese Association for Leasing, Factoring and Renting (ALF), founded in 1984 and whose Members represent nearly 100% of the Factoring market in Portugal, appreciates the opportunity to express its comments on the proposed Model Law on Factoring (MLF).

We hereby present our comments, starting with some general remarks and then going into specific articles on the MLF:

Overall, in Portugal, the Model Law largely transcends Law-Decree-Law n.º 171/95, of July 18, which regulates companies and factoring contracts, and the articles of the Portuguese Civil Code that rule the legal system of credit transfers/assignment of credits.

The Model Law also appears to assume that there is always a notification made to the Debtor, apparently leaving out other types of Factoring. However, this notion is not clear throughout the text.

Thus, it would be important for the Model Law to be more precise and to distinguish the different types of factoring (with and without recourse, notified and confidential). Otherwise it will only apply to a restricted number of operations.

- **Page 12** reads: "*Article 2 - Definitions*
(...)
(g) "Registry" means the registration system for this Law established by [the relevant authority in the enacting State]."

This provision presumes the existence of an official Registry for factoring operations, which in Portugal, and possibly in most other EU countries, does not exist.

- Page 13 reads: "*Article 8 - Contractual limitations on the transfer of receivables*
1. 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.
2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement."

The Portuguese Civil Code states in its Article 577 that (emphasis added):
"1. The creditor may assign to a third-party, part or all of the receivable, regardless of the debtor's consent, as long as the transfer is not prohibited by a determination of the law or agreement of the parties and the receivable is not, by the very nature of the provision, linked to the creditor's person.
2. A covenant by which the possibility of transfer is prohibited or restricted shall not be enforceable against the assignee, unless the assignee knew of it at the time of the transfer."

We have no objections to present to the principles of Article 8 of the Model Law, however, we would like to point out that it differs from that established in the Portuguese legal system.

- **Page 17** reads: "*Article 15 - Impact of the transferor's insolvency on the priority of a transfer*
A transfer that is effective against third parties at the time of the commencement of insolvency proceedings in respect of the transferor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to the applicable insolvency law.":

This article provides that in the event of insolvency of the Debtor, the credit of the transferee shall be ranked first in relation to other creditors, without prejudice to the credits that must be ranked first under the law. We point out that this provision differs from the provisions of the Portuguese Insolvency and Company Reorganization Code (CIRE), with a clear differentiated treatment in relation to other credits.

- It further reads: "*Article 17 - Transfers competing with rights of judgment creditors*

1) The right of a creditor that has obtained a judgment or provisional order ("judgment creditor") has priority over a transfer if, before the transfer is made effective against third parties, the judgment creditor has [taken the steps to be specified by the enacting State for a judgment creditor to acquire rights in the receivable or the steps referred to in the relevant provisions of other law to be specified by the enacting State]."

From the proposed text, it seems that the intention is that a creditor who has obtained a final court decision or an injunction has priority in the payment of the claim that is the object of the transfer, as long as these processes were initiated prior to the transfer to a third party. However, taking into consideration the current Portuguese legislation in force, if the judicial action does not have a suspensive effect on the disposal of the credit, then this provision is not applicable.

- **Page 18** reads: "*Article 20 - Irrelevance of knowledge*

The priority of a transfer is not affected by any knowledge that the transferee may have of another transfer":

Article 584 of the Portuguese Civil Code provides that: "If the same receivable is assigned to several people, the assignment that is first notified to the debtor or has been accepted by him shall prevail." On the other hand, under the terms of the provisions of article 587 of the same Civil Code, "The assignor guarantees to the assignee the existence and enforceability of the receivable at the time of the assignment, under the terms applicable to the business, free of charge or against payment, in which the assignment is integrated".
Now, if the receivable has already been the object of a first assignment, at the time of the second assignment, it no longer exists because it no longer belongs to the assignee. Therefore, we do not see how, knowing that the credit does not exist, the Factor can still accept the assignment based only on the registration. On the other hand, this provision seems to go against what is established in article 22 (b) of the present Model Law on Factoring.

- **Page 19** reads: "*Article 22 - Representations of the transferor*

The transferor of a receivable represents, as at the time of the transfer, that:
(a) The transferor has the right to transfer the receivable;
(b) The transferor has not previously transferred the receivable to another transferee; and
(c) The debtor does not and will not have any defenses or rights of set-off.
2. The transferor does not represent that the debtor has, or will have, the ability to pay."

It seems somewhat contradictory when combined with the above-mentioned article 20 of the MLF.
According to the provisions of article 587 of the Portuguese Civil Code, "The assignor only guarantees the debtor's solvency if he has expressly obliged to do so".
Generally speaking, Clients state in their Factoring contracts that, to the best of their knowledge, on that date, the Debtor did not show any signs of possible inability to pay its obligations.
We therefore believe that this presumption should be able to be overturned as already foreseen in the Portuguese Civil Code.

- **Page 20** reads: "*Article 24 - Right to payment*

(...)
(c) If payment with respect to the receivable is made to another person over whom the transferee has priority, the transferee is entitled to be paid that amount by the other person.":

The Transferee may acquire the right to claim the receivable on the third party to whom the payment was wrongfully made, but this can in no way exclude the possibility of the transferee also going against the Debtor and/or Adherent (Client/Seller), depending on the context of the situation. The wording of the Model Law should make this important aspect explicit.

- **Page 21** reads: "*Article 27 - Debtor's discharge by payment*

(...)
5. If the debtor receives notification of a transfer by a person to whom the receivable has been transferred, the debtor is discharged by paying in accordance with the notification of that transfer or, in the case of a series of such transfers, the notification of the last of those transfers."

We do not understand the scope of this provision. According to the provisions of article 577 of the Portuguese Civil Code, the assignment is made by the Creditor and to this extent, the notification of the Debtor must always have the intervention of the original creditor (assignor). This provision allows the guarantee that third parties do not unduly appropriate credits which were not assigned to them.

- **Page 22** reads: "*Article 30 — Modification of the contract giving rise to a receivable*
(…)
2.
(…)
(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable transferee would consent to the modification."

The concept of "reasonable transferee" is undefined and may generate legal disputes.

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ALF renews its thanks for having the possibility to send our remarks and we remain at your disposal for any further information you may need.

ANNEXE 10 – COMMENTS FROM MR JOSÉ P. SALA MERCADO

Argentina does not have a law. However, it does have special rules regarding the factoring contract in the CCCN that are complemented by general provisions of the general part of the code and the general part of the contracts.
The factoring contract in Argentina is not of use given the microeconomic complications and the lack of imperative responsibility of the factored due to the assigned debtor's insolvency.
Although the incorporation of a model law would not be feasible given the encoding technique adopted by Argentina that regulates the contract, new precepts could be incorporated into the code according to the following (normative bis, ter, quater, etc.)
The rules of assignment of rights are applied accordingly.

MLF	**Argentinian Law**
Art 1	(probable inclusion)
art. 2	(probable inclusion)
Art. 3	(probable inclusion, but also now can be done by parties agreements)
Art. 4	Art 9 CCCN
Art. 5	Arts. 1421, 1423, 1424, 1425, 1618 y ss CCCN
Art 6	There is no similar rule, but it is understood that the credit includes the main and the accessory (assignment of credit art. 1428)
Art. 7	The 1426 CCCN does not establish an imperative of real and personal guarantees of the factored that benefit the factor without a new transfer
Art. 8	Unenforceability of clauses between factored and debtor to the factor is not received in CCCN, without prejudice to resp. factored for impossible collection based on original cause
Art. 9	There is no registration, but direct notification to the debtor cf. Art. 1428 and 1620 CCCN
Art. 10	There is no registration, but the collection of the credit with its accessories is only enforceable against the debtor assigned by CCCN 1428
Art. 11	Dipr rule on recognition of opposability in 3rd states according to its rules. Possible inclusion
Art. 12	Registration rules (commercial registries are provincial, so it is not possible to establish general rules of the procedure, beyond the effects of registration)
Art. 13	Concurrent transfers are determined IN PRIORITY by order of registration (the Art. does not have a registration and they concur according to the day of the notification. If they are made on the same day, they concur in the same rank as Art. 1626CCCN, so it is possible to include the registration that provides security)
Art. 14	The priority extends to the accessory cf. Article 6 = 1428 CCCN
Art. 15	The assignment is not opposable if it is notified after the opening of the competition (art. 1623 CCCN), which would change if the registration was included. Possible inclusion.
Art. 16	Dipr rule on recognition of privileges granted by another state. Difficult inclusion given the numerus clausus of the privileges.
Art. 17	Opposition to 3rd assignees of an executive judgment of a creditor on the assigned credits prior to the assignment being opposable. Difficult enforceability in the case of securities for collection of an autonomous nature
Art. 18	Subordination of the right of collection. Possible inclusion, although unnecessary due to the unobjectionable waiver of any patrimonial right to personal injury.
Art. 19	Inscripción define prioridad al cobro ya sea de crédito presente o futuro. Posible inclusión al implementar registro.
Art. 20	Knowledge does not affect the priority established by the registration. Possible inclusion, although it is contrary, allowing bad faith, assigning jure et de jure value to the registration.
Art. 21	binding effect of the contract and the conduct of the parties. Art. 959 CCCN
Art. 22	Security of the credit's transmission due to the powers of the assignor and the unenforceability of the debtor's exceptions. Possible inclusion. It is of little use in Argentina due to the non-guarantee of the debtor's solvency. The rule does not add much in that sense.
Art. 23	Modifications that alter the main obligation cannot be made without the agreement of the debtor or they are unenforceable. Possible inclusion although it is already applicable due to the relative effect of the contracts.

Art. 24	Payment made by the debtor to the factored, to the factor or to a 3rd party subordinated to the factor. Rights are governed by the general theory of obligations. Possible inclusion.
Art. 25	Modifications that alter the main obligation cannot be made without the agreement of the debtor or they are unenforceable. Possible inclusion although it is already applicable due to the relative effect of the contracts.
Art. 26	Art. 1428 and 1620 CCCN
Art. 27	Art. 1621 (acts or payments prior to notification); by subsequent acts, possible inclusion
Art. 28	Opposability of exceptions by the assigned debtor. Effect of the assignment of credits or contractual position art. 1638 CCCN, as agreed. Possible inclusion.
Art. 29	Agreement of non-opposition of exceptions with the debtor (possible inclusion)
Art. 30	Effectiveness of modification of rights between factored and debtor with respect to the factor before or after the notification. Possible inclusion.
Art. 31	Default of the factoring with the debtor does not generate obligations for the factor. of possible inclusion
Art. 32	Collection rights (possible inclusion)
Art. 33	Collection of values (of possible inclusion)
Art. 34	The factor's right to assign credits (possible inclusion)
Arts. 35 y 36	Distribution of what was collected; post-breach rights; guaranteed credits (possible inclusion)
Arts. 37 a 47	Dipr rules (possible inclusion, without prejudice to the general regulations of the CCCN)

IMPORTANT

- Transfer against third parties
- Registry
- Priority of a transfer
- Conflict of laws

ANNEXE 11 – FEEDBACK FROM MR DEMETRIS ZACHAROUDES, FCI MEMBER IN CYPRUS

Article 3.1 - you should not be able to contract out of the Law - we have not seen this before in Cyprus law.

Article 12 - is the registry "central" or one per country?

Article 18 - would like more explanation as to what it means.

Article 19 - would like more explanation on this. How does the coming into existence of a receivable affect priority? We do not see how anything other than registration should affect priority.

Article 26.4 - what does this clause mean?

Article 28 / 29 - we would like some more explanation on the set-off concept. How would 29 be applied in practice? It means that the transferee (the Bank in this case) should ask the transferor beforehand to agree with all its debtors beforehand, not to raise the set-off defence against the Bank?

Article 33.2 - we would like some explanation on how this would apply in practice. Isn't the transferee (i.e. the Bank) collecting from the debtor? If so, then how could the transferor provide consent to the transferee to collect before default occurs?

From Annexe A:

Clause 11.2: we consider that it is better to state a clear date of cancellation rather than information "no longer being accessible"

Suggestion - would it be prudent to include floating charges in the Register as well? in which case upon registration of a transfer, any floating charge will be easily identifiable in which case the transferee will need to request a "waiver"/"exclusion" from the registered floating charge.

Generally, it should be clarified that registration of a transfer, especially since this registration is in a different register from that kept by the Registrar of Companies, should have priority over future registered Floating charges i.e. the bank registering the future floating charge should take into account that the receivables transferred are excluded from assets that are captured under the charge and that the transferee has priority over these receivables. Moreover, we note that the person registering such a transfer should obtain a waiver from prior Floating charge holders under which the latter will waive their rights over the receivables transferred. To this end, in our opinion, Chapter V of the Factoring Model Law should be amended accordingly.

ANNEXE 12 – FEEDBACK FROM MS ALECSANDRA VALASUTEANU, FCI MEMBER IN ROMANIA

Article 2(1)(i):

(i) "Transfer" of a receivable means:

(i) an outright transfer of the receivable by agreement; and

(ii) a security transfer of the receivable.

R625919

2022-09-23 08:30:14

Circular definnition: the definition of "Security transfer" means a transfer of a receivable whereas the definition of "Transfer" of a receivables means a Security transfer.

Article 24(1):

Article 24 — Right to payment

1. As between the transferor and the transferee, whether or not notification of a transfer has been sent:

(a) If payment with respect to the receivable is made to the transferee, the transferee is entitled to retain the payment;

(b) If payment with respect to the receivable is made to the transferor, the transferee is entitled to be paid that amount by the transferor; and

(c) If payment with respect to the receivable is made to another person over whom the transferee has priority, the transferee is entitled to be paid that amount by the other person.

R625919

2022-09-28 07:06:52

The following or similar should be added in order to underline that the Debtor must pay according to transferee instructions (in line with 27 (2) and any breach must be settled to the transferee's satisfaction.

"Should payments made according to paragraphs (a) and/or (b) have occurred as a result of transferee's payment instructions not being observed by debtor and transferee not be unable to collect such payments according to paragraphs (b) and/or (c), the transferee is entitled to request the payment be made a second time, by the debtor, according to the most recent payment instructions sent by them to the debtor.

Article 25:

Article 25 — Principle of debtor protection

1. Except as otherwise provided in this Law, a transfer does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the contract giving rise to the receivable.

2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change without the consent of the debtor:

(a) The currency of payment specified in the contract giving rise to the receivable; or

(b) The State specified in the contract giving rise to the receivable in which payment is to be made to a State other than that in which the debtor is located.

R625919

2022-09-28 07:30:05

Please clarify the intention behind this limitation, as well as our understanding of applicability below.

Example 1: If a German Debtor pays, according to the commercial contract with the Supplier, to an account located in Romania, and the Romanian Supplier (transferee) sells the receivable to a Swiss transferor, the transferor cannot collect in their account located in Switzerland unless Debtor agrees to this change of account. So, in order for the transfer to work properly, should the debtor disagree with the change of account, the Swiss transferor needs to open an account with a bank in Romania. This seems to unnecessarily complicate the transfer.

Example 2: Under FCI 2 factor system, Romanian Export Factor sells receivables acquired from Romanian transferees too an Import Factor in Germany that covers the non-payment risk of the Dutch debtor. According to the commercial contract between Romanian transferor and Dutch transferee, the account to which payment should be made in the absence of a transfer is located in Romania. If debtor does not consent to pay to IF's account which is open in Germany, which is the standard 2 factor system approach, the only option left is fast cash, which seldom causes operational risk. Should the intention be to allow a change of payment account jurisdiction but only to the state the debtor is located in, the limitation remains an issue any time the transferee is not located in the same State as the debtor.

Article 26 (4):

Article 26 — Notification of the debtor

1. A notification of a transfer and a payment instruction must be in writing.

2. A notification of a transfer or a payment instruction is effective when received by the debtor if it reasonably identifies the receivable and the transferee, and is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if the notification of the transfer or a payment instruction is in the language of the contract giving rise to the receivable.

3. A notification of a transfer or a payment instruction may relate to receivables arising after notification.

4. Notification of a transfer constitutes notification of all previous transfers.

R625919

2022-09-27 13:37:47

Please clarify. What previous transfers are referred to here?

Article 27:

Article 27 — Debtor's discharge by payment

1. Until the debtor receives notification of a transfer, the debtor is discharged by paying in accordance with the contract giving rise to the receivable.

2. After the debtor receives notification of a transfer pursuant to Article 26, subject to paragraphs 3 to 8, 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.

3. If the debtor receives more than one payment instruction relating to a single transfer of the same receivable by the same transferor, the debtor is discharged by paying in accordance with the last payment instruction received from the transferee before payment.

4. If the debtor receives notification of more than one transfer of the same receivable by the same transferor, the debtor is discharged by paying in accordance with the first notification received.

5. If the debtor receives notification of a transfer by a person to whom the receivable has been transferred, the debtor is discharged by paying in accordance with the notification of that transfer or, in the case of a series of such transfers, the notification of the last of those transfers.

6. If the debtor receives notification of the transfer of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this Article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid.

R625919

2022-08-31 09:36:49

Unclear why debtor would be allowed to ignore the notification in case of partial assignment, if this is the intention of this clause. To be clarified.

Article 28:

Article 28 — Defences and rights of set-off of the debtor

1. In a claim by the transferee against the debtor for payment of a receivable, the debtor may raise against the transferee all defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the transfer had not been made and the claim were made by the transferor.

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2022-09-28 07:41:26

Once the transfer has been registered, the possibility to set-off should be limited to debts that have risen prior to transfer registration and not for any future claims by debtor as this infringes on the very essence of factoring and other sale of receivables structures.

All debts between parties (i.e. cross-sell, penalties, other services than transfered ones) should be set w/o impacting the transfer and, therefore, the transferee's right to collect according to its instructions (also supported by 23.1 and 27.2). This is also supported by the fact that, under a transfer that envisages the sale of the receivable, that receivable is no longer in the transferor's books at the time the debtor initiates the set-off and, therefore, the set-off cannot, in any case, occur.

Article 29:

Article 29 — Agreement not to raise defences or rights of set-off

1. A debtor may agree with the transferor in a signed writing not to raise against the transferee the defences and rights of set-off that it could raise in accordance with Article 28.

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2022-09-28 07:43:07

Please see comment at 28.1. Debtors are unlikely to give up their right to set-off, while Factors are equally unlikely to enter into a transfer whereby their collection is impacted by elements o/s their control, thus rendering the receivables uncertain.

Annex A, Clause 14 (2)(b):

2. The transferee must register a cancellation notice if:

(a) The registration of the initial notice was not authorised by the transferor and the transferee has been informed by the transferor that it will not authorise the registration of the initial notice;

(b) The transfer authorised the registration of the initial notice but the authorisation has been withdrawn and no transfer agreement has been entered into; or

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2022-08-31 09:01:09

The transferor, not the transfer

ANNEXE 13 – FEEDBACK FROM MR HÉCTOR MANUEL GÓMEZ FLORES, FCI MEMBER IN MEXICO

From: Héctor Manuel Gómez Flores <HGOMEZF@bancomext.gob.mx>
Sent: Friday, 26 August 2022 22:42
To: FCI <fci@fci.nl>
Subject: The UNIDROIT

Dear FCI's team,

Good evening to you.

I would like to mention that we reviewed the draft model law on factoring consultation document in relation to the UNIDROIT query for the purpose of standardizing a factoring contract at a global level as a reference for contracting parties. In this regard, we have no particular comments regarding it, considering that our contracts contain, considered in general terms, the provisions of the proposed framework contract and in the Mexican legal system, a Public Registry is also regulated for the purposes of the operations that are celebrated for effects of publicity and priority.

Additionally, it should be noted that although UNIDROIT makes contributions of clauses to various transactions as a reference framework for the countries, these formats serve as guides to orient the drafting of the contracts of the counterparties that seek some reference, so in our case, we do not have observations on these proposals.

Have a great weekend to all!!

Best regards,

BANCOMEXT
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Héctor M. Gómez Flores
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ANNEXE 14 – FCI COMMENTS FROM THE LEGAL COMMITTEE OF FCI

DRAFT MODEL LAW ON FACTORING

Introduction

This Model Law is intended to promote factoring and other receivable-based asset financing.

In all asset-based financing transactions the creditor strives to be primarily satisfied by the value of the asset in question. It is expected that the value of the asset will be sufficient to cover the claim. Whether or not the creditor is entitled to additional proceeds, or whether the client must provide additional means in case of a loss depends on the individual arrangements between the parties.

In loan arrangements the creditor expects to be repaid by the debtor on due date. The ability of the debtor to repay is the main concern of the creditor. In addition, the creditor may or may not request additional collateral which will be used only in case of default.

Assets to be used in asset-based finance transactions can be physical assets, such as machinery or real estate, intellectual property, or other immaterial goods. This law deals with receivables as assets, as many small and middle-sized companies often lack sufficient physical assets to cover an obligation, while a great number of receivables arise from their workflow that are due for payment after a certain amount of time. Factors use that value in receivables prior to their due date to provide finance for their clients. Most of these receivables arise from the sale of goods or services, some from other business activities.. For the factor, the perspective is on the ability of the debtor to pay, while the ability of the transferor to pay is of lesser importance. Therefore, through factoring, suppliers have better access to finance at affordable rates.

Factors have developed a variety of methods to finance such receivables. In most cases, they purchase the receivables and have them transferred to the factor, who thereby becomes the owner. Typically, the factor provides finance by paying a part or all of the purchase price to the client, or by providing an advance for the purchase price, so the client will see funds well before the due date of the receivable. In non-recourse factoring the factor also provides protection against bad debts ("default protection") so payment by the factor is made even if the debtor of the receivable is unable to pay or becomes insolvent. Ledgering and maintenance of accounts often is provided by the factor as a service, and so is dunning and collection.

While large ticket factoring is often based on a non-notification policy, it is common in SME factoring to notify the debtor of the transfer of the receivable, and request payment on due date directly to the factor.

While factoring was created on the distribution side, it can also be used on incoming invoices ("Reverse Factoring"), sometime combined with traditional factoring to cover the whole supply chain. Technological innovation nowadays also allows the sale of receivables to investors by using virtual platforms.

As factoring techniques have developed over the years, a further growth of factoring in the future can be expected in an expanding economy, driven also by the technological evolution.

Outside the factoring world, other methods of asset-based receivable finance were created, such as securitization. A special-purpose company acquires receivables by way of purchase and refinances the deal by issuing commercial papers on the capital market.

While acknowledging that not all different methods of receivable finance are common practice in all countries, UNIDROIT suggests that the text be applicable to all such variants to avoid priority conflicts between different methods, and to allow competitors a level playing field.

CHAPTER I

SCOPE AND GENERAL PROVISIONS

Article 1 — Scope of application

1. This Law applies to transfers of receivables.

2. Nothing in this Law affects the rights and obligations of a person under other laws governing the protection of parties to transactions made for personal, family or household purposes.

3. Nothing in this Law overrides a provision of any other law that limits the transfer of specific types of receivable.

4. Nothing in this Law affects the rights and obligations of any person under the law governing negotiable instruments.

FCI Comment	1-3 FCI understands that limitations on the transfer of receivables **based on (other) law** remain unaffected while **contractual limtations** of transfers are overridden by art. 8. FCI welcomes the prohibition of ban of assignment clauses to increase the availability of credit for small and medium-sized companies.

Article 2 — Definitions

FCI Comments	**FCI suggests having** a general interpretation clause. Singular includes plural and vice versa, any gender includes all other genders

1. For the purposes of this Law:

(a) "Debtor" means a person who owes payment of a receivable.

FCI Comments	It should be clarified if this includes a guarantor

(b) "Default" means the failure of a person who owes an obligation secured by a security transfer to pay or otherwise perform that obligation and any other event that constitutes default under the terms of an agreement between the transferor and the transferee.

FCI Comments	FCI suggests clarifying if default can only exist when an obligation secured (in general terms, factors use the term "default" mostly for debtors of a receivable irrespective of any security rights

(c) "Competing claimant" means a person with rights in a receivable that may be in competition with the rights of a transferee of the receivable.

FCI Comments	FCI suggests moving this up to follow alphabetical order

(d) "Future receivable" means a receivable that arises after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time.

(e) "Proceeds" of a receivable means any:

(i) money;

(ii) negotiable instrument; or

(iii) right to payment of funds credited to a bank account,

that is received in respect of the receivable, whether in total or partial payment or other satisfaction of the receivable. It includes proceeds of proceeds.

(f) "Receivable" means a contractual right to payment of a sum of money arising from:

(i) the supply or lease of goods or services;

(ii) the assignment or licence of intellectual property; or

(iii) the payment obligation for a credit card transaction.

A receivable does not cease to be a receivable as defined by this section if it is consolidated or refinanced by the parties to it.

(g) "Registry" means the registration system for this Law established by [the relevant authority in the enacting State].

FCI Comments	We understand that the registry can also be part of a general registry system of a state for any kind of asset registration

(h) "Security transfer" means a transfer of a receivable by agreement, or the creation of a right in a receivable by agreement, to secure payment or other performance of an obligation, regardless of the way in which the parties have described the transaction, the status of the transferor or transferee or the nature of the secured obligation.

(i) "Transfer" of a receivable means:

(i) an outright transfer of the receivable by agreement; and

(ii) a security transfer of the receivable.

Where the context requires, "transfer" also means the rights of a transferee arising from a transfer.

FCI Comment	FCI wonders if this sentence is necessary. On one hand, transfer is described as a legal action, on the other hand as "rights of the transferee".

(j) "Transfer agreement" means an agreement providing for the transfer of a receivable that meets the requirements in Article 5(1).

(k) "Transferee" means a person to whom or in whose favour a receivable is transferred.

(l) "Transferor" means a person who transfers a receivable.

(m) "Writing" includes an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

FCI Comment	We suggest clarifying, in an accompanying document, whether an oral communication that was recorded qualifies as "writing" in this definition.

Article 3 — Party autonomy

1. With the exception of Articles [4, 5, 36(3), 37(1) and 38-54], the provisions of this Law may be derogated from or varied by agreement.

FCI Comments	FCI suggests, for the final edition, to add the purpose if the relevant articles

CHAPTER II

EFFECTIVENESS OF TRANSFERS OF RECEIVABLES BETWEEN THE PARTIES

Article 5 — Requirements for the transfer of a receivable

1. An agreement is only effective as a transfer agreement if it:

FCI Comments	The use of the phrase "transfer agreement" is needlessly complex and suggests that some sort of contract is needed. It can be shortened to "A transfer is only effective if.."

a. is evidenced by a writing that is signed by the transferor;

b.

FCI Comments	Should there be definition of "signed" particularly for electronic transfers?

c. identifies the transferor and the transferee; and

d. describes the receivable in a manner that reasonably allows its identification. A description of receivables in a transfer agreement will be sufficient if it indicates that the receivables consist of all of the transferor's receivables, or all of the transferor's receivables within a generic category.

2. A receivable may be transferred by a transfer agreement if the transferor has rights in the receivable or the power to transfer it.

3. A transferor may transfer:

(a) a part of or an undivided interest in receivables;

(b) a generic category of receivables; and

(c) all of its receivables.

4. A transfer agreement may provide for the transfer of a future receivable, but the transfer is effective only when the transferor acquires rights in the receivable or the power to transfer it.

FCI comments 5-2	The right of the transferor must include the right to transfer. Security rights, other than ownership rights, give only limited rights for transfers (see art. 34.1). So the "rights" should be better described. Domestic law will decide what kind of right the transferor must have to transfer receivables. The MLF cannot have rules for all such rights, e.g. capacity, power of attorney etc.

Article 6 — Proceeds

The right of the transferee of a receivable extends to its identifiable proceeds.

Article 7 — 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 have the benefit of that right under the law governing it only with a new act of transfer, the transferor is obliged to transfer the benefit of that right to the transferee.

FCI Comments	It may be useful to give examples of "any personal or property right" in the Guide of Enactment

2. A transferee has the benefit of a right under paragraph 1 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 the ability of the transferee to have the benefit of that right.

Article 8 — Contractual limitations on the transfer of receivables

1. 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.
2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.

FCI comments	FCI expressly welcomes the prohibition on contractual bans of assignments

Article 17 — Transfers competing with rights of judgment creditors

1. The right of a creditor that has obtained a judgment or provisional order ("judgment creditor") has priority over a transfer if, before the transfer is made effective against third parties, the judgment creditor has [taken the steps to be specified by the enacting State for a judgment creditor to acquire rights in the receivable or the steps referred to in the relevant provisions of other law to be specified by the enacting State].

2. In the case of a security transfer, if the transfer is made effective against third parties before or at the same time the judgment creditor acquires its right in a receivable by taking the steps referred to in paragraph 1, the transfer has priority but that priority is limited to the greater of the credit extended by the transferee:

FCI Comments	We understand the reference to include the entire credit line

Article 24 — Right to payment

1. As between the transferor and the transferee, whether or not notification of a transfer has been sent:

FCI Comments	It may be useful to amend "sent to the debtor"

(a) If payment with respect to the receivable is made to the transferee, the transferee is entitled to retain the payment;

(b) If payment with respect to the receivable is made to the transferor, the transferee is entitled to be paid that amount by the transferor; and

(c) If payment with respect to the receivable is made to another person over whom the transferee has priority, the transferee is entitled to be paid that amount by the other person.

3. In the case of a receivable that arose under a contract for the supply of goods, the transferee is entitled to any goods that may be returned in respect of the receivable.

FCI comments 24-2	The rule as drafted gives the impression that it only applies for transfers made after the receivable arose. As future receivables can be transferred, and follow the same rules we suggest choosing "arises"

4. A transferee may not retain more than the value of its right in the receivable.

FCI comments 26-4	FCU welcomes the rule but suggests rewording. The rule refers to chain transfers (Receivable is transferred from A to B, and from B to C) "All previous assignments" is too wide and should be limited by " …transfers of that receivable". Alternatively: Wording in Ottawa 1988 Article 11-2 is fine. "2. - For the purposes of this Convention, notice to the debtor of the subsequent assignment also constitutes notice of the assignment to the factor."

FCI comment 27-8	While the rule is fine in substance, the sentence should be rephrased "This Article does not affect any other ground which discharges the debtor by its payment to the person entitled to payment, or to a competent judicial or other authority, or to a public deposit fund.

B. SECURITY TRANSFERS

Article 33 — Collection of payment under a security transfer

1. After default, the transferee under a security transfer is entitled to collect the receivable at any time after payment becomes due.

2. The transferee may exercise the right to collect under paragraph 1 before default if the transferor consents.

3. The transferor exercising the right to collect under paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the receivable.

FCI comments	Other than in the case of outright transfers, the transferee in a security transfer is allowed to collect only with the consent of the transferor or in case of a default of the transferor. Consequently, the "default" mentioned in 33-1 and the following paragraphs refers the default of the transferor, not the account debtor of the receivable. Therefore, in 33-1 and the following paragraphs, it should read "after default of the transferor"

Article 34 — Right of the transferee to sell a receivable

1. After default, the transferee under a security transfer is entitled to sell the receivable without applying to a court or other authority.

FCI comments	Other than in the case of outright transfers, the transferee in a security transfer is allowed to collect only with the consent of the transferor or in case of a default of the transferor. Consequently, the "default" mentioned in 33-1 and the following paragraphs refers the default of the transferor, not the account debtor of the receivable. Therefore, in 33-1 and the following paragraphs, it should read "after default of the transferor"

ANNEXE 15 – COMMENTS ON THE DRAFT MLF BY COSTA RICAN BAR ASSOCIATION

(submitted by Mr Torrealba)

Con un atento saludo, nos permitimos someter a su estimable consideración los comentarios al Proyecto de *Ley Modelo de Factoraje* (*Draft MLF*), emanados de la subcomisión de estudio designada por el Colegio de Abogados y de Abogadas de Costa Rica.

1. Planteamiento introductorio: Perspectiva costarricense

La figura del factoraje en Costa Rica estuvo, hasta antes del 21 de mayo de 2015, sujeta el régimen común de la cesión de créditos, regulada en los códigos Civil y de Comercio. El 21 de mayo de 2015 entró en vigor la *Ley de Garantías Mobiliarias* (LGM) elaborada sobre la base de la Ley Modelo Interamericana de Garantías Mobiliarias de la OEA, con una diferencia notable: El concepto de garantía mobiliaria (*security interest*) que, en la Ley Modelo Interamericana, se circunscribe a las garantía mobiliarias de origen contractual, en la *Ley de Garantías Mobiliarias* costarricense se expandió para abarcar, además, las garantías mobiliarias de origen legal (privilegios legales especiales) y de origen judicial (embargos, anotaciones de demanda). La LGM instituyó un régimen unitario de oponibilidad a terceros de la cesión de créditos no endosables, basado en la inscripción en el Sistema de Garantías Mobiliarias. Este régimen se aplica tanto a la cesión de créditos en función de garantía como a la cesión en propiedad: "*Las disposiciones de esta ley referidas a garantías mobiliarias sobre créditos y cuentas por cobrar también se aplican* ***a toda especie de cesión de créditos*** *independientemente de su denominación o nomenclatura. Sus efectos frente a terceros requieren el cumplimiento de las reglas de publicidad y prelación establecidas en la presente ley*".[1]

Se trata, por consiguiente, de un sistema que ya tiene previsto tanto la cesión en garantía mobiliaria (*security transfers*) como la cesión en propiedad plena (*outright transfers*), ambas susceptibles de inscripción en el Sistema de Garantías Mobiliarias del Registro Público. Lo cual sujeta al factoreo al régimen establecido en la dicha Ley bajo el esquema del contrato de cesión, cuando se trata de créditos no endosables. La mayoría de los temas desarrollados en la Ley Modelo de Factoreo son tratados por la Ley Garantías Mobiliarias.

Paralelamente, en nuestro medio el factoraje opera, además, a través de la transmisión de créditos incorporados en títulos cambiarios (letras de cambio, pagarés); razón por la cual, en tales hipótesis, la transmisión requiere el cumplimiento de la ley de circulación del respectivo título (entrega material, endosos, etc).

Por otra parte, el 30 de setiembre de 2019 entró en vigor, en Costa Rica, la Ley 9691 de 3 de junio de 2019, *Ley Marco del Contrato de Factoreo* (LMCF), la cual regula algunos aspectos fragmentarios de *factoring* y reenvía supletoriamente a la *Ley de Garantías Mobiliarias* y al Código de Comercio a los fines del colmado de lagunas[2]. Entre las particularidades de la LMCF cabe citar: la dotación de fuerza ejecutiva a las certificaciones de contador público sobre saldos deudores; la presunción de autenticidad de las firmas digitales; la presunción de legitimación del suscriptor de la factura; la equivalencia funcional de la cesión por medios electrónicos; y la creación de plataformas electrónicas de factoreo, sujetas a un régimen de confidencialidad de las operaciones.

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[1] Art. 19 LGM de Costa Rica. Sin embargo, la LGM no derogó expresamente las disposiciones de los códigos Civil y Comercial relativas a la oponibilidad de la cesión de créditos frente al deudor y frente a terceros ; razón por la cual subsiste el dilema hermenéutico sobre si la LGM reformó tácitamente el derecho común de la cesión de créditos, o si, por el contrario, si la LGM se limitó a establecer un régimen especial. Por lo reciente de las reformas, la cuestión no ha sido zanjada jurisprudencialmente.

[2] Art. 23 LMCF.

Ha surgido, en nuestro medio, la duda de cómo conciliar el sistema electrónico de registro público gravámenes y cesiones de créditos, instaurado por la LGM, con los sistemas electrónicos de registro privado y confidencial de cesión de créditos en factoraje, creados por la LMCF. Mientras la LGM propugna por la eliminación de gravámenes ocultos, estableciendo un registro unitario y público de cesiones y gravámenes sobre créditos, la LMCF parece haber adoptado una filosofía distinta, donde los valores preponderantes son la privacidad y la confidencialidad de la información. Y, sin embargo, la LMCF una y otra vez reenvía a la LGM. La pregunta persistente es: ¿Cuál es el régimen actual de prelación entre intereses rivales?

De cara a esa y a otras incertidumbres interpretativas sobre las que no es del caso profundizar, la iniciativa de UNIDROIT de postular una *Ley Modelo de Factoraje*, es muy oportuna, con miras a mejorar el régimen jurídico de este importante modelo negocial. La propuesta de UNIDROIT, es amplia y presenta ventajas como son: la armonización terminológica, y su aplicación local e internacional, entre otras. Aun así, considerando el sistema actual en Costa Rica donde se cuenta con una Ley de Garantías Mobiliarias inspirada en un sólido modelo internacional y una Ley Marco del Contrato de Factoraje, la tarea a futuro es valorar si efectivamente, en un sistema como el nuestro convendría implementar la LMF.

Desde la perspectiva costarricense, nos permitimos plantear las siguientes observaciones y comentarios al Proyecto de *Ley Modelo de Factoraje* (*Draft MLF*).

Iniciaremos con algunas observaciones de corte general, para luego pasar a aspectos más específicos.

Sobre la ausencia de distinción entre transferencias a título oneroso y a título gratuito:

La MLF no distingue entre transferencias de créditos (*receivables*) efectuadas a título oneroso y a título gratuito. Todas las transferencias son sometidas a un régimen único de prioridad y prelación, basado en el registro.

En el ordenamiento costarricense está profundamente arraigado el principio conforme al cual los bienes donados responden por las deudas que tenía el donador al momento de la donación [3]. En otras palabras: el acreedor puede lograr la inoponibilidad a su respecto de los actos de disposición a título gratuito efectuados por su deudor, que le resulten perjudiciales (*eventum damni*).

La MLF vendría a derogar dicho principio. Al postularse que basta la inscripción para que la transferencia (sin distinguir si es por causa gratuita u onerosa) resulte oponible a terceros, se privaría a los acreedores del *tradens* de un importante remedio para revertir el fraude de acreedores.

Sobre la ausencia de un tratamiento particular a los créditos de consumo:

La MLF abarca, dentro de su ámbito de aplicación, los créditos provenientes de contratos de venta de bienes y prestación de servicios, en general, sin distinguir los créditos provenientes de relaciones jurídicas de consumo.

El artículo 29 de la MDL establece la posibilidad de que el deudor convenga por escrito con el acreedor original que no opondrá, al eventual cesionario, defensas o excepciones basadas en la relación contractual subyacente o en otras situaciones jurídicas exógenas existentes al momento de la notificación de la cesión. Dicha renuncia de excepciones puede resultar lesiva a los derechos fundamentales del consumidor, máxime si consta en contratos formulario o de adhesión.

[3] Artículo 1402 del Código Civil, en relación con el 848 *ibídem*.

Consideramos que, a fin de armonizar la disciplina legal factoraje con la tutela efectiva de los derechos del consumidor, se debería observar el principio conforme al cual la cesión del crédito no puede desmejorar la posición del deudor-consumidor, y que, tratándose de un crédito originado en una relación de consumo, el acuerdo de renuncia anticipada de excepciones se ha de tener por no puesto. Este principio debería resguardarse aún en aquellos supuestos en los que el débito del consumidor se garantice con títulos valores (*negotiable instruments*), haciendo constar en el título que la deuda proviene de una relación de consumo, a fin de neutralizar la activación del principio cartular de abstracción; de tal suerte que el consumidor pueda oponer, al adquirente derivativo del título valor, las defensas basadas en la relación contractual subyacente de donde nació el crédito.

Sobre la inscripción registral como único mecanismo de oponibilidad a terceros:

La MLF establece, en su artículo 9, un mecanismo único de oponibilidad a terceros: la inscripción en un **registro**. Sin embargo, no se toma en cuenta que, en la práctica comercial, el factoraje a menudo tiene por objetivo créditos incorporados en títulos cambiarios como letras de cambio, pagarés, facturas cambiarias, o anotaciones en cuenta; cuyas **leyes de circulación** exigen la tradición del título debidamente endosado, o, en su caso, la inscripción en el registro privado del emisor. En tales casos, no sería suficiente la inscripción en un registro a los fines de la oponibilidad del traspaso a terceros.

Actualmente, la LGM costarricense estatuye tres sistemas *coexistentes* de publicidad de garantías mobiliarias, **extensibles, por el artículo 19 *ibídem*, a la transferencia de créditos**: 1. La *inscripción* en el Sistema de Garantías Mobiliarias, que es la norma de base aplicables a créditos no endosables; 2. El *desplazamiento posesorio*, aplicable a bienes muebles corpóreos existentes y determinados, incluyendo los títulos valores y los títulos representativos de mercaderías emitidos en papel: "*la garantía mobiliaria sobre un título valor o un título representativo de mercaderías negociables emitidos en papel se constituirá y se le dará publicidad por medio de su endoso y entrega en posesión al acreedor garantizado*" [4]; y 3. El *control*, que se aplica a ciertos bienes intangibles, como cuentas bancarias y de inversión. La garantía sobre cuentas bancarias y de inversión se constituye y se hace oponible a terceros en forma simultánea, "*…mediante la adquisición del control por parte del acreedor garantizado*" [5]. Si bien estas garantías no requieren ser inscritas en el SGM [6], el artículo 5, inciso 9, requiere, además, la fecha cierta, exigencia que es una de las pocas particularidades idiosincráticas de la ley costarricense *de Garantías Mobiliarias*. L a Ley Modelo de la OEA no tiene este requisito, que evidentemente es de oponibilidad a terceros.

En síntesis: Nos preguntamos si la MLF debería tomar en cuenta otros mecanismos de oponibilidad a terceros además de la inscripción en un registro.

Conflicto de prioridades entre cesionario y acreedor subrogado:

La MLF se proponer unificar el régimen de publicidad de la circulación de créditos, para dirimir, por vía de reglas comunes de prelación, los conflictos de mejor derecho sobre créditos.

Surge la duda de si el régimen de publicidad se aplica también a la subrogación de créditos. El pago con subrogación sea legal o convencional, hace circular el crédito desde el patrimonio del acreedor subrogante al del acreedor subrogado. La pregunta es si éste tiene la carga de inscribir su derecho en el registro (en nuestro caso, el Sistema de Garantías Mobiliarias), para alcanzar prelación frente a intereses rivales (por ejemplo, un causahabiente o un embargante del acreedor subrogante).

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[4] Art. 33.1 LGM.

[5] Art. 37 LGM.

[6] De conformidad con el artículo 14, inciso 3 LGM.

Sobre la ausencia de un principio de razonabilidad comercial en los *security transfers*.

El artículo 34 de la MLF, relativo a los *security transfers*, establece el derecho del cesionario, en caso de incumplimiento, de vender extrajudicialmente los *receivables*, que, en tal hipótesis, serían los bienes garantes.

Se echa de menos, en la MLF —al igual que en la Ley Modelo Interamericana de Garantías Mobiliarias que sirvió de base a la LGM costarricense—, la consagración de un **principio de razonabilidad comercial** en la disposición de los bienes garantes, como el que se encuentra en el UCC estadounidense [7] De conformidad con este principio, el acreedor debe emplear el máximo esfuerzo a fin de que obtener el máximo precio posible por el bien garantizador [8]. Es de lamentar que este principio, siendo fundamental en el sistema del *Article 9* del UCC para el equilibrio de intereses, no haya sido extrapolado a la Ley Modelo de la OEA ni, por consiguiente, a LGM. Tampoco lo encontramos en la MLF.

A falta, en la LGM, de un principio de orden público de razonabilidad comercial que tutele los derechos del deudor garante en la fase de ejecución extrajudicial de la garantía, los contratos de garantía tienden a mimetizar las reglas del remate judicial; las cuales son la misma antítesis de la razonabilidad comercial. El remate se publicita formalmente, con poca anticipación (5 días), sin intención real de atraer a los potenciales compradores; se programa, a veces, en fechas inconvenientes (ej., 26 de diciembre); se localiza en sitios no comerciales (ej., las oficinas de un notario o de un fiduciario); se exigen prerrequisitos para la participación (ej., el depósito de una fracción o la totalidad de la base); y, lo más grave, se autoriza al acreedor para adjudicarse los bienes en tercer remate por el 25% del valor de la base original, tal y como lo dispone el artículo 161 del *Código Procesal Civil* [9]. No es de extrañar que el deudor garante se quede, una vez ejecutada la garantía, con la viva impresión que, con el remate —tanto judicial como extrajudicial— se le han mancillado sus derechos. Los tribunales, ante los reclamos de los deudores, se dan por satisfechos con tal que se respete el debido proceso formal.

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[7] Código Uniforme de Comercio, §9-504: "*[E]very aspect of the disposition, including the method, manner, time, place and terms must be commercially reasonable*". (Traducción libre: "*Todos los aspectos de la disposición, incluyendo el método, la manera, el tiempo, el lugar y los términos deben ser comercialmente razonables*"). Esta regla es considerada de orden público, no susceptible de exclusión mediante pacto en contrario, respecto del cual **GILMORE** afirma: "*This is mandatory rule, not subject to disclaimer or limitation*": *Security Interests in Personal Property*, p. 1232.

[8] "The secured party´s obligation is to act (as the Code puts it) in a "commercially reasonable" manner, or (as Judge Desmond put it in Kiamie) "in good faith", or (as Judge Learned Hand, citing Kimie, once put it) with a "reasonable regard for the pledgor´s right". The obligation on the secured party is to use his best efforts to see that the highest possible price is received for the collateral". Ibid., p. 1234. Traducción libre: "La obligación del acreedor garantizado es actuar (como dice el Código) de manera "comercialmente razonable", o (como dijo el juez Desmond en Kiamie) "de buena fe", o (como dijo el juez Learned Hand, citando a Kimie) con una "consideración razonable del derecho del deudor garante". La obligación del acreedor garantizado es hacer todo lo posible para que se reciba el precio más alto posible por la garantía ". El caso Kimie´Estate, al cual se hace referencia en los pasajes transcritos, resuelto por la Corte de Apelaciones de Nueva York en 1955, se refería a la subasta de las acciones de cuatro corporations propietarias de varias parcelas en Manhattan. El acreedor garantizado, Colonial Trust Company, publicó un aviso de subasta de las acciones en dos diarios neoyorkinos, indicando el nombre las sociedades y el número de las acciones, sin dar más detalles sobre los bienes inmuebles pertenecientes a dichas sociedades. A falta de postores, la compañía fiduciaria se adjudicó las acciones. Los jueces consideraron que el acreedor no había hecho suficiente publicidad como para atraer la atención del público sobre la naturaleza de los bienes en venta. La sola mención de las acciones se consideró insuficiente. Los tribunales condenaron a la fiduciaria como "converter of the stock", es decir, la responsable de un acto de disposición ilegítimo de un bien ajeno. Se consideró que adjudicación no se había hecho de buena fe. V. **GILMORE**, op.cit. pp. 1232-1234.

[9] "*Si en el primer remate no hubiera postor se efectuará la segunda subasta una vez transcurrido un plazo no menor de cinco días, rebajando la base en un veinticinco por ciento (25%) de la original. Si en el segundo remate tampoco hay oferentes, se celebrará una tercera subasta en un plazo no menor de cinco días. La tercera subasta se iniciará con el veinticinco por ciento (25%) de la base original y en ella el postor deberá depositar la totalidad de su oferta. Si en la tercera subasta no hubiera postores, se tendrán por adjudicados los bienes al ejecutante, por el veinticinco por ciento (25%) de la base original*."

En síntesis: Creemos que la MLF debería considerar la posibilidad de incorporar el principio de razonabilidad comercial de la disposición de bienes garantes, en las operaciones de transferencia de créditos en función de garantía.

Sobre el vencimiento de los créditos antes que la obligación garantizada:

No hemos encontrado, en la MLF, una disposición que discipline una situación que se presenta en la práctica comercial: que los créditos cedidos en garantía venzan (sean exigibles) antes que la obligación garantizada. ¿Debe, el cesionario en función de garantía, proceder al cobro de los créditos? ¿Qué se debería hacer con el dinero, entretanto su crédito *vis-à-vis* al cedente deviene exigible? ¿A quién pertenece ese dinero durante el período de intermitencia?

¿Hay retrocesión automática en caso de pago o extinción de la obligación garantizada?

No hemos hallado, en la MLF, una norma que discipline la hipótesis de qué ocurre, en los *security transfers*, si el cedente paga la obligación garantizada, o si ésta se extingue por cualquier otra causa. ¿Será que ocurre una retrocesión automática, o se requerirá un nuevo negocio jurídico de cesión? ¿Qué puede hacer el cedente si el cesionario se niega a restituir total o parcialmente los créditos?

Sobre los *proceeds*:

La MLF establece, a favor del cesionario, un derecho prioritario sobre los *proceeds* derivados de los *receivables* adquiridos, incluyendo dinero, valores, o fondos acreditados en cuentas bancarias, así como los "*proceeds*" de los "*proceeds*", siempre y cuando medie trazabilidad.

Observamos que se puede generar una rivalidad entre los cesionarios de los créditos y los acreedores garantizados con garantías mobiliarias que abarquen *bienes posteriormente adquiridos* y *acuerdos de control de cuentas bancarias*.

En la práctica comercial de las garantías mobiliarias, normalmente se incluyen, dentro de la lista de bienes afectados por la garantía mobiliaria, tanto los *proceeds* de los bienes originalmente gravados, como los bienes posteriormente adquiridos (*after-adquired property*), así como los acuerdos de control de cuentas bancarias que le permitan al acreedor monitorear en tiempo real el ciclo económico de su deudor (ventas del día, depósitos, pagos), a fin de constatar la normalidad de los niveles de capital de trabajo y otros indicadores de liquidez y poder detectar oportunamente las posibles señales de alarma sobre posibles fugas de recursos. Además, los acreedores cautos se aseguran de satisfacer, para cada tipo de garantía negociada, los requisitos de oponibilidad a terceros a fin de establecer su prioridad frente a otros posibles acreedores del deudor.

Los *proceeds*, en el lenguaje de las garantías mobiliarias, son bienes garantizadores que reemplazan o son generados por otros bienes garantizadores. Salvo pacto en contrario, el *security interest* se extiende a todos bienes identificables en el patrimonio del deudor cuya adquisición se pueda trazar retrospectivamente a los bienes originalmente gravados. El potencial multiplicador es muy amplio; tanto así, que se afirma que "*los proceeds de los proceeds son proceeds*" [10].

Cuando se realiza un depósito, el dinero depositado se mezcla con el saldo previo, para conformar una masa de bienes fungibles. ¿Cómo se sabe si ese dinero específico generado por la primera venta es el dinero utilizado para renovar el inventario cubierto por la garantía mobiliaria?

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10 **LOPUCKI**, **WARREN**, **LAWLESS**: *Secured Transactions.* Eight Edition, Wolters Kluwer, 2016, p. 166.

A fin de evitarse tan pesada carga probatoria, los acreedores garantizados se valen de otras técnicas. Una de ellas es incluir, desde un principio, en el *financing statement* (el formulario de inscripción de la garantía), dentro del elenco de los bienes garantizadores, la "*after-acquired property*" del deudor, es decir, los **bienes posteriormente adquiridos**, los cuales pueden referirse a la totalidad de bienes presentes y futuros del deudor (cláusula "*all-assets*") o limitarse a una o más categorías de bienes (por ejemplo, los equipos, inventarios, y **las futuras cuentas por cobrar**). La ventaja, para el acreedor garantizado, de incluir una cláusula de *bienes posteriormente adquiridos* es que queda relevado de la carga de probar la trazabilidad de los *proceeds* con el bien originalmente gravado. La diferencia fundamental entre los *proceeds* y la *after acquired property* es que el valor de los primeros ha de derivar de otro bien garantizador, mientras que el valor de los segundos puede provenir de cualquier fuente.

Otra técnica utilizada por los acreedores consiste en pactar un *security interest* de control sobre la cuenta bancaria en la que el deudor queda obligado a depositar el producto de las ventas. De este modo, al ingresar los flujos de efectivo a la cuenta quedan directamente gravados con la garantía original, sin necesidad de establecer la trazabilidad con otros bienes. El control de la cuenta se complementa con la facultad de realizar periódicamente inspecciones de inventario.

En síntesis: Surge la duda sobre cómo dirimir la rivalidad de intereses que, con seguridad, se presentará entre: (1) los adquirentes de *receivables*; y (2) los acreedores garantizados con garantía mobiliaria cuya garantía sea extensible a los bienes derivados y atribuibles (*proceeds*), los bienes posteriormente adquiridos (*after-acquired property*) y a las cuentas bancarias gravadas con acuerdos de control. ¿Sería posible establecer presunciones o criterios para dirimir anticipadamente quién tendría mejor derecho sobre los *proceeds*? No es suficiente, en nuestro criterio, zanjar la controversia en atención al *prior in tempore, potior iure*, tomando como fecha focal la de la inscripción de la garantía o la del traspaso. El meollo del problema se concentra en la elaboración de criterios normativos útiles para orientar la determinación de trazabilidad.

Dejamos, así, rendida la presente opinión, augurándoles muchos éxitos en este importante Proyecto.

Cordialmente,
Anayansy Rojas Chan **Abril Villegas Pérez**

Federico Torrealba Navas

ANNEXE 16 – COMMENTS FROM ASSIFACT (ITALIAN ASSOCIATION FOR FACTORING)

(submitted by Mr Alessandro Carretta)

ASSIFACT
Associazione Italiana per il Factoring

Milano, 21 ottobre 2022
Ns. Rif.: 301/22/VD

To: International Institute for the Unification of Private Law (UNIDROIT)
Via Panisperna, 28
00184 Rome
Italy

To whom it may concern

Re: Model Law On Factoring

Assifact, the Italian Association for Factoring, has examined the text of the draft Model Law on Factoring and is pleased to provide its comments on the consultation paper with the memo hereby attached.

Although the transfer of receivables in Italy is already regulated by Law 52/1991, Assifact is aware that the Model Law, once finalized, will become a benchmark not only for the jurisdictions in which there is no such a law, but also for any future development in existing laws: in this perspective, the banks and the factors represented by Assifact recognized the opportunity to provide their contribution during the ongoing consultation, on the basis of their more than thirty years of experience in applying the aforementioned legislation.

In particular, Assifact wishes to underline its full support to the provision under which the transfer of receivables would overrule any contractual ban on assignment, which would be a ground-breaking innovation for the factoring industry in several Countries (and should probably be extended also to some favourable treatments for the debtor provided for in some jurisdictions, in particular when a public entity is concerned, i.e. the right to refuse the assignment). On the other hand, although the Association recognizes that the registration of a transfer is common to the most modern laws on factoring, we believe the Working Group should address some very important issues such as, for example, the need to ensure that the receivables transferred are adequately determined in the registration notice and, at the same time, that the registration do not harm transfers without notification to the debtors.

Hoping that the Unidroit may find the attached comments useful, Assifact remains at your disposal for any further clarification or need in the person of Diego Tavecchia (diego.tavecchia@assifact.it), Head of Research, Technical Committees and International Affairs Department of Assifact.

With best regards
Alessandro Carretta
Secretary general

Alessandro Carretta

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Unidroit Model Law on Factoring

Feedback on the Consultation document

Art. 2

2.1 In the Overview (§19), it is stated that "*The draft MLF applies only to receivables (i) arising from contracts for the supply or lease of goods and services, (ii) arising from contracts for the licence or assignment of intellectual property and (iii) representing the payment obligation for a credit card transaction. By adopting a clear and limited scope, the draft MLF does not apply to receivables arising from contracts for the sale or lease of immovable property […]*". The exclusion of receivables arising from the sale or lease of immovable properties need to be clarified as these are legitimate receivables and are transferred under a factoring agreement in many Countries, such as Italy. Alternatively, the Guide to Enactment could specify that the scope of application could be enlarged to these receivables where there is no conflict with the law of the jurisdiction.

Art. 8

8.1 Art. 8 seems aimed to overrule any contractual ban on assignment. However, when read in combination with art. 1 Paragraph 4: "*Nothing in this Law affects the rights and obligations of any person under the law governing negotiable instruments.*"), it doesn't seem effective against bans on assignment provided by the law, as it may be the case for Public sector entities. The transfer of receivables to entities that are Public Administrations are often subject to i) legal prohibition of assignment (for specific cases), ii) contractual ban on assignment and iii) right to refuse the transfer when notified. Although we fully agree with the contents of Art. 8 and in particular with the decision to override anti-assignment clauses, we believe that the MLF should also provide clear indications against the right to refuse the transfer once it is set and notified, where provided in the jurisdiction.

Art. 9 and Annex A

9.1 The registration of a transfer of receivables into a public registry seems to be a common feature in the modern law on factoring across the world. However, we believe that the current framework as laid out in the MLF does not take into account the fact that many factoring agreements are not disclosed to the debtor. In this situation, the registration of the transfer could be detrimental to the purpose of the agreement as the debtor could easily check the register and find out that its payables have been transferred, thus breaching the non disclosure agreement between the factor and its client.

9.2 Although in some jurisdiction it is common that a client transfers all its receivables or homogeneous clusters of receivables to the same factor ("portfolio approach"), in many other the factor will select the debtors it likes or the client wants to transfer only some of its debtors, or even only some of its receivables ("selection approach"). We advise that the provision included in the Annex, Clause 10:

"*1. The receivables must be described in an initial or amendment notice in a manner that reasonably allows their identification.*

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2. A description that indicates that the receivables consist of all of the transferor's receivables, or of all of the transferor's receivables within a generic category, satisfies the standard in paragraph 1."

doesn't fit with the "selection approach" in which the client could transfer different debtors (or even different portfolios of receivables towards the same debtor) to different transferee, thus requiring to identify the debtors in order to make the registration of the transfer sufficiently determined and reliable for third parties. Moreover, the need to give publicity to the transfer in order to apply the MLF and its many benefits would make undisclosed factoring substantially impossible if the debtor has the right to search the register. It could also raise data protection issues. Considering the importance of not notification factoring (which is even prevalent in some jurisdictions) we believe this point should be addressed carefully and thoroughly to avoid any hinder to the business which is fully legitimate and widely used all over the world.

9.3 The factoring industry all over the world has been involved in a process of deep digitalization and innovation to speed up the time-to-finance for the client. As the registration will introduce a new requirement in order to assure effectiveness against third party rights, we advise to consider providing guidance (at least in the prospected Guide for Enactment) to assure that the registration process is carried out smoothly and substantially in real time, so that it doesn't hamper the efforts of the factors to provide quick answers to the clients' needs.

9.4 Clause 4 of Annex A states that "*A notice may be registered before a transfer or the entry into of a transfer agreement to which the notice relates.*" In this case, it's not clear when the transfer becomes effective against third party rights.

9.5 The principle that "*The registration of an amendment or cancellation notice is effective regardless of whether it is authorised by the transferee*" (Clause 15) seems particularly dangerous for the transferee's interest.

9.6 In Annex A, clause 7, letter d) "*The period of effectiveness of the registration*" should be clarified in order to assure that the rights of the transferee regarding receivables already transferred and outstanding at the date of expiry of the transfer is not affected. Although the agreement to transfer future receivables may have a deadline, once the single receivable is transferred, such individual transfer has no expiry date.

Art. 15

15.1 We suggest clarifying if and how the registration is effective also against any actions and in particular voidable actions from the insolvency trustee (or comparable organisms) in the case of client's insolvency.

Art. 20

20.1 Art. 20 seems inconsistent with the principle of good faith ("*The priority of a transfer is not affected by any knowledge that the transferee may have of another transfer*"). We believe this wording gives leeway for fraudulent behaviours and might be not admittable in some jurisdictions.

Art. 22

22.1 It is not provided that the client represents that the receivable exists or will exist.

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22.2 Paragraph 2 states that "*The transferor does not represent that the debtor has, or will have, the ability to pay.*" We ask to clarify that the parties have the right to override this general rule, otherwise recourse factoring transactions would not be possible.

Art. 23

23.1 We ask to clarify Paragraph 2: apparently, the current wording is not fully aligned with the previous Paragraph of the same article and with art. 27. After the notification of a transfer, only the transferee must be able to send payment instructions to the buyer and any payment instruction from the transferor should be clearly identified as ineffective.

Art. 24

24.1 Paragraph 2 states that "*In the case of a receivable that arose under a contract for the supply of goods, the transferee is entitled to any goods that may be returned in respect of the receivable*". This seems to introduce a right for the transferee to receive the goods that could be returned (to the transferor?). We ask to clarify the concrete meaning of this right from the perspective of the factor.

Art. 26

26.1 We ask to clarify the meaning of the following: "*4. Notification of a transfer constitutes notification of all previous transfers.*"

ANNEXE 17 – COMMENTS FROM THE FINANCIAL STABILITY DIRECTORATE MINISTRY OF FINANCE, REPUBLIC OF CYPRUS

(submitted by Mr Stravrinaki)

"Article 3.1 – Please explain the reasons to contract out of the Law.
Article 12 - is the registry "central" or one per country?
Article 18 - would like more explanation as to what it means.
Article 26.4 - what does this clause mean?
Article 28 / 29 - we would like some more explanation on the set-off concept. How would 29 be applied in practice? It means that the transferee (the Bank in this case) should ask the transferor beforehand to agree with all its debtors beforehand, not to raise the set-off defense against the Bank?
Article 33.2 - we would like some explanation on how this would apply in practice. Isn't the transferee (i.e. the Bank) collecting from the debtor? If so, then how could the transferor provide consent to the transferee to collect before default occurs?

Annex A:
Clause 11.2: we consider that it is better to state a clear date of cancellation rather than information "no longer being accessible"

Suggestion - would it be prudent to include floating charges in the Register as well? in which case upon registration of a transfer, any floating charge will be easily identifiable in which case the transferee will need to request a "waiver"/"exclusion" from the registered floating charge.

Generally, it should be clarified that registration of a transfer, especially since this registration is in a different register from that kept by the Registrar of Companies, should have priority over future registered Floating charges i.e. the bank registering the future floating charge should take into account that the receivables transferred are excluded from assets that are captured under the charge and that the transferee has priority over these receivables. Moreover, we note that the person registering such a transfer should obtain a waiver from prior Floating charge holders under which the latter will waive their rights over the receivables transferred. To this end, in our opinion, Chapter V of the Factoring Model Law should be amended accordingly.

Chapter V – Priority of a transfer.
The priority rights of a Factoring agreement vs competitive Charges (Floating, Debentures etc), although not defined in any law we are aware off, have been established through common law, especially in the UK. These are also highly dependable on the kind of the competitive charge and even the wording of both the factoring agreement and the specific document. We don't think is possible to define those in the Factoring Law.

From our knowledge and legal advice, a notified factoring agreement which is a selling agreement of receivables, from the time of the notification, has priority over not only any future charges but also from any previous (existing) ones. A company should be free to use its assets in any way it deems appropriate under its ''common course of business''. Therefore a company can sell/transfer its receivables at any time (like its stocks) without any limitations from any charge, to a Factor. Once this is notified, all the rights of the receivables (including the payment) are transferred to the Factor. Furthermore, special attention should be given to Confidential Factoring agreements and the mechanisms of registering such a confidential agreement.
Thus, Chapter V needs clarifications in much more detail and common law precedence, should be taken into account."

ANNEXE 18 – ISSUES PAPER

(Submitted by (in alphabetical order): Andrew Boxall; Helena Busljeta; Nuncio D'Angelo; Sheelagh McCracken (UNIDROIT Australian Correspondent); Dale Rayner; John Stumbles; Greg Tolhurst)

1. Introduction

[1.1] We have prepared this brief issues paper in connection with the UNIDROIT Draft Model Law on Factoring (the "**MLF**") in response to the online public consultation.

[1.2] We draw on Australia's recent experience in implementing and applying the Australian personal property securities legislation, the *Personal Property Securities Act 2009* (Cth) ('Australian PPSA'), which has been in operation since January 2012. We consider that experience of this style of legislation – which in its general approach, if not necessarily its detail, reflects policy choices raised in the UNCITRAL Legislative Guide to Secured Transactions (and subsequently embodied in the UNCITRAL Model Law on Secured Transactions ('Secured Transactions Model Law') and reflected in the MLF) - can be helpful in relation to the MLF in assisting to:

- promote the rule of law and international development;
- promote the adoption of a consistent and reliable basis on which receivables can be transferred outright and by way of security so as to facilitate domestic and international commerce, financing and investment.

[1.3] We have considered the extent to which the MLF is consistent with Australia's own legal framework, policy and economy as reflected in the Australian PPSA, and the extent to which it allows security to be taken and given reliably, easily and with a minimum of cost. We would not support the adoption of the MLF in Australia in place of the Australian PPSA. While aspects of the Australian PPSA are still under review,[1] the process of transferring debts (whether outright or by way of security) is covered in the Australian PPSA. In our view, the Australian PPSA's balancing of competing interests more accurately reflects market practice and commercial expectations in Australia.

[1.4] We start our discussion with some general policy-oriented comments and then highlight some drafting issues and questions that arose out of our analysis. We will of course be pleased to discuss any of the points identified.

2. General Comments

Title of the MLF

[2.1] We consider that the title of the MLF is slightly misleading, given in particular that the term 'factoring' is typically understood as involving sales of certain types of receivables.[2]

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[1] See Bruce Whittaker, **Review of the Personal Property Securities Act 2009 (Cth), Final Report**, Commonwealth of Australia, 2015.

[2] See ICC, 'Standard Definitions for Techniques of Supply Chain Finance, 2016, [3.4.3] ('SCF Definitions'): 'Factoring is a form of Receivables Purchase, in which sellers of goods and services sell their receivables (represented by outstanding invoices) at a discount to a finance provider (commonly known as the 'factor').' We note the suggestion by UNIDROIT that the MLF should 'build on' these definitions: Factoring Model Law Working Group, 5th session, Rome 16-18 May 2022, Issues Paper, III Other Matters, DD Terminology, [154]. We note the discussion as to further consideration of the title in the Summary Report of the Third Session, Rome, 26-28 May 2021, [93]-[94]. We also note further discussion in the Summary Report of the Fourth Session, Rome, 1-3 December 2021, [100]; [102]; Issues Paper of the Fifth Session, Rome, 16-18 May 2022, [65]-[68] and finally, the decision in the Summary Report of the Fifth Session, Rome 16-18 May 2022 [79] to retain the title of Model Law on Factoring.

[2.2] As currently drafted, the MLF covers not only outright transfers but also those made by way of security. The latter are defined to include the creation of a new right in the receivable. The scope of the MLF thus extends beyond the traditional notion of factoring. Moreover, by using the terminology of transferor and transferee rather than for example, terms used in other conventions such as supplier/factor or client/factor,[3] the MLF encompasses a broader range of persons engaging in these transactions. Moreover, despite being used in the title, the word 'factoring' (or cognates) does not appear in the body of the MLF.

[2.3] We have noted that one of the stated reasons behind the development of the MLF was the facilitation of 'the use of factoring as an important form of financing increasing access to credit.' Hence, we suggest that it would be more accurate and helpful to describe the MLF in more general terms, such as a 'Model Law on Receivables Financing.'[4] That terminology also, in our view, reflects common usage.

Conceptual compatibility with the UNCITRAL Model Law on Secured Transactions

[2.4] The Online Consultation Paper states that the MLF is 'designed to be consistent with' the Secured Transactions Model Law and for those jurisdictions that have not reformed their secured transactions law it serves 'as an initial step towards broader…reform'. (III. [15]).

The distinction drawn by the MLF between 'outright transfers' and 'security transfers' does not, however, reflect the treatment of outright transfers under the Secured Transactions Model Law. Under the latter, an outright transfer is treated as a security transaction. A security right is expressly defined to mean 'The right of the transferee under an outright transfer of a receivable by agreement'.[5]

While contending that consistency would warrant both outright transfers and security transfers in the MLF to be regarded as giving rise to security rights and that such could be readily accommodated in the context of a model law renamed 'Receivables Financing', we recognise that that would require significant redrafting of the MLF, accompanied by explanation as to why outright transfers are so regarded.

We would suggest that if the current distinction between outright and security transfers is maintained, it would be helpful to provide in the Guide to Enactment an explanation of how an outright transfer would be treated under any broader secured transactions reform based on the Secured Transactions Model Law.

Balancing of competing interests

[2.5] In laying down its rules, the MLF has balanced a range of competing interests; namely, those of the transferee, the transferor, the debtor and competing claimants.

[2.6] At times, the balance appears contrary to likely commercial expectations. In particular, we would question:

- the complete override of anti-assignment clauses, precluding the debtor from suing the transferor for damages in circumstances where the transfer is in breach of the

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[3] See, for example, Factoring Convention (1988) and AFREXIMBANK, Factoring Model Law (2016), noted in Factoring Model Law Working Group, Fifth Session (hybrid), Rome 16-18 May 2022, [156].

[4] The SCF Definitions give the following terms by way of synonym for Factoring: 'Receivables Finance, Receivables Services, Invoice Discounting, Debtor Finance'; see note 2 above, [3.4.3].

[5] United Nations, UNCITRAL Model Law on Secured Transactions, Vienna, 2016, Article 2 (kk)(ii). Article 1 (2) states 'With the exception of Articles 72-82 [regarding enforcement of a security right], this Law applies to outright transfers of receivables by agreement.

contract between the debtor and the transferee (Chapter II, Article 8). We recognise that that has been discussed at length by the Working Group, but in our view it removes too much autonomy from the debtor.

We also recognise that the provision may be excluded pursuant to Article 3, but consider that its setting as a default provision tips the balance too far against the debtor. We suggest that it is preferable for the debtor's ability to sue (which is maintained in other conventions and in the Secured Transactions Model Law) be retained in the MLF, with a note in the Guide to Enactment to the effect that this can be modified so as to exclude the right;

- the apparent lack of any property interest (equivalent in a common law regime to an equity of redemption) remaining in the transferor where the transfer is made by way of security and is a transfer of title to the receivable (and not a creation of a new right);
- the apparent right of the transferee to proceeds where those proceeds are constituted by credit in a bank account in circumstances where the bank otherwise might reasonably expect to have a claim to priority under a secured transactions law regime, whether by way of security interest or by way of a banker's right of combination or of a set-off; and
- the lack of guidance as to the time at which priority is determined between competing claimants. What should be the cut-off date for registration? This is an issue that has been debated in jurisdictions with personal property securities legislation, such as Canada and Australia, with varying views propounded.

Scope: Extent of inclusion of outright transfers

[2.7] It is unclear whether the MLF envisages a priority conflict arising out of an outright transfer followed by a security transfer and resolution of that conflict by reference to the MLF priority rules.[6]

[2.8] In our view, the impact of an outright transfer leaves the transferor without any rights in the receivables and hence incapable of entering into a subsequent transfer under MLF Article 5. Any purported subsequent transfer should, logically, be a nullity or a legal impossibility.

[2.9] Yet it is sometimes argued in jurisdictions with personal property securities legislation that the transferor should be deemed to retain rights, so as to enable the resulting priority dispute to be determined under statutory priority rules.

[2.10] We do not consider it appropriate, in the absence of express direction, to read into the MLF any retention of rights by the transferor. If the underlying policy is in favour of application of the MLF priority rules, an express mechanism is desirable. In this regard, we note US *Uniform Commercial Code* Article 9-318 which recognises in subsection (a) that the seller of an account does not retain an interest but nonetheless provides in subsection (b):

> 'For purposes of determining the rights of creditors of, and purchasers for value of an account… from, a debtor that has sold an account…, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the account…identical to those the debtor sold.'

[6] The point was noted in the Summary Report of the First Session, Rome 1-3 July 2020, [144] where Mr Dubovec is reported as having suggested that 'the Working Group could provide guidance on this issue.'

Distinction between transfer agreement and transfer

[2.11] 'Transfer agreement' is defined as 'an agreement providing for the transfer of a receivable that meets the requirements in Article 5(1).' 'Transfer' is not defined in a way that describes its essential features; rather, it merely describes the two types of transactions contemplated ie outright transfers and security transfers.

[2.12] Article 5, while headed 'Requirements for the transfer of a receivable' and located in Chapter II headed 'Effectiveness of Transfers of Receivables Between the Parties', focuses on the transfer agreement. It is unclear whether it is envisaged that the transfer agreement is intended invariably to effect the transfer of existing receivables, or whether the transfer may take place at a different time to the agreement, assuming in each case that the transferor has rights in the receivables. The transfer of future receivables cannot, by definition, take effect on execution of the transfer agreement.

Current drafting risks, in our view, conflating 'transfer agreement' and the actual 'transfer'.

If the intention is that the transfer agreement and the transfer are indeed separate steps, we suggest that a transfer should take effect in accordance with the intention of the parties. This might be determined by reference to, for example, the terms of the parties' agreement (and perhaps additionally, drawing on language commonly found in common law domestic sale of goods legislation, their conduct or the circumstances of the case).

Such a distinction between the transfer agreement and the transfer raises the further fundamental question whether it is in fact the transfer that should be in writing.

3. Drafting Comments

[3.1] Noting the Consultation's purpose as being in part to 'solicit comments on the drafting of the instrument itself', we have highlighted a number of points in the table below. These do not purport to offer a comprehensive review of each clause in the instrument, but rather reflect issues and questions arising out of our general analysis of the operation of the MLF as currently drafted.

Article	Comment
Ch 1	**Scope and General Provisions**
1	We suggest this Article should state that the Model Law applies to the transfer of receivables, whether the transfer is an outright transfer or a transfer by way of security. This makes the scope of the MLF clear and is consistent with drafting in the Secured Transactions Model Law.[7]
1	It might be useful to include a general statement upfront indicating that the prior law with respect to transfers applies to the extent specified in Chapter IX, thereby drawing attention at the outset to the relationship of the MLF with existing law.
2(1)(e) "Proceeds"	Proceeds are defined to include a right to payment of funds credited to a 'bank account'. As non-bank financial institutions may be authorised to receive deposits, we suggest that this be broadened to

[7] See UNCITRAL Model Law on Secured Transactions, article 2(kk), definition of "Security right". We note the discussion by the Working Group in The Summary Report of the Fourth Session, Rome, 1-3 December 2021, [102] and its rejection of that wording. However, as it reflects the definitions used in Article 2, we consider it should be included.

Article	Comment
	refer to an account with any authorised deposit-taking institution. (We note that usage in the Secured Transactions Model Law is limited to bank accounts, but that 'bank account' is explicitly defined in Article 2(c) to mean 'an account maintained by an authorized deposit-taking institution to which funds may be credited or debited.')
2(1)(f) "Receivable"	We note that the overview states that the Model Law does not apply to the transfer of receivables arising from various financial services transactions. This is not expressly stated in the Model Law, although the definition of 'receivable' is limited to certain types of receivables, including the contractual right to payment of a sum of money arising from the supply or lease of goods or services or the payment obligation for a credit card transaction. We are concerned that the lack of definition may cause uncertainty, but note the intention to provide guidance in the Guide to Enactment.
2(1)(i) "Transfer"	The definition of "transfer" does not actually define what is meant by a transfer. We suggest that the definition should provide that a transfer means the transfer of rights in a receivable to another person and, if the transfer is a security transfer, includes the creation of rights in a receivable by agreement.
2(1)(k) "Transferee"	This Article states that a transferee is 'a person to whom or in whose favour a receivable is transferred'. Does this mean where the receivable is transferred to another person on their behalf (eg a transfer to a security trustee or an agent), the transferee is the beneficiary or principal?
Additional definitions?	The expression 'signed', in relation to a writing, appears in several places: see Articles 5(1)(a) and 29(1),(3). It would be helpful to have a definition of 'signed' with respect to electronic communications.
Chapter II	**Effectiveness of Transfers of Receivables between the Parties**
5	As noted in the General Comments, the terms 'transfer agreement' and 'transfer' appear conflated. It would be helpful if this Article stated that a transfer takes effect when the parties to the transfer intend it to be transferred. This makes it clear when the transfer takes place while also giving flexibility to the parties to determine the time of transfer.
5(1)	It is not clear what is meant by "effective". Does this mean the agreement is only effective between the transferor and the transferee, or does it also encompass effectiveness against the debtor? As noted below, it is unclear whether third parties in Article 9 include the debtor. We note that the comparable provision in the UNCITRAL Model Law on Secured Transactions merely provides that a security agreement must meet the specified requirements.[8] It may be simpler to follow the UNCITRAL drafting approach and merely state that a transfer agreement must satisfy the requirements in the article. Also, should the MLF permit a receivable to be transferred other than by a written transfer agreement which is signed by the transferor? For example, should a transferor be able to adopt or accept the terms of a transfer agreement by conduct?

[8] See UNCITRAL Model Law on Secured Transactions, Article 6(3).

Article	Comment
5(1)(c)	Article 5(3)(a) permits parts of a receivable to be transferred. We suggest that it would be beneficial if article 5(1)(c) expressly required a transfer agreement for a part of a receivable to specify the percentage or proportionate share of the receivable which is being transferred. This would prompt parties to turn their mind to this issue when they enter into the transfer agreement and so avoid any potential for future uncertainty over identifying the part of the receivable which has been transferred.
5(2)	Should this Article be amended as marked below? A receivable may only be transferred by a transfer [agreement] if the transferor has rights in the receivable or the power to transfer it.
7	This Article, when read with Article 33(3), seems to have the outcome that if a secured receivable is transferred, the security is dragged along with the receivable and the transferee becomes a secured creditor under a security granted to a third party. If so, we assume that this could raise risk for the residual security holder. It also raises complex questions of enforcement of an undivided share in a security interest held in the name of another person, and whether there are or should be obligations on the security holder in favour of the transferee in relation to any recoveries. We note that Articles 7 and 33 can be contracted out of. It might be worth flagging this in the Guide to Enactment.
8	See General Comments.
Chapter III	**Effectiveness of Transfers or Receivables against Third Parties**
9	This Article refers to the effectiveness of a transfer against 3rd parties, whereas Article 5 refers to the effectiveness of an agreement between the parties. If it is accepted that Article 5 refers to the effectiveness of a transfer, then the wording of Article 9 appears appropriate. Does 'third parties' include debtors, or should that phrase be 'third parties (other than debtors)'? Should it additionally be specified that the transfer is effective…only if 'it is effective between the parties under Article 5 and'?
Chapter 5	**Priority of a transfer**
13	Should this Article refer to the 'time of registration' instead of the 'order of registration' for consistency with Articles 19 and 52(5)? It may also be worth clarifying that the 'time of registration' is the time a registration notice becomes effective under Annexe A, clause 11(1).
15	Is this intended to override the law of insolvent transactions to preserve the validity of the transfer agreement?
17	Is this also intended to pick up garnishee orders?
Chapter VI	**Rights and Obligations of the Parties**
21	Should this be made subject to Article 3(1), which makes certain provisions of the Law mandatory?
22	There should be a representation that the receivable is enforceable. What is meant by the reference to the 'right to transfer the receivable'? Is this a reference to authority to transfer or to the property right in the receivable? If there is no property right, the receivable cannot be transferred. It is not clear why Article 22 (1)(b) is included given that the MLF

Article	Comment
	promotes transfers of receivables and seems to assume that receivables can be transferred multiple times. With respect to article 22(1)(c), is it not difficult for a transferor to represent that no future defences or rights of set-off will arise? Some defences or rights of set-off may arise by operation of law.
24	Is the intended policy of Articles 24 and 27 to permit the transferee to bring multiple claims but prevent the transferee from recovering more than 100% of the face value of the receivable? It would be helpful to make the relationship between Article 24 and 27 clear.
24(3)	This Article provides that a transferee of a receivable may not retain more than the value of its right in the receivable. Is this meant to cover the right of redemption of a transferor who transfers the receivable by way of security? We also note the potential application of Article 35(1)(b).
26(4)	It is not clear what this Article is intended to achieve.
27(3) and (4)	How do these Articles work with Article 26(4)?
28(3)	How does this fit with Article 8 which does not permit any such action?
29	Where signing is required, electronic signing should be permitted. See Drafting Comments 'Additional definitions?' with respect to Chapter 1.
Chapter VII	**Collection and Enforcement**
33(3)	The reference to "transferor" should be to "transferee".
35(1)(b)	The reference to paragraph 2(c) seems incorrect – there is no such paragraph. Should it be 1(c)?
42	This Article provides that the transferor is located in the State in which it has its place of business. It might be preferable to provide that the transferor is located in the jurisdiction in which it is incorporated or formed. It can be difficult to determine where a transferor has a place of business. By contrast, it is relatively simply to determine the place in which a company is incorporated.
Annexe A	**Registry Provisions**
clause 15	Should the reference to "transferee" be to "transferor"? The amendment or cancellation of a registration affects the transferee, so it is not clear to us why the consent of the transferee is not required.

ANNEXE 19 – COMMENTS FROM THE GOVERNMENT OF POLAND, MINISTRY OF JUSTICE, COMMERCIAL LAW DEPARTMENT

(sent by Ms Joanna Herczyńska)

The presented draft Model Law on Factoring is a "soft law" instrument, the purpose of which is to create solutions for countries that want to introduce legal factoring regulations into national law or update their existing regulations, but are not yet able to undertake a comprehensive reform of the law on secured transactions based on instruments developed by the United Nations Commission on International Trade Law (UNCITRAL), and provide model legislation for countries that have already reformed their secured transaction laws but wish to consider implementing additional specific rules to improve the factoring legal framework.

The draft shows that the rules presented therein apply to factoring contracts both in internal relations (domestic factoring) and in relations with the international element (international factoring).

UNIDROIT's initiative to develop a draft model law on factoring should be assessed positively. Particularly noteworthy is the solution providing for the establishment of a register where transfers of receivables will be disclosed. The proposed solution will make it possible for everyone to check whether the person who claims to have acquired the receivable is indeed entitled to enforce it without the need to submit extensive documentation including confirmation of transfers made. It should be noted that in the proposed Model Law on Factoring for many activities there is a requirement for the written form, and the written form is defined not only as an ordinary written (paper) form, but also as a form of an electronic document.

With reference to Art. 5 sec. 1 lit. a, it should be noted that it could be specified whether a document can be signed electronically and, if so, which type of electronic signature should be used.

In art. 19 paragraph 1 of the Model Law, it is proposed to rewrite the text as follows: "The priority of a transfer of a receivable that is described in a notice registered in the Registry is determined by the time of registration, regardless of whether the receivable is acquired by the transferor, or comes into existence, before or after the time of registration. "

In art. 33 sec. 3 of the Model Law, it is suggested to consider replacing the word "transferor" with "transferee", because the entire art. 33 relates to the rights of the transferee.

Moreover, in Art. 34 of the Model Law, there is an error in the numbering of paragraphs - paragraph 3 follows paragraph 1, and in art. 49 sec. 1 both points are mistakenly marked as point 2.

ANNEXE 20 – COMMENTS FROM MR IYARE OTABOR-OLUBOR LECTURER IN COMMERCIAL LAW, COLLEGE OF BUSINESS AND SOCIAL SCIENCES

Article 2(1)(a):

Article 2 — Definitions

1. For the purposes of this Law:

(a) "Debtor" means a person who owes payment of a receivable.

Should we not use the word 'customer' instead of debtor to adequately identify the debtor as a business? The word 'debtor' can be misconstrued to include a consumer debtor, whereas a 'customer' is a business debtor.

Article 2 (1)(f):

(f) "Receivable" means a contractual right to payment of a sum of money arising from:

(i) the supply or lease of goods or services;

Receivables can potentially include other forms of legal tender other than money.

Article 8:

Article 8 — Contractual limitations on the transfer of receivables

1. 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.

Can we specifically exclude subrogated rights in this model law? In some countries, when a right to claim on insurance is subrogated to the insurance company or its creditor, the debtor needs to be informed who the rights are subrogated to before it can take effect.

Article 31:

Article 31 — Recovery of payments

Failure of a transferor to perform the contract giving rise to the receivable does not entitle the debtor to recover from the transferee a sum paid by the debtor to the transferor or the transferee.

There are some industry issues with this statement, especially around unjust enrichment. Art. 31 seems to postpone the right of a restitution benefactor where mistaken payment has been made by the debtor/customer to the transferee, e.g., if the debtor has been misled into making payments to the transferor on the promise of contractual performance, e.g. fraudulent misrepresentation. With credit card transactions often facilitated by international card issuers e.g. visa & mastercard, today, it is industry practice for customers to file chargebacks to claim back refunds where they may have been taken fraudulently. This provision seems to contradict the practices of these card issuers.

Annexe A – Clause (1)(a)(ii):

Clause 1 — Definitions

For the purposes of this Annexe:

(a) "Address" means:

(i) A physical address or a post office box number, city, postal code and State; or

(ii) An electronic address;

Electronic address can mean an email address or 'domain address' e.g. www.address.com.

Can we instead use an appropriate word such as 'virtual address'?

Annexe A – Clause (1)(h):

(h) "Registered notice" means a notice the information in which has been entered into the registry record;

Possibly a technical error here. It should be written as 'a notice of information'.

Annexe A - G. ORGANISATION OF THE REGISTRY AND THE REGISTRY RECORD

Can we provide guidance for countries that already have a collateral registry for tangible movables, but may want to expand its registry to pure intangibles such as receivables?

G. ORGANISATION OF THE REGISTRY AND THE REGISTRY RECORD

ANNEXE 21 – COMMENTS FROM ASOBANCARIA

(submitted by Mr José Manuel Gómez Sarmiento)

Respetados señores:

En atención a la publicación para comentarios del Proyecto de Ley Modelo sobre Factoring, la Asociación Bancaria y de Entidades Financieras de Colombia, Asobancaria, comparte algunas observaciones, recomendaciones y sugerencias frente a su contenido.

En primer lugar, se resalta la importancia y utilidad de la labor adelantada por UNIDROIT tendiente a estandarizar la normatividad, por vía de la solución práctica de los cuestionamientos que surgen a partir de los diversos marcos legales existentes en materia de Factoring (o su ausencia). Lo anterior redundará, seguramente, en el incremento de la realización de operaciones tanto en los países que actualicen su legislación con base en los lineamientos establecidos, como en operaciones de comercio internacional.

Frente al aparte sobre el *"Registro y prioridad"* del Proyecto, el cual tiene por finalidad la adopción de un sistema de registro a través del cual la transferencia de un crédito es oponible a terceros y la prioridad entre transferencias concurrentes se determina por el orden de registro, se recomienda que quede claro que dicho sistema se limita al Factoring nacional o local, para evitar generar inconvenientes de implementación normativa en el escenario internacional, con las consecuentes dificultades asociadas a la aplicación extraterritorial de normas.

Por su parte, en el numeral primero del artículo 28 (sobre excepciones y derechos de compensación al deudor) se establece que *"En la reclamación del cesionario contra el deudor por el pago de un crédito, el deudor podrá oponer al cesionario todas las excepciones y derechos de compensación derivados del contrato que dio origen al crédito, o cualquier otro contrato que formó parte del mismo. Transacción, de la cual el deudor podría valerse como si la transferencia no se hubiera hecho y la reclamación fuera hecha por el cedente"* (subrayado fuera de texto). Al respecto, es del caso mencionar que, en la normatividad colombiana, los títulos valores, como las facturas de venta a plazo que pueden negociarse a través del Factoring, tienen el atributo de que el ejercicio del derecho incorporado en ellas es autónomo (Art. 619, C.Co.) respecto del negocio subyacente. La autonomía significa que la vinculación de cada suscriptor de un título es independiente y no tiene ninguna relación con la obligación de cualquier otro suscriptor (Art. 627, C.Co.) y, por ende, los vicios que puedan afectar la obligación de uno de ellos no afectan el vínculo de los demás. Esta disposición, además, es el producto de un proyecto uniforme de regulación internacional en Latinoamérica, el Proyecto INTAL, que fue un mecanismo de unificación de la regulación latinoamericana que se realizó en la década del 70 del siglo pasado, y que originó la regulación de la normativa interna es los países de la región actualmente vigente en estos, y que se recomienda tomar en cuenta.

Esta característica se fundamenta en la necesidad de que la relación cambiaria que crea cada suscriptor se considere separada de otras que puedan surgir. En consecuencia, para el caso colombiano, se evidencia que en las operaciones de Factoring, en las que quien suscribe o endosa el título valor se encuentra realizando una transferencia diferente a la cesión de un crédito o de una posición en un contrato, en la medida que estas que pueden verse afectadas por el negocio anterior.

En consecuencia, de tenerse que adoptar una regla en Latinoamérica que no permita la independencia del negocio subyacente que originó el título, cuanto este es transferido a un factor, limitará la posibilidad de negociación de estos títulos o documentos de deber, disminuyendo la posibilidad de financiamiento por estos mecanismos. Lo anterior, por el riesgo que genera recibir un documento que puede ser discutido su pago por una causa que realmente es desconocida por el adquirente.

Por lo anterior, para evitar el inconveniente mencionado, además de tener que generar cambios estructurales en la naturaleza de los títulos valores objeto de este tipo de operaciones, se recomienda eliminar el numeral 1 del artículo 28 del Proyecto de Ley Modelo sobre Factoring, puesto que parecería inconveniente una norma de este carácter para el adquiriente o factor, pues el deudor (pagador del título) podría oponerse contra él, alegando por ejemplo el derecho de compensación que debería defender ante el emisor del título, vulnerando la integridad de los títulos que se negocien a través del Factoring. Otra opción sería indicar que las opciones de defensa se tomarán conforme se regule en la legislación nacional de cada país que adopte esta legislación.

Por último, en relación con el numeral segundo del artículo 33, relativo al cobro en virtud de una transferencia del título de deuda, por virtud del cual el cesionario podría ejercer el derecho a cobrar, antes del incumplimiento, si el cedente así lo consiente, se resalta que no podría pensarse que la obligación pueda exigirse antes de expirar su plazo, puesto que se afectan los derechos del deudor, que es el de solo exigirle después de su vencimiento, a menos que, por ejemplo, se encuentre en insolvencia. Nuevamente, se trata de normas de la naturaleza del sistema de derecho privado, razón por la cual se recomienda modificar el numeral en comento, eliminando la posibilidad de adelantar el cobro antes del incumplimiento, si el cedente así lo consiente, sin contar con la voluntad del deudor. Esta disposición, además se reconoce hoy en la legislación colombiana en el artículo 1553 del Código Civil, que es directamente tomado del derecho romano, que ha sido modelo de regulación no solo en este país, sino en muchos otros latinoamericanos y europeos.

Se espera de esta manera haber aportado en la importante labor que realiza el Instituto Internacional para la Unificación del Derecho Privado.

Cordialmente,

Aso Ban Caria

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ANNEXE 22 – COMMENTS FROM THE SECURED FINANCE NETWORK ("SFNET")

(submitted by Mr Richard Kohn)

Dear All,

The Secured Finance Network ("SFNet"), through its International Finance & Development Committee (the "Committee"), respectfully submits the following comments on the UNIDROIT Draft Model Law on Factoring (the "Draft Law") for your consideration. These comments are not organized into a formal position paper, but rather represent comments submitted by various SFNet members, and are presented in the form received from such members with only minor clerical edits. The comments are in addition to the comments that I had the privilege of making at the Q&A session earlier this month in my role as Chair of the Committee.

1. One issue is the treatment of the proceeds of receivables once paid into a bank account in many jurisdictions. [The Draft Law should make it] clear that the transferee does not lose its rights to those proceeds upon the insolvency of the transferor, since the right is deemed to become a "new" right to payment from the depository bank. The Draft Law does seem to address this (Article 6; Article 10), but does it need to go further, e.g., to address commingled proceeds and tracing, per 9-315(a)(2)?

2. Another issue is having the effectiveness of the ongoing assignment of receivables cut off upon the insolvency of the transferor (even as contrasted with having the assignment cease upon the commencement of a court-controlled insolvency case), particularly given the difficulties of determining "insolvency" as a practical matter under the laws of many jurisdictions. Article 15 seems intended to address this by implication in referring to the "commencement of insolvency proceedings," but does not directly address the use merely of "insolvency" to impact the rights of the transferee.

3. You may recall that certain decisions in Germany prior to 2007 challenged the global assignment of receivables on the basis that the newly created receivables secured antecedent debt ("incongruent security"). Article 19 seems clear as to priority of a security transfer to secure future obligations, but is there a means to protect the transferee from the argument that the security right only necessarily arose upon the creation of the receivable and therefor the hardening period [runs] from that moment rather than from the date of the instrument providing for the assignment for purposes of amounts owing previously? This may be addressed in the Draft Law, but given the history of the issue both in France and Germany, even so might be of interest to note.

4. Another issue is the priority issue for an assignment of receivables to prevail over the holder of a security right in the inventory sold that gave rise to such receivables, absent appropriate purchase-money steps.

5. It is good to see [that] the definition of the term "receivable" includes payment obligations for a credit card transaction. You may recall the PEB commentary on this given that credit card transactions involve two different sets of payment obligations: one is by the card holder to the card issuer and the other by the card issuer to the merchant/seller of goods or services. The PEB concluded that the "receivable" payable by the card issuer is a "payment intangible" rather than an "account" under the UCC.

6. Transfer: security assignment versus pledge: Perhaps it could be made clearer that the definition of transfer also includes a pledge. For example, a transfer for security purposes is prohibited in the Dutch Civil Code.

7. Private international law re assignment of debts: This is complicated and highly controversial in the EU. The negotiations on an EU draft regulation on third party effects have completely stalled. The reason is that a member of parliament resisted any rule that would allow some sort of party autonomy, even indirectly. See:

https://eapil.org/2021/06/04/eu-council-to-adopt-regulation-on-third-party-effects-of-assignment-of-claims/
https://www.lexisnexis.co.uk/legal/news/an-r-i-lawyers-guide-to-the-proposed-eu-regulation-on-the-law-applicable-to-the-third-party-effects-of
https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2018)623546

8. Article 39: Specifically the rule in [Draft Law] Article 39 also came up in the EU negotiations. I believe it was brought up by Spain. It is problematic from a Dutch perspective for the following reason: if a bank has the benefit of a right of mortgage, it will typically secure all present and future amounts payable to that bank, while specifying only one receivable or underlying loan agreement. The rule may limit the mortgage bank's ability to a sell part of its receivables in accordance with another law. What's more, I don't really understand its justification from a Spanish perspective.

9. Proceeds: It makes complete sense to me that the transferee has a claim to the proceeds of the receivable, but this is likely to incur resistance from the Dutch banks to the extent they also act as account banks. In this capacity, they are reluctant to accept a pledge over a bank account for the benefit of another party. The right to the proceeds in Article 6 may need more elaboration. Is it in the nature of a pledge that arises by operation of law?

10. Insolvency and future receivables: It is not entirely clear whether it is intended that a transfer may become effective if insolvency proceedings have commenced in respect of that transferor (Article 19).

11. [The Draft Law is a] very interesting and needed work. As a professional in the [factoring] industry for over 25 years, these developments are very important for the international market.

12. Insolvency – Insolvency is not defined. Do you mean formal proceedings (to the extent applicable) or is it intended to be a broader term?

13. Proceeds – It may be helpful to have more clarity around how the proceeds work.

a. The transfer of the receivable includes the proceeds too and is Article 41, for example, consistent with that approach?

b. Proceeds" of a receivable means any:
(i) money;
(ii) negotiable instrument; or
(iii) right to payment of funds credited to a bank account - This comes ahead of all other rights or just if identifiable?

14. Article 16 – What are the anticipated types of claims?

15. Article 30 (2)(b) – Is the "reasonable transferee would consent to the modification" a standard that is known/accepted in other countries/laws?

16. Article 35 (1)(b) – Is the reference to paragraph 2(c) intended to be 1(c)?

I hope you find these comments to be helpful. Either I or other members of SFNet would be pleased to make ourselves available by email or on a call for any further explanation or discussions concerning these points that you may wish to have.

Kind regards,

Richard Kohn

ANNEXE 23 – COMMENTS FROM MR MILOŠ LEVRINC UNIDROIT CORRESPONDENT

As part of the ongoing online consultation on the draft Model Law on Factoring (MLF) allow me to submit comments on the draft MLF.

I note that the draft Model Law on Factoring (MLF) covers all types of transfers of receivables, not limited to absolute assignments. The Slovak regime for absolute assignments of receivables is governed by the Civil Code, which also applies to commercial transactions. The Code also recognizes a security assignment of receivable. The reform of the pledge provision in 2002 introduced a registration system for pledges of receivables. Special laws may govern specific types of receivables. Case law has addressed several aspects of transfers of receivables, particularly in insolvency. However, no statutory provision or case law provides a priority rule among the different types of transfers.

Several aspects of the Slovak regime would benefit from the clarity provided by the MLF. For instance, the Supreme Court of Slovakia defined a description standard for future receivables, which must be identified by the name of the transferor, debtor and a type, such as a receivable arising from the following contract. The degree of specificity is driven by doctrinal considerations rather than the needs of practice. The law does not expressly provide that a part of the receivable may be transferred, but that has been occurring in practice. The law recognizes and enforces an anti-assignment clause that would make a transfer ineffective. However, such a clause would be ineffective in insolvency of the transferor. This is another area that Slovak law should consider to extending the ineffectiveness of prohibitions to pre-insolvency situations.

The Slovak regime concerning conflict of laws questions is based on Rome I Regulation that does not specify the law applicable to property aspects of transfers. Hence, Slovak courts would need to proceed by analogy to the provisions in our domestic regime governing movable assets in general, which would be the location of the asset. However, there is a great deal of uncertainty as to the applicable law, which would benefit from a clear statutory provision, as contained in the MLF.

Implementing States would likely benefit from some guidance on treating transfers of receivables in insolvency. For instance, Slovak law governs the procedures for transferring receivables during the insolvency proceedings and admitting the transferee as a participant in the insolvency proceedings. The procedures differ whether the transferee is already owed receivables from the transferor in insolvency, or it is not involved in insolvency proceedings. Understandably, some aspects of transfers of receivables would not be appropriate to address in the MLF, but the Working Group should consider addressing them in a guide.

Yours sincerely, JUDr. Miloš Levrinc, PhD.
UNIDROIT Correspondent for Slovakia

ANNEXE 24 – STATEMENT OF THE LEGAL & COMPLIANCE DEPARTMENT RAIFFEISEN FACTOR BANK AG (VIENNA / AUSTRIA)

(submitted by Ms Béla Szegedi-Székely)

Dept. Legal & Compliance
Status: October 2022

Raiffeisen Factor Bank
Member of RBI Group

Statement of the Legal & Compliance Department Raiffeisen Factor Bank AG (Vienna / Austria) on the subject: Factoring Model Law (FML) by UNIDROIT

The statement is sent electronically to the following institutions:

1. **FCI**

Deadline for feedback:
Fri, 21.10.2022

Feedback to: fci@fci.nl

2. **UNIDROIT**

Deadline for feedback:
Fri, 21.10.2022

Feedback to: MLFconsultation@unidroit.org

3. **Fachverband Raiffeisen Banken AT & BWG (Austrian Banking Science Association)**

Feedback to:
johannes.rehulka@rbinternational.com;
office@bwg.at

Any queries regarding the statement should be addressed to:

MMag. Béla SZEGEDI-SZÉKELY
Head of Legal & Compliance

Certifications:
Compliance Officer / AML/KYC Officer / Data Protection Officer

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Dept. Legal & Compliance
Status: October 2022

Raiffeisen Factor Bank
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Punctuation regarding the Factoring Model Law (FML) with a focus on discrepancies with Austrian law (prevailing doctrine & case law):

1) The type of receivables in Austria is generally limited to receivables from the delivery of goods and services[1] , but the FML goes much further and also includes for example receivables from credit card payments.

2) The FML classifies the legal nature of factoring **not as a purchase contract** but as an assignment of receivables. **This would mean that some essential advantages of the purchase contract nature under Austrian law (such as the right to separate satisfaction in insolvency proceedings) would no longer apply.**

3) The FML also deals with the sale of receivables as security (security transfer) for underlying claims, this does not fall under factoring in Austria but is similar to the concept of assignment/cession loans (credit).

4) **The FML provides for a public registry in which all transferred claims must be registered in order to be effective against third parties. Currently, such a registry does not exist in Austria; the introduction of such a registry would impair and slow down transferability and lead to additional costs for all stakeholders.**

5) With regard to collision in factoring cases with an international connection, reference should be made to the quote in the publication "Factoring, Receivables Finance & ABL - A Study of Legal Environments Across Europe 2021"[2] of the EUF (EU Federation for the Factoring & Commercial Finance Industry):

   "It is common practice in all standard Austrian factoring contracts to agree on the choice of law and the place of jurisdiction Austria, since in particular the Commercial Court of Vienna and also the Supreme Court in Austria already had and have a lot of experience with factoring. For this reason, all Austrian factoring contracts exclude references to other legal norms or the UN Convention on Contracts for the International Sale of Goods. Another, but rare, variant is the choice of an arbitration court, whereby in Austria, if an arbitration court is agreed, the choice usually falls on an arbitration court of the Austrian Federal Economic Chamber."[3]

6) It should be noted that Austria has not ratified the following two international conventions on factoring to date:[4]
   - The UNIDROIT Convention on International Factoring (1988)
   - The United Nations Convention on the Assignment of Receivables in International trade (2001)

7) The FML only defines non-recourse factoring as factoring. The topic of recourse factoring is not mentioned anywhere.

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[1] Cf. § 1 (1) Nr. 16 Austrian Banking Act (BWG)
16. der Ankauf von Forderungen aus Warenlieferungen oder Dienstleistungen, die Übernahme des Risikos der Einbringlichkeit solcher Forderungen - ausgenommen die Kreditversicherung - und im Zusammenhang damit der Einzug solcher Forderungen (Factoringgeschäft);

[2] https://euf.eu.com/news/euf-legal-study-art.html

[3] https://euf.eu.com/news/euf-legal-study-art.html;
"Factoring, Receivables Finance & ABL - A Study of Legal Environments Across Europe 2021" page 24

[4] https://euf.eu.com/news/euf-legal-study-art.html;
"Factoring, Receivables Finance & ABL - A Study of Legal Environments Across Europe 2021" page 24

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8) The FML, despite its claim to be internationally linked, does not contain any legal accounting standards or references to them. In the interest of international standardization, it would be useful to at least include references to IFRS articles.

9) The working group that drafted the FML (headed by Prof. Henry Gabriel) is mainly composed of experts from the Anglo-Saxon legal sphere. It would be advisable to expand the expert group to include experts from the continental European legal sphere (civil law). Especially with regard to the fact that the FML also includes factoring of payment obligations in connection with credit card transactions as well as the transfer or licensing of intellectual property, we are critical of possible collisions with European law directives, especially PSD2[5] and the Directive on the enforcement of intellectual property rights[6].

10) The FML is intended to be a stand-alone instrument that can be adopted and implemented by states wishing to reform their legislation to facilitate factoring. As with all UNIDROIT instruments, the Model Law is intended to be adopted by both common law and civil law states. However, the Issues Paper of May 2022[7] explicitly states that the FML is intended to serve as a model for legal reform in all countries, but it was drafted with a focus on developing and emerging countries that want to reform their domestic factoring law but are not yet in a position to carry out a complete reform of their law on secured transactions on the basis of the UNCITRAL Model Law on Secured Transactions.[8]

Conclusion:

In conclusion, we see several critical points and major disadvantages in our prima vista analysis, should the FML be ratified by Austria or implemented in AT law. Finally, we would like to conclude with the following quote from the publication "Factoring, Receivables Finance & ABL - A Study of Legal Environments Across Europe 2021"[9] of the EUF (EU Federation for the Factoring & Commercial Finance Industry):

"Since the Commercial Court in Vienna and the Supreme Court in Austria have had and still have a lot of experience with factoring, Austria has a relatively high level of legal certainty with regard to factoring. The procedure and settlement in the event of insolvency, the factor's right to separate his receivables (Aussonderrungsrecht), are well known to all insolvency administrators in Austria, which is why there are usually no problems in the settlement of insolvency cases. Furthermore, factoring enjoys a positive image among companies in Austria today and is recognized and appreciated as a clever and efficient financing product." [10]

[5] Directive (EU) 2015/2366
[6] Directive (EU) 2004/48
[7] https://www.unidroit.org/wp-content/uploads/2022/05/Study-LVIII-A-%E2%80%93-W.G.5-%E2%80%93-Doc.-2-Issues-paper.pdf
[8] https://www.unidroit.org/wp-content/uploads/2022/05/Study-LVIII-A-%E2%80%93-W.G.5-%E2%80%93-Doc.-2-Issues-paper.pdf; Fig. 149
[9] https://euf.eu.com/news/euf-legal-study-art.html
[10] https://euf.eu.com/news/euf-legal-study-art.html;
"Factoring, Receivables Finance & ABL - A Study of Legal Environments Across Europe 2021" page 25

ANNEXE 25 – COMMENTS FROM MR PEDRO MENDOZA MONTANO, GUATEMALA UNIDROIT CORRESPONDENT

Guatemala
Commentary on Model Law on Factoring

Guatemala UNIDROIT Correspondent – Pedro Mendoza Montano

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Abbreviations:
MLF= Model Law on Factoring
GFL= Guatemalan Factoring Law

Text of the UNIDROIT MLF	Text of Guatemala Legislation on Factoring	Possible Improvements to the Guatemalan Legislation on Factoring based on UNIDROIT MLF
Article 1 — Scope of application 1. This Law applies to transfers of receivables. 2. Nothing in this Law affects the rights and obligations of a person under other laws governing the protection of parties to transactions made for personal, family or household purposes. 3. Nothing in this Law overrides a provision of any other law that limits the transfer of specific types of receivable. 4. Nothing in this Law affects the rights and obligations of any person under	Article 1. Object. The purpose of this Law is to regulate the factoring contract and the discount contract. The present Law is of a subsidiary nature, it applies supplementary to the will of the parties.	Article 1 of the GFL partially reflects the ideas contained in both article 1 and 3 of the MLF. The MLF takes a more direct approach on choice of law and mandatory law, clearly stating the subsidiary nature of the instrument in relation to other subjects that should be regulated in other bodies of law. Most of Guatemala's legal provisions on choice of law are regulated by the same legal instrument that typically embraces the principle of "*lex*

the law governing negotiable instruments.		*specialis derogat lex generali*". Embracing the approach contained in the MLF would pave the way for the adoption of more comprehensive regulation for receivables.
Article 2 — Definitions 1. For the purposes of this Law: (a) "Debtor" means a person who owes payment of a receivable. (b) "Default" means the failure of a person who owes an obligation secured by a security transfer to pay or otherwise perform that obligation and any other event that constitutes default under the terms of an agreement between the transferor and the transferee. (c) "Competing claimant" means a person with rights in a receivable that may be in competition with the rights of a transferee of the receivable. (d) "Future receivable" means a receivable that arises after the time a transfer agreement is entered into, whether or not the contract giving rise to the receivable has been entered into at that time. (e) "Proceeds" of a receivable means any: (i) money; (ii) negotiable instrument; or (iii) right to payment of funds credited to a bank account, that is received in respect of the receivable, whether in total or partial payment or other satisfaction of the receivable. It includes proceeds of proceeds. (f) "Receivable" means a contractual right to payment of a sum of money arising from: (i) the supply or lease of goods or services; (ii) the assignment or licence of intellectual property; or (iii) the payment obligation for a credit card transaction. A receivable does not cease to be a receivable as defined by this	Article 2. Definitions. For the purposes of this Law, in respect of which the terms apply to both the singular and the plural, the following terms are defined as follows for the singular as well as for the plural, the following are defined by: a. Discounter or assignee: The individual, legal entity or autonomous patrimony, in favor of whom the discounted credit right is assigned. The discounter delivers to the discounter, in exchange for the credit right, a previously agreed amount. b. Discounter, seller or assignor: It is the individual, legal entity or autonomous patrimony, holder of a credit right, who, by virtue of a factoring or discounting contract, assigns in favor of the discounter such credit right, in exchange for an amount previously agreed upon. the discounter such credit right, in exchange for a previously agreed amount. c. Debtor of the right of credit or assigned: It is the natural person, legal person or autonomous patrimony, in whose charge is the obligation of the right of credit assigned by the assignor. d. Factor or assignee: The natural person, legal entity or autonomous patrimony in favor of whom the seller or assignor	No comment

section if it is consolidated or refinanced by the parties to it. (g) "Registry" means the registration system for this Law established by [the relevant authority in the enacting State]. (h) "Security transfer" means a transfer of a receivable by agreement, or the creation of a right in a receivable by agreement, to secure payment or other performance of an obligation, regardless of the way in which the parties have described the transaction, the status of the transferor or transferee or the nature of the secured obligation. (i) "Transfer" of a receivable means: (i) an outright transfer of the receivable by agreement; and (ii) a security transfer of the receivable. Where the context requires, "transfer" also means the rights of a transferee arising from a transfer. (j) "Transfer agreement" means an agreement providing for the transfer of a receivable that meets the requirements in Article 5(1). (k) "Transferee" means a person to whom or in whose favour a receivable is transferred. (l) "Transferor" means a person who transfers a receivable. (m) "Writing" includes an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.	assigns a credit right under a factoring contract. e. Discount contract: Under a discount contract, the discounter assigns in favor of the discounter a credit right of future maturity in exchange for an agreed amount. the discounter a credit right of future maturity, in exchange for an amount previously agreed between them. previously agreed between them. f. Factoring Contract: By means of a factoring contract, a seller or assignor assigns in favor of a factor, totally or partially, one or several factor, in whole or in part, one or more credit rights, so that the factor may perform one or more of the following functions of the following functions: i. Advance resources of the credit right being assigned; ii. Receive the credit right(s) as a discount, as defined in paragraph e) of this article; ii. e) of this article; iii. Manage a portfolio of assigned credit rights; iv. Notify the debtor of the credit rights that are the object of the contract, the assignment or discount of the credit right; iv. of the credit right; v. Collect in its own name or in the name of the seller the receivables under the contract; v. Collect in its own name or in the name of the seller the receivables under the contract; vii. contract; vi. Protect or arrange for the protection of the seller against non-payment by the debtor of	

	the receivable; vi. credit right; g. Credit right: It is the right of a person to receive from another person an amount of money by virtue of a contractual relationship, regardless of whether or not the obligor is obliged to pay the other person. contractual relationship, regardless of whether the obligation of the party obliged to deliver such amount is by virtue of a credit relationship or any other contractual obligation. The right of a person to receive an amount of money from another person under a contractual relationship, regardless of whether the obligation of the party obliged to deliver such amount is under a credit relationship or under any other contractual obligation. The credit right is what the assignor assigns in favor of the factor or the discounter under the factoring contract. factoring contract. h. Electronic Communications: Any written communication that is carried out electronically. electronic means.	
Article 3 — Party autonomy 1. With the exception of Articles [4, 5, 36(3), 37(1) and 38-54], the provisions of this Law may be derogated from or varied by agreement. 2. An agreement referred to in paragraph 1 does not affect the rights or obligations of any person who is not a party to the agreement.	Article 1. Object. The purpose of this Law is to regulate the factoring contract and the discount contract. The present Law is of a subsidiary nature, it applies supplementary to the will of the parties.	Article 1 of the GFL partially reflects the ideas contained in both article 1 and 3 of the MLF. Both the GFL and the MFL reflect the principle of party autonomy in this provision but the MFL goes a step further and also reiterates the principle of privity of contract in its second paragraph.
Article 4 — General standards of	Article 18. Specific regulations.	Principles of contractual

conduct A person must exercise its rights and perform its obligations under this Law in good faith and in a commercially reasonable manner	For the discounting and factoring of negotiable instruments, in addition to the rules contained in this Law, the rules contained in the Code of Commerce regarding negotiable instruments shall apply, which shall be applied on a supplementary basis. For the discounting and factoring of securities issued by a General Depository Warehouse, in addition to the rules set forth in this Law, the rules contained in the Law of General Deposit Warehouses and its regulations shall apply. ARTICLE 669 of the Guatemalan Commercial Code. Philosophical principles. The obligations and mercantile contracts will be interpreted, executed and fulfilled in accordance with the principles of known truth and kept good faith, in order to conserve and protect the principles of known truth and guarded good faith, in order to conserve and to protect the straight and honorable intentions and desires of the honorable intentions and desires of the contracting parties, without limiting with arbitrary interpretation their natural effects.	commercial law are already reflected in other bodies of law.
Article 5 Requirements for the transfer of a receivable 1. An agreement is only effective as a transfer agreement if it: a. is evidenced by a writing that is signed by the transferor; b. identifies the transferor and the transferee; and c. describes the receivable in a manner that reasonably allows its identification. A description of receivables in a transfer	Article 5. Assignment of Credit Rights. Any credit right that by its nature can be assigned may be assigned, unless the specific its nature may be assigned, unless the specific regulations governing such right expressly prohibit its assignment by discounting or factoring. expressly prohibits its assignment by discounting or factoring.	No comment

agreement will be sufficient if it indicates that the receivables consist of all of the transferor's receivables, or all of the transferor's receivables within a generic category. 2. A receivable may be transferred by a transfer agreement if the transferor has rights in the receivable or the power to transfer it. 3. A transferor may transfer: (a) a part of or an undivided interest in receivables; (b) a generic category of receivables; and (c) all of its receivables. 4. A transfer agreement may provide for the transfer of a future receivable, but the transfer is effective only when the transferor acquires rights in the receivable or the power to transfer it.	The assignment of rights also includes the assignment of credit rights incorporated in contracts, agreements, clauses, agreements, clauses, clauses, clauses, clauses, clauses, clauses, clauses, clauses, clauses, clauses contracts, covenants, clauses or agreements that by their nature may be assigned in favor of a third party, This includes, but is not limited to, leasing contracts, leasing, or real rights of usufruct for a consideration. onerous. Article 6. Assignment of receivables. The following may be the object of discounting and factoring that by their nature allow the assignment of the credit rights they embody. When When an assignment is made by discounting or factoring of negotiable instruments, this assignment must be stated in the instrument itself by means of endorsement, endorsement or factoring. If the instrument has been issued in physical form, this assignment must be stated on the instrument itself by means of an endorsement, if the instrument has been issued in physical form. electronic form, the person or entity must be informed of the discount or factoring operation responsible for keeping the electronic registry of such securities, in order to record the assignment.	
Article 6 — Proceeds The right of the transferee of a receivable extends to its identifiable proceeds.	Article 8. Entries in account. Discounting and factoring shall be perfect, and therefore the transaction is binding, when it is carried out by means of book entries in the accounts of the	No comment

	transaction is binding, when it is carried out by means of annotations on account in the accounts of the parties, which must comply with the the parties, which must comply with the requirements set forth in this Law and in any other specific legislation on credit law. specific regulations on credit law that may be applicable and that are not contrary to the spirit of this Law. of this Law. Article 9. Documentation. The factoring contract and the discounting contract shall be documented in writing, either by means of in written form, either by public deed, by private document, with or without a legalized signature, or in any form in which a legalized signature is required, or in any form in which a legalized signature is required. legalized signature or in any form in which there is evidence of the will of the parties entering into the discount contract, whatever it may be. contract, including book entries and communications by electronic means. electronic means.	
Article 7 — 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 have the benefit of that right under the law governing it only with a new act of transfer, the transferor is obliged to transfer the benefit of that right to the transferee. 2. A transferee has	Article 25. Registration in the Registry of Secured Transactions. When the discounter, seller or assignor, assigns credit rights as security to a discounter or a factor, and authorizes him to exercise the rights of the credit to exercise the rights of the receivable during the term of the contract, but continues to hold title to the receivable in his the ownership of the receivable in its accounts, this operation must be registered in the	In Guatemalan Law, this is an issue governed by Securities Law (Garantia Mobiliaria). Under Guatemalan law a registration would be necessary. This is in accordance with article 9 of the Model Law, so there is no inconsistency.

the benefit of a right under paragraph 1 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 the ability of the transferee to have the benefit of that right.	Register of Movable Guarantees. Movable Guarantees. For this purpose, it will be sufficient for the parties to document in writing the credit rights that are the object of the guarantee, and such document will in such a document authorizing the discounter or the factor to make the registration in the Register of Movable Guarantees, in the The assignment of credits in guarantee will be registered under the name of the assignor or discounter debtor, The assignment of credits in guarantee will be governed by the provisions of the Law of Movable Guarantees, Decree 51-2007 of the Congress of the Republic. Number 51-2007 of the Congress of the Republic. Article 26. The following shall be applicable to the assignment of credit rights made by the discounter in favor of the discounter, by virtue of the the discounter, by virtue of the factoring contract or discount contract regulated in the present Law, as well as to the assignment of credit rights as a guarantee, the provisions referred to in numeral 6 of Article 7 of the Value Added Tax Law, Decree Number 27-92 of the Congress of the Republic.	
Article 8 Contractual limitations on the transfer of receivables 1. 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. 2. Neither a transferor nor a transferee is liable for breach of an agreement referred to in paragraph 1, and the debtor may not avoid the contract giving rise to the receivable on the sole ground of the breach. A person that is not a party to an agreement referred to in paragraph 1 is not liable for the transferor's breach of the agreement on the sole ground that it had knowledge of the agreement.		
Article 9 — Registration A transfer of a receivable is effective against third parties only if a notice with respect to the transfer is registered in the Registry.	Governed by Guatemalan Law in a different body. Securities Law (Ley de Garantias Mobiliarias)	
Article 10 — Proceeds If a transfer of a receivable is effective against third parties, the transferee's right to any proceeds of that receivable under Article 6 is also effective against third parties.	Governed by Guatemalan Law in a different body. Securities Law (Ley de Garantias Mobiliarias)	
Article 11 — Continuity in third-party effectiveness upon a change of the applicable law to this Law 1. If a transfer is effective against third parties under the law of another State and this Law becomes applicable, the transfer remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of: (a) the time when third-party effectiveness would have lapsed under the law of the other State; and (b) the expiry of [a short period of time to be specified by the enacting State] after this Law becomes	This is currently not expressly regulated under Guatemalan Law.	

applicable. 2. If a transfer continues to be effective against third parties under paragraph 1, the time of third-party effectiveness is the time when it was achieved under the law of the other State.		
Article 12 — The Registry The rules relating to registrations and searches in the Registry are set out in Annexe A.	Governed by Guatemalan Law in article 24 and subsequent.	Guatemalan law takes into account 2 types of registrations. The first one being the book entry ties that has a constitutive character since when the contract is annotated it is perfect between the parties. The second registration mentioned in our law has declarative effects towards third parties and must be made in the Registry of Movable Guarantees. This registry grants publicity and priority before third parties. One difference with respect to the MLF is that the Model Law does not expressly state who has standing to apply for registration. Although it could be inferred that the legal standing to apply for registration can be anyone who has an interest. We would therefore recommend expressly including who will have standing to request registration.
Article 13 — Competing transfers Priority between competing transfers of the same receivable is determined by the order of registration.		Regarding cross-border transactions, it is advisable to clarify that priority is determined by other of registration in the same registry, or in the registry in which the receivable or the debtor is located.
Article 15 — Impact of the transferor's insolvency on the priority of a transfer		It might be advisable considering including the effects of insolvency procedures upon the debtor of the receivable.

A transfer that is effective against third parties at the time of the commencement of insolvency proceedings in respect of the transferor remains effective against third parties and retains the priority it had before the commencement of the insolvency proceedings, unless another claim has priority pursuant to the applicable insolvency law.		
Article 17 — Transfers competing with rights of judgment creditors 1. The right of a creditor that has obtained a judgment or provisional order ("judgment creditor") has priority over a transfer if, before the transfer is made effective against third parties, the judgment creditor has [taken the steps to be specified by the enacting State for a judgment creditor to acquire rights in the receivable or the steps referred to in the relevant provisions of other law to be specified by the enacting State]. 2. In the case of a security transfer, if the transfer is made effective against third parties before or at the same time the judgment creditor acquires its right in a receivable by taking the steps referred to in paragraph 1, the transfer has priority but that priority is limited to the greater of the credit extended by the transferee: (a) Before the transferee received a notice from the judgment creditor that the		Regarding this matter, it might be advisable to include the right of the transferee to terminate the contract if the rights of judgment creditors affect the enforceability of his own rights.

judgment creditor has taken the steps referred to in paragraph 1 or within [a short period of time to be specified by the enacting State] thereafter; or (b) Pursuant to an irrevocable commitment of the transferee to extend credit in a fixed amount or an amount to be fixed pursuant to a specified formula, if the commitment was made before the transferee received a notice from the judgment creditor that the judgment creditor had taken the steps referred to in paragraph 1.		
Article 18 — Subordination 1. A person may at any time subordinate the priority of its rights under this Law in favour of any existing or future competing claimant. The beneficiary need not be a party to the subordination. 2. Subordination does not affect the rights of competing claimants other than the person subordinating its priority and the beneficiary of the subordination.		Regarding this matter, it is advisable to include the formal requirements that should be met for considering the subordination as perfected, such as the registration of the subordination.
Article 21 — Rights and obligations of the transferor and the transferee 1. The mutual rights and obligations of a transferor and transferee arising from their transfer agreement are determined by the terms and conditions set out in that agreement, including any rules or general conditions referred to therein. 2. The transferor and the transferee are bound by any usage to which they have agreed and, unless otherwise agreed, by any practices they have established between	Article 1. Object. The purpose of this Law is to regulate the factoring contract and the discount contract. The present Law is of a subsidiary nature, it applies supplementary to the will of the parties.	No comment

themselves.		
Article 22 — Representations of the transferor 1. The transferor of a receivable represents, as at the time of the transfer, that: (a) The transferor has the right to transfer the receivable; (b) The transferor has not previously transferred the receivable to another transferee; and (c) The debtor does not and will not have any defences or rights of set-off. 2. The transferor does not represent that the debtor has, or will have, the ability to pay	Except for the provision contained in section 2 of this article, this is currently not expressly regulated under Guatemalan Law; however, based on the principles recognized under article 669 of the Commerce Code quoted above, the transferor should inform the transferee of all relevant or substantial factors for the transaction (which include the representations mentioned in this article). The relevant provision reads as follows: Article 12. Responsibility. Unless otherwise agreed, the assignor or seller is liable to the counter, the factor or its assignee for payment of the assigned receivable.	Article 22(1): First, regarding the chapeau of this section, it might be advisable to change its drafting since as it stands it might be understood that in all cases the transferor must make these representations but there are certain cases in which the receivable that is transferred might be encumbered or the object of a litigation. Second, concerning littera c) of this section, specifically in the phrase “and will not have”, we consider that, as it stands, it might be contrary to what it is established in the chapeau of the same section since the chapeau reads as follows: “The transferor (...) represents, as at the time of the transfer (...)”, but, according to this incise, he/she makes a representation for the future, which is also for him/her to make since it may not assure what will happen in a future to a receivable to it is no more in his/her domain. In this scenario, the solution may be to add that this incise is referring particularly to defenses and rights of set-off arising from the contract as it stands as at the time of the transfer, which is also consistent with article 28. Article 22(2): According to the article quoted of the GLF the transferor is responsible before the transferee for the actual payment of the receivable; however, the current drafting of this section not only reflects the common rules of the civil law on this matter but it is also the solution that is fairer and the one that corresponds to the reality of the market.

Article 23 — Right to notify the debtor 1. The transferor, the transferee or both may send the debtor notification of a transfer and a payment instruction, but after notification of the transfer has been received by the debtor only the transferee may send a payment instruction. 2. Notification of a transfer or payment instruction sent in breach of an agreement between the transferor and the transferee is not ineffective for the purposes of Article 27, but nothing in this Article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.	Article 14. Notification. The discounter or factor, as the case may be, shall notify the debtor of a receivable subject to discount or factoring of the assignment. Notification to the debtor of the assigned receivable may be made by any generally accepted written means, including ordinary mail or courier, with certified acknowledgment of receipt, by electronic document or by notarial or judicial service. Such notification, to be effective, must identify the assigned receivable, and include sufficient instructions to enable the debtor thereof to make payment, which may include direct payment to the counter. Such notice shall give priority to the counter, factor or assignee over any other action, defence, protective measure, encumbrance, which the debtor of a discounted claim is subsequently notified of.	The provision contained in the present article of the MLF (together with the right granted to the debtor under Article 27(7) of the MLF) gives more security to the transactions since it protects the debtor for being defrauded by a person falsely claiming to be the new creditor of a receivable.
Article 24 — Right to payment 1. As between the transferor and the transferee, whether or not notification of a transfer has been sent: (a) If payment with respect to the receivable is made to the transferee, the transferee is entitled to retain the payment; (b) If payment with respect to the receivable is made to the transferor, the transferee is entitled to be paid that amount by the transferor; and (c) If payment with respect to the receivable is made to another person over whom the transferee has priority, the transferee is entitled to be paid that amount by the other person. 2. In the case of a	This is currently not expressly regulated under Guatemalan Law.	No comment

receivable that arose under a contract for the supply of goods, the transferee is entitled to any goods that may be returned in respect of the receivable. 3. A transferee may not retain more than the value of its right in the receivable.		
Article 25 — Principle of debtor protection 1. Except as otherwise provided in this Law, a transfer does not, without the consent of the debtor, affect the rights and obligations of the debtor, including the payment terms contained in the contract giving rise to the receivable. 2. A payment instruction may change the person, address or account to which the debtor is required to make payment, but may not change without the consent of the debtor: (a) The currency of payment specified in the contract giving rise to the receivable; or (b) The State specified in the contract giving rise to the receivable in which payment is to be made to a State other than that in which the debtor is located.	This is currently not expressly regulated under Guatemalan Law; however the substance of section 1 of the MLF might be derived from the general principle of consent recognized in article 1518 of the Civil Code.	The principle of debtor protection, particularly in the context presented within article 25(2) is a good addition that our current legislation lacks. Regarding this principle, the GLF only stipulates that there must be payment instructions so that the debtor may make payment. However, it does not go into depth about what the instructions should contain, what might be changed, and what must be maintained as originally intended. Article 25 (2) of the MLF provides a clearer set of rules in this regard. Having clear rules on what the payment instruction might modify, and what must be kept as originally intended unless the debtor consents to modify it, is a good addition that will also contribute to the overall enforceability of factoring contracts.
Article 26 — Notification of the debtor 1. A notification of a transfer and a payment instruction must be in writing. 2. A notification of a transfer or a payment instruction is effective when received by the debtor if it reasonably identifies the receivable and the transferee, and is in a language that is reasonably expected to inform the debtor about its contents. It is sufficient if the notification of the transfer or a payment instruction is in the language of the contract giving rise to the	Article 14. Notification. The discounter or factor, as the case may be, shall notify the debtor of a receivable subject to discount or factoring of the assignment. Notification to the debtor of the assigned receivable may be made by any generally accepted written means, including ordinary mail or courier, with certified acknowledgment of receipt, by electronic document or by notarial or judicial service. Such notification, to be effective,	The distinction between a notification of a transfer and a payment instruction that Article 26 of the MLF is so valuable; as the other different provisions that this same Article includes.

receivable. 3. A notification of a transfer or a payment instruction may relate to receivables arising after notification. 4. Notification of a transfer constitutes notification of all previous transfers.	must identify the assigned receivable, and include sufficient instructions to enable the debtor thereof to make payment, which may include direct payment to the counter. Such notice shall give priority to the counter, factor or assignee over any other action, defence, protective measure, encumbrance, which the debtor of a discounted claim is subsequently notified of.	
Article 27 — Debtor's discharge by payment 1. Until the debtor receives notification of a transfer, the debtor is discharged by paying in accordance with the contract giving rise to the receivable. 2. After the debtor receives notification of a transfer pursuant to Article 26, subject to paragraphs 3 to 8, 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. 3. If the debtor receives more than one payment instruction relating to a single transfer of the same receivable by the same transferor, the debtor is discharged by paying in accordance with the last payment instruction received from the transferee before payment. 4. If the debtor receives notification of more than one transfer of the same receivable by the same transferor, the debtor is discharged by paying in accordance with the first notification received. 5. If the debtor receives notification of a transfer by a person to whom	This is currently not expressly regulated under Guatemalan Law.	The adoption of the rules contained in this Article of the MLF together with the rules contained in the previous Article could make the current local rules on this matter much clearer.

the receivable has been transferred, the debtor is discharged by paying in accordance with the notification of that transfer or, in the case of a series of such transfers, the notification of the last of those transfers. 6. If the debtor receives notification of the transfer of a part of or an undivided interest in one or more receivables, the debtor is discharged by paying in accordance with the notification or in accordance with this Article as if the debtor had not received the notification. If the debtor pays in accordance with the notification, the debtor is discharged only to the extent of the part or undivided interest paid. 7. If the debtor receives notification of a transfer from the transferee, the debtor is entitled to request the transferee to provide within a reasonable period of time adequate proof that the transfer from the initial transferor to the initial transferee and any intermediate transfer has been made. Unless the transferee does so, the debtor is discharged by paying in accordance with this Article as if the notification had not been received. Adequate proof of a transfer includes but is not limited to any writing emanating from the transferor that indicates that the transfer has been made. 8. This Article does not affect any other ground on which payment by a debtor to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund, discharges the debtor.		
Article 28 — Defences and rights of set-off of the debtor 1. In a claim by the transferee against	Article 15. Defences. The debtor of the assigned receivable may	No comment

the debtor for payment of a receivable, the debtor may raise against the transferee all defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the transfer had not been made and the claim were made by the transferor. 2. The debtor may raise against the transferee any other right of set-off, provided that was available to the debtor at the time it received the notification. 3. [Notwithstanding paragraphs 1 and 2, defences and rights of set-off that the debtor may raise pursuant to Article 7 or 8 against the transferor for breach of an agreement limiting in any way the transferor's right to transfer the receivable are not available to the debtor against the transferee.]	oppose to the counter, buyer or the factor, the exceptions that could have been raised against the seller or assignor, except those that are personal and are not transferred with the assignment of the receivable. Article 16. Compensation. The debtor of an assigned receivable may not set off the counter, buyer or the factor, unless the contract giving rise to the assigned receivable provides that it should have been notified earlier and the assignment could be opposed, or such an assignment allowed a personal debt to be set-off. Article 17. Personal defences. The debtor of the assigned receivable may raise against the accountant or the factor any personal defences he has against him. The debtor may also raise set-off and confusion if they are due to obligations that he has with the discounter or the factor.	
Article 29 — Agreement not to raise defences or rights of set-off 1. A debtor may agree with the transferor in a signed writing not to raise against the transferee the defences and rights of set-off that it could raise in accordance with Article 28. 2. A debtor may not waive defences: (a) Arising from fraudulent acts of the transferee; or (b) Based on the debtor's incapacity. 3. Such an agreement may be modified only by an agreement in a writing signed by the debtor. The effect of such a modification as against the transferee is determined by Article 30(2).	This is currently not expressly regulated under Guatemalan Law.	

Article 30 — Modification of the contract giving rise to a receivable 1. A modification of the contract giving rise to a receivable that is made between the transferor and the debtor before the debtor receives notification of the transfer and that affects the transferee's rights is effective as against the transferee, and the transferee acquires corresponding rights. 2. A modification that is made between the transferor and the debtor after the debtor receives notification of the transfer and that affects the transferee's rights is ineffective against the transferee unless: (a) The transferee consents to it; or (b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable transferee would consent to the modification. 3. Paragraphs 1 and 2 do not affect any right of the transferor or the transferee arising from breach of an agreement between them.	This is currently not expressly regulated under Guatemalan Law; however the substance of section 1 of the MLF might be derived from the general principle of consent recognized in article 1518 of the Civil Code.	No comment
Article 31 — Recovery of payments Failure of a transferor to perform the contract giving rise to the receivable does not entitle the debtor to recover from the transferee a sum paid by the debtor to the transferor or the transferee.	Article 23. Obligation of the disclaimer, assignor or seller to comply with the contract. If the disclaimer, assignor or seller is obliged to perform a service under the contract by which he is the holder of the receivable subject to discount, said dismissee, assignor or seller is obliged to perform the obligation assumed in the contract. The assignment of the claim does not imply the assignment of contractual rights, unless expressly stated in the discount agreement or factoring contract. Therefore, if	The rule contained in this Article of the MLF is consistent with the autonomous character of the receivable with respect of the contract from which it arises; that is not the case of Article 23 of the GLF which is also contrary to what is established in the first paragraph of Article 4 of the GLF which also recognizes the principle of the autonomy of the receivable stating: "Article 4. Contractual obligation and receivable. As regards discounting and factoring, the service, which is the subject of the contract, must be distinguished from the

	as a result of the default of the obligor or assignor, the discounter or factor does not receive the payment of the assigned receivable, such discounter or the factor will be entitled to initiate enforcement proceedings against the disclaimer or assignor for the amount of the assigned receivable, plus the interest generated and the damages, if they have been caused. The document stating the discount or where the factoring is recorded is sufficient enforceable. The foregoing is, without prejudice to the process initiated by the creditor of the unfulfilled contractual obligation.	receivable arising as a result of that contract. Therefore, the subject of the discount contract and factoring is the assignment of the receivables embodied in a contract and not the contract itself or the obligations acquired by the contractual party (...)".
Article 34 — Right of the transferee to sell a receivable 1. After default, the transferee under a security transfer is entitled to sell the receivable without applying to a court or other authority. 3. The transferee may select the method, manner, time, place and other aspects of the sale, including whether to sell receivables individually, in groups or altogether. 4. The transferee must give notice of its intention to: (a) The transferor and any person who owes the obligation secured by the security transfer; (b) Any person with a right in the receivable that informs the transferee of that right in writing at least [a short period of time to be specified by the enacting State] before the notice is sent to		Regarding section 4.(b), it might be advisable to limit the persons with rights over the receivable only to those with a *pari passu* or higher priority rank than the rank of the transferee, with the purpose of not having cumbersome requirements that might prevent the transferee from selling the receivable.

the transferor; and (c) Any other transferee that registered a notice with respect to a transfer of the receivable at least [a short period of time to be specified by the enacting State] before the notice is sent to the transferor. 5. The notice must be given at least [a short period of time to be specified by the enacting State] before the sale takes place and must contain: (a) A description of the receivables; (b) obligation secured by the security transfer, including interest and the reasonable cost of enforcement; (c) A statement that the transferor, any person who owes the obligation secured by the transfer or any other person with a right in the receivable is entitled to terminate the enforcement process; and (d) A statement of the date after which the receivable will be sold or, in the case of a public sale, the time, place and manner of the intended sale. A statement of the amount required at the time the notice is given to satisfy the The notice must be in a language that is reasonably expected to inform the recipient about 7. It is sufficient if the notice to the transferor is in the language of the		

transfer agreement. 8. The notice need not be given if the receivable is of a kind sold on a recognised market.		
Article 35 — Distribution of the proceeds of collection or sale of a receivable and liability for any deficiency 1. If the transferee exercises the right provided in Article 33 or 34: (a) [Subject to Article 16,] the transferee must apply the proceeds of its collection or sale to the obligation secured by the transfer after deducting the reasonable cost of collection or sale; (b) Except as provided in paragraph 2(c), the transferee must pay any surplus to any subordinate competing claimant that, prior to any distribution of the surplus, notified the transferee of its claim, to the extent of the amount of that claim, and remit any balance remaining to the transferor; and (c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the transferee may pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority. 2. The transferor and any person who owes the obligation secured by the security transfer remains liable for any amount owing after application of the net		Please review the numbering since it refers to a non-existent paragraph 2(c).

proceeds of collection or sale to the obligation secured by the transfer.		
Article 38 — Effectiveness and priority of transfers Except as provided in Article 39, the law applicable to the effectiveness and priority of a transfer of a receivable is the law of the State in which the transferor is located.	N/A	Current private international law in Guatemala would provide for the applicable law to be the one of the country where the contract (here the transfer) is to be performed, absent contrary agreement. A different solution, is adopted in our Ley de Garantías Mobiliarias (law on securities over movable goods), that, consistently with the MLF, the law applicable is the one of the transferor's location. Regarding immovable objects, the lex rei sitae is presently adopted in Guatemala.
N/A	N/A	Guatemalan law provides for the immediate application of new procedural statutes which in the literature is taken to imply that the new procedural law applies to new stages in the same proceedings, but not older "concluded" ones. The MLF on the other hand suggests that the new law does not apply to prior proceedings at all, understanding prior proceedings as referring to proceedings initiated prior to the entry into force of the MLF. This may lead to a modification of internal Guatemalan law in case of implementation.
Article 50 — Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law 1. Subject to paragraph 2, prior law applies to a matter that is the subject of proceedings	N/A	In the context of enforcement, the MLF suggests that either the old or the new law may apply depending on the case. The MLF is not clear as to the criteria governing which of the two laws is to apply. This. may present some issues in case of

before a court or arbitral tribunal commenced before the entry into force of this Law. 2. If any step has been taken to collect or enforce a prior transfer before the entry into force of this Law, collection or enforcement may continue under prior law or may proceed under this Law.		implementation, given Guatemala's provisions on non-retroactive law.

ANNEXE 26 – COMMENTS FROM THE SUPERINTENDENCY OF FINANCE OF COLOMBIA

(sent by Mr Bernardo BRO. Rodríguez Ossa)

SUPERINTENDENCIA FINANCIERA DE COLOMBIA

Radicación:2022170775-001-000
Fecha: 2022-10-21 18:05 Sec.dia3859
Anexos: No
Trámite::773-CORRESPONDENCIA INFORMATIVA
Tipo doc::39-RESPUESTA FINAL E
Remitente: 50300-50300-SUBDIRECCION DE REGULACION
Destinatario::ATM220403-BERNARDO RODRIGUEZ OSSA

Señor
BERNARDO RODRIGUEZ OSSA
Carrera 9 No. 74 - 08 Oficina 504
bernardo.rodriguez@pralaws.com
Bogotá D.C.

Número de Radicación : 2022170775-001-000
Trámite : 773 CORRESPONDENCIA INFORMATIVA
Actividad : 39 RESPUESTA FINAL E
Anexos :

Respetados señor Rodríguez:

De manera atenta me refiero a su comunicación radicada bajo el número de la referencia mediante la cual informa, en su condición de corresponsal del el Instituto Internacional para la Unificación del Derecho Privado (UNIDROIT), que dicho instituto está adelantando un proceso de consultas del borrador de su ley modelo sobre factoring.

La Superintendencia Financiera de Colombia agradece la oportunidad brindada por su conducto para remitir comentarios al documento de consulta frente al proyecto de ley sobre factoring. Así mismo, resaltamos y destacamos este modelo de ley que, sin duda, contribuirá a la construcción y mejora de un instrumento económico adecuado para favorecer la realización de operaciones de factoring con mayores condiciones de seguridad jurídica y transparencia.

Sobre el particular, la Superintendencia Financiera pone a consideración los siguientes comentarios:

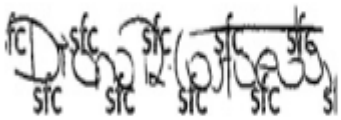
1. En primer lugar, se observa que la exigencia del registro podría llegar a entenderse como un requisito adicional para el perfeccionamiento de la operación de factoring y no únicamente como un requisito de oponibilidad frente a terceros. En esa medida, y teniendo en cuenta que la operación de factoring en ocasiones se desarrolla de manera masiva, el mencionado requisito podría generar un desincentivo para la celebración del mismo.

2. En segundo lugar, amablemente sugerimos que no se limite el tipo de "receivables" que pueden transferirse por medio de la operación de factoring, sino que se señalen los requisitos mínimos que estos deben cumplir. Lo anterior, para efectos de permitir que otro

tipo de documentos que cumplan esos requisitos puedan llegar a transferirse por medio de esta operación

Finalmente, reiteramos nuestro agradecimiento y quedamos atentos en caso de que se requiera alguna aclaración.

Cordialmente,



DIANA ROCIO CASTANEDA SUAREZ
50300-SUBDIRECTOR DE REGULACION
50300-SUBDIRECCION DE REGULACION

Copia a:

Elaboró:
GERALDINE FANDIÑO BUSTOS
Revisó y aprobó:
DIANA ROCIO CASTANEDA SUAREZ

ANNEXE 27 – BBVA LAWYERS TEAM COMMENTS TO UNIDROIT ML ON FACTORING (MLF)

(sent by Mr David Morán Bovio)

Introduction

October 24th, 2022, at 12:00, BBVA Lawyers' team dealing with Factoring [Juan José Asegurado Fernández, as organizer, and his team on the issue: Elena Gonzalez-Estefani Marín (finally she couldn't attend), Aitor Ruiz de Alegría Carrero and Celia Avilés de Benito] in Spain and some other States where BBVA works (Belgium, Portugal, France, UK), hold a video-conference with Unidroit Correspondent (UC), Professor David Morán Bovio, in order to comment MLF.

Previously, although with not too much time, they have had the opportunity to join their views. As Mr. Asegurado was explaining their views UC wrote. Afterwards Mr. Asegurado sent UC the points. This list united with the notes organize the following comments.

All numbers are written mainly from Spain National Law perspective although influenced by international commercial relationships in BBVA ordinary dealings. The nature of the Model Law (a text to be adapted to different jurisdictions) wasn't bear in mind in order to look at it more directly and without any filter.

BBVA Lawyers team thanked the opportunity and were ready for further discussions.

Comments

1. Commercial dispute [something goes wrong between debtor and transferor within their mutual commercial relationship] after transfer agreement. Perhaps more attention is needed along MLF. What happens when commercial disputes arise. How to deal with reimbursement to the debtor who returns the goods.
2. Transferor agrees public receivables [receivables own by Public Entities] transfer, but Public Entity's National Law prohibit such transfer agreement or National Law introduces limitations. This aspect perhaps requires different attention calls (asterisks) along the text in order to let know the States the need to check their National Law in different settings.
3. Article 2.1.(f).(iii). Considers transfer of each receivable within the credit card relationship or a bulk transfer? [see below number 5]
4. Article 5.2: "A receivable may be transferred by a transfer agreement if the transferor has rights in the receivable or the power to transfer it". The alternative perhaps ought to be a cumulative: "and" instead of "or". So the reading should be: "A receivable may be transferred by a transfer agreement if the transferor has rights in the receivable and the power to transfer it".
5. Article 5.3.(a): it appears difficult to be implemented if bulk transfer doesn't indicate transfer of each receivable. Particularly if different commercial aspects in debtor-transferor relationships are considered. Bulk transfer without indication of each receivable appears problematic.
6. Article 5.4: the insolvency perspective (Article 271.3 Spanish Law) generates some doubts to enforce it.
7. Article 7.2: the possibility fixed there still is not common in Spanish Law (article 1198 Código civil, that being inspired in French Civil code it could be seen as a difficulty on other States with that common inspiration).
8. Article 8: shares the very same difficulty described above (number 7). The National Law reference changes to 1526 and 1527 Código civil.

9. Article 9: our National Law opens another difficulty with regional registries (Basque, by now).
10. Article 11: Continuity perhaps not needed if transfer of receivables was once effective.
11. Article 15: its regime could be opposed by Spain Insolvency Law (Article 226). It is to be clarified if with MLF we are within a special rule (or not).
12. Article 22.1.(c): what about commercial disputes [described within number 1 above]?
13. Article 23.1: Perhaps notifications might be to the transferor exclusively limited (particularly when Article 27.7 is read and Annex Clause 2.1).
14. Article 24.2: Sounds opposed to creditor's right to sell (judicially or by similar proceedings) the goods but his inability (in Spanish system) to retain them.
15. Article 26.4: The ground to support it doesn't appear so clear.
16. Article 28: His relationship with Article 22.1.(c) perhaps deserves additional clarification to underline the different debtor-transferor and debtor-transferee relationships.
17. Article 31: Again commercial disputes [see above number 1]: if the debtor returns the goods to the transferor, who (transferor or transferee) owns the payment back?
18. Article 32.2: It seems easier to apply it to personal rights transfer than to property rights (this second group needs more formalities).
19 Annex. Clause 4: Appears rather shocking presently in Spanish system.

ANNEXE 28 – OBSERVATIONS FROM THE REPUBLIC OF ARGENTINE

(sent by Mr Lucas R. Paviolo)

These observations are not included in the Secretariat's analysis document

UNIDROIT – Ley Modelo de Factoraje

Comentarios de la República Argentina

A. Consideraciones Generales

i. Existe como antecedente a la LMF la Convención De Unidroit Sobre Factoring Internacional suscripta en Ottawa en 1988, la cual entró en vigor en 1995 y cuenta con nueve Estados contratantes, entre los cuales no se cuenta a la Argentina. La Convención regula operaciones de Factoring internacional.

ii. Por su parte, la LMF bajo análisis abarca tanto operaciones de carácter internacional como nacional, así como incorpora providencias relativas a las prácticas actuales de Factoring, las cuales no existían al momento de la suscripción de la Convención en 1988.

Asimismo, el contenido de la LMF es consistente con la normativa de la CNUDMI vinculada a la materia, a saber la Ley Modelo sobre Garantías Mobiliarias (2016) y la Convención de las Naciones Unidas sobre la Cesión de Créditos en el Comercio Internacional (2001).

iii. En este contexto, la LMF se propone como instrumento de soft law, con el objetivo de servir como instrumento para los Estados que quieren contar con una nueva ley de Factoring o actualizar parcialmente leyes existentes. También reviste utilidad para Estados que ya hayan realizado actualizaciones legislativas en la materia y quieran considerar la implementación de reglas adicionales específicas o una mejora de las existentes.

iv. Caracterizar a la LMF como instrumento de soft law con provisiones no vinculantes resulta adecuado para nuestro país en atención a que tanto las definiciones del contrato de Factoring, de las partes vinculadas a través del contrato como la tipificación de los créditos o derechos por cobrar objeto de la operación, sus formas de transferencia y modalidades de financiamiento, garantías y su securitización, así como otros elementos, exceden en el texto de la LMF lo previsto en el Código Civil y Comercial argentino (CCC) en su Libro Tercero, Título IV, capítulo 13.

v. A modo de ejemplo del mayor alcance previsto en la LMF frente a la legislación nacional, el artículo 1421 del CCC tipifica al contrato de Factoring como "la obligación de adquirir créditos originados en el giro comercial", mientras que la LMF se refiere en su artículo 1.1 a la "transmisión de créditos", definiendo a los mismos en su artículo 2.f como aquellos " (i) surgidos de contratos para la provisión o consignación de bienes y servicios, (ii) surgidos de contratos para la licencia o asignación de propiedad intelectual y (iii) que representen el pago de una obligación de una transacción de tarjeta de crédito", excluyendo a los créditos originados en operaciones de carácter puramente financiero.

vi. Cabe agregar que, la antedicha caracterización de la LMF como soft law propicia su compatibilidad con la legislación nacional, en atención a lo previsto en el inciso d) del artículo 2651 del CCC, en tanto puede entenderse que el instrumento representa "los usos y prácticas

comerciales generalmente aceptados por el derecho comercial internacional, las costumbres y los principios del derecho comercial internacional" que resultan aplicables cuando las partes, en virtud de su autonomía, eligen incorporarlas al contrato de Factoring.

B. Consideraciones Particulares sobre el Capitulo "Conflicto de Leyes"

En relación con la compatibilidad del Capítulo VIII de la LMF "Conflicto de Leyes" con el Código Civil y Comercial (Apartado IV "Disposiciones de Derecho Internacional Privado"), cabe formular los siguientes comentarios:

i. El inciso 1 del artículo 37 de la LMF establece que la ley aplicable a los derechos y obligaciones recíprocos del cedente y del cesionario, derivados de su acuerdo de transferencia es la ley elegida por ellos y, en ausencia de una elección de ley, es la ley que rige el acuerdo de transferencia.

Esta redacción es compatible con el art. 2651 del CCC, que establece que "los contratos se rigen por el derecho elegido por las partes en cuanto a su validez intrínseca, naturaleza, efectos, derechos y obligaciones. La elección debe ser expresa o resultar de manera cierta o evidente de los términos del contrato o de las circunstancias del caso".

Al respecto de la posibilidad de que en ausencia de elección de ley, aquella aplicable sea la que rige el acuerdo de transferencia según establece la LMF, se advierte compatibilidad con el artículo 1652 del CCC en tanto éste establece que "En defecto de elección por las partes del derecho aplicable, el contrato se rige por las leyes y usos del país del lugar de cumplimiento. Si no está designado, o no resultare de la naturaleza de la relación, se entiende que lugar de cumplimiento es el del domicilio actual del deudor de la prestación más característica del contrato", al caracterizar a la transferencia como la referida "prestación más característica del contrato".

ii. El inciso 2 del artículo 37 de la LMF establece que la ley aplicable a los derechos y obligaciones entre el deudor y el cedente será la ley aplicable a " (a) Los derechos y obligaciones mutuos del deudor y el cesionario; (b) Las condiciones bajo las cuales la transferencia puede ser invocada contra el deudor, incluyendo si puede hacerse valer una limitación al derecho del cedente a transferir el crédito por cobrar por el deudor; y (c) Si se han cumplido las obligaciones del deudor".

Esta redacción resulta compatible con el artículo 2651 inciso d) del CCC que establece que "d) los usos y prácticas comerciales generalmente aceptados, las costumbres y los principios del derecho comercial internacional, resultan aplicables cuando las partes los han incorporado al contrato".

iii. Los artículos 38, 42 y 43 de la LMF se refieren a la localización del cedente.

El artículo 38 de la LMF establece que, "la ley aplicable a la eficacia y prioridad de una transferencia de un crédito, es la ley del Estado en que se encuentre localizado el cedente".

En complemento, el artículo 42 de la LMF esclarece el significado de esta última expresión: "el cedente está localizado: a) En el Estado en que tenga su establecimiento de negocios; (b) Si el cedente tiene su lugar de negocios en más de un Estado, en el Estado en el que se ejerce la

administración central; y (c) Si no tiene un asiento de negocios, en el Estado en el que tiene su residencia habitual".

Finalmente el artículo 43 de la LMF precisa que las alusiones a la localización del cedente se aplican: " (a) Para cuestiones relacionadas con la efectividad de la transferencia entre el cedente y el cesionario, a la ubicación del cedente en el momento de la supuesta creación de la transferencia; y; (b) Para las cuestiones de oponibilidad a terceros y prelación, a la ubicación del cedente en el momento en que surge el problema".

En el caso de los artículos de referencia, se advierte compatibilidad parcial con el artículo 2613 del CCC, el cual define al domicilio y residencia habitual de la persona humana como "a) su domicilio, en el Estado en que reside con la intención de establecerse en él; b) su residencia habitual, en el Estado en que vive y establece vínculos durables por un tiempo prolongado. En caso de no tener domicilio conocido, se considera que lo tiene donde está su residencia habitual o en su defecto, su simple residencia".

iv. El artículo 39 de la LMF establece que "en el caso de una transferencia de un crédito garantizado por un derecho en los bienes inmuebles, la ley aplicable a la prioridad de la transmisión del crédito frente al derecho de un reclamante concurrente que es inscribible en el registro de la propiedad inmueble en el que pueden inscribirse los derechos sobre el inmueble en cuestión es la ley del Estado bajo cuya autoridad se lleva el registro de la propiedad del inmueble".

Este artículo es compatible con los artículos 2663 y 2667 del CCC que establecen respectivamente que "La calidad de bien inmueble se determina por la ley del lugar de su situación" y que "Los derechos reales sobre inmuebles se rigen por la ley del lugar de su situación. "

v. El artículo 44 de la LMF, denominado "Exclusión de reenvío" afirma que la referencia a "la ley" de un Estado como la ley aplicable a un asunto se refiere a la ley vigente en ese Estado distinta de sus normas de derecho internacional privado.

Se observa coherencia con lo establecido en el artículo 2596 del CCC que indica que "Cuando, en una relación jurídica, las partes eligen el derecho de un determinado país, se entiende elegido el derecho interno de ese Estado, excepto referencia expresa en contrario".

Se interpreta que, en materia contractual, si los particulares celebran un negocio jurídico donde acuerdan cuál es el derecho aplicable, debe inferirse que se refieren al derecho privado. El derecho seleccionado tiene como función evitar normas de conflicto. Por lo tanto, la elección es a la ley material, excluyendo el reenvío, salvo que exista expresa referencia en sentido contrario.

vi. El artículo 45 de la LMF establece que "1. Las disposiciones de este capítulo no impiden que un tribunal aplique leyes imperativas de la ley del foro que se aplican independientemente de la ley aplicable bajo las disposiciones de este capítulo. 2. Este artículo no permite que un tribunal desplace las disposiciones de este capítulo relativas a la ley aplicable a la oponibilidad de terceros y la prioridad de una transferencia".

El inciso 1 referido se encuentra en línea con lo prescripto por el artículo 2599 del CCCC que establece que "Las normas internacionalmente imperativas o de aplicación inmediata del derecho argentino se imponen por sobre el ejercicio de la autonomía de la voluntad y excluyen la aplicación del derecho extranjero elegido por las normas de conflicto o por las partes. Cuando resulta aplicable un derecho extranjero también son aplicables sus disposiciones internacionalmente imperativas, y cuando intereses legítimos lo exigen pueden reconocerse los efectos de disposiciones internacionalmente imperativas de terceros Estados que presentan vínculos estrechos y manifiestamente preponderantes con el caso".

Cabe recordar que el CCC recepta con el nombre de normas internacionalmente imperativas un tipo de normas rigurosamente obligatorias que están fundadas en nociones de orden público. Su presencia excluye la aplicación y funcionamiento de normas indirectas y, por lo tanto, hace un uso jurídico del derecho extranjero.

Por otra parte, se advierten problemas de compatibilidad del inciso 2 con lo previsto en el art. 2600 del CCC, el que indica que "Las disposiciones de derecho extranjero aplicables deben ser excluidas cuando conducen a soluciones incompatibles con los principios fundamentales de orden público que inspiran el ordenamiento jurídico argentino".

vii. Finalmente, el artículo 47 de la LMF proyecto de Ley Modelo, encorchetado en la versión bajo análisis, refiere que "Si la ley aplicable a una cuestión es la ley de un Estado que comprende uno o más territorios unidades, cada una de las cuales tiene sus propias reglas de derecho con respecto a esa cuestión: (a) Cualquier referencia en este capítulo a la ley de un Estado significa la ley vigente en el unidad territorial; y (b) Las reglas internas de conflicto de leyes de ese Estado, o en ausencia de tales reglas, de ese unidad territorial determina la unidad territorial cuya ley sustantiva se aplicará".

Este artículo resulta compatible con el artículo 2595 del CCC que establece que "Cuando un derecho extranjero resulte aplicable: [ ] b) si existen varios sistemas jurídicos covigentes con competencia territorial o personal, o se suceden diferentes ordenamientos legales, el derecho aplicable se determina por las reglas en vigor dentro del Estado al que ese derecho pertenece y, en defecto de tales reglas, por el sistema jurídico en disputa que presente los vínculos más estrechos con la relación jurídica de que se trate".

TRADUZIONE NON UFFICIALE

UNIDROIT – Legge Modello di Factoring

Commenti della Repubblica Argentina

A. Considerazioni generali

i. Come premessa alla LMF vi è la *Convenzione Unidroit sul factoring internazionale* firmata a Ottawa nel 1988, entrata in vigore nel 1995 e conta nove Stati contraenti, tra i quali non si annovera l'Argentina. La Convenzione disciplina le operazioni di *Factoring* internazionale.

ii. Da parte sua, la LMF in esame coinvolge sia le operazioni internazionali che nazionali, oltre a comprendere ordinanze relative alle pratiche attuali di *Factoring*, che non esistevano al momento della sottoscrizione della Convenzione nel 1988.

Parimenti, il contenuto della LMF è coerente con le normative della CNUDMI legate alla materia, vale a dire la Legge Modello sulle Garanzie Immobiliari (2016) e la Convenzione delle Nazioni Unite sulla Cessione di Crediti nel commercio internazionale (2001) .

iii. In questo contesto, la LMF si propone come strumento di *soft law*, con l'obiettivo di fungere da strumento per gli Stati che intendono avvalersi di una nuova legge di *Factoring* o aggiornare parzialmente leggi esistenti. È utile anche per gli Stati che hanno già realizzato aggiornamenti legislativi in materia e vogliono considerare l'attuazione di specifiche regole aggiuntive o un miglioramento di quelle esistenti.

IV. Caratterizzare la LMF come uno strumento di *soft law* con disposizioni non vincolanti risulta appropriato per il nostro paese in considerazione del fatto che sia le definizioni del contratto di *Factoring* delle parti contrattualmente legate che la configurazione dei crediti o diritti da riscuotere oggetto dell' operazione, le loro forme di trasferimento e modalità di finanziamento, garanzie e la loro cartolarizzazione, nonché altri elementi, vanno oltre nel testo della LMF a quanto previsto dal Codice Civile e Commerciale Argentino (CCC) nel suo Libro Terzo, Titolo IV, capitolo 13.

v. A titolo di esempio della maggior portata prevista dalla LMF rispetto alla normativa nazionale, l'articolo 1421 del CCC configura il contratto di *Factoring* come "l'obbligo di acquisire crediti originati nel giro commerciale", mentre la LMF si riferisce nel proprio articolo 1.1 alla "trasmissione di crediti", definendoli nel suo articolo 2.f come quelli " (i) derivanti da contratti di fornitura o consegna di beni e servizi, (ii) derivanti da contratti per la licenza o l'assegnazione della proprietà intellettuale e (iii) che rappresentino il pagamento di un'obbligo di una transazione con carta di credito", esclusi i crediti derivanti da operazioni di natura meramente finanziaria.

vi. È opportuno aggiungere che la suddetta configurazione della LMF come *soft law* ne favorisce la compatibilità con la legislazione nazionale, secondo quanto previsto dalla lettera d) dell'articolo 2651 del CCC, in quanto si può intendere che lo strumento rappresenta "gli usi e le prassi commerciali generalmente accettate dal diritto commerciale internazionale, i costumi e i principi del diritto commerciale internazionale" che sono applicabili quando le parti, in virtù della loro autonomia, scelgono di introdurle al contratto di *Factoring*.

B. Considerazioni particolari sul Capitolo "Conflitto di Leggi"

In relazione alla compatibilità del Capitolo VIII della LMF "Conflitto di leggi" con il Codice Civile e Commerciale (Sezione IV "Disposizioni di Diritto Internazionale Privato"), è opportuno formulare le seguenti osservazioni:

i. Il comma 1 dell'articolo della LMF stabilisce che la legge applicabile ai reciproci diritti e obblighi del cedente e del cessionario, derivanti dal loro accordo di trasferimento, è la legge da essi prescelta e, in mancanza di scelta di legge, è la legge che disciplina il contratto di trasferimento.

Tale redazione è compatibile con l'art. 2651 del CCC, il quale stabilisce che "i contratti sono regolati dalla legge scelta dalle parti per quanto riguarda la loro validità intrinseca, la natura, gli effetti, i diritti e gli obblighi. La scelta deve essere espressa o risultare in modo certo o evidente dei termini del contratto o le circostanze del caso".

Quanto alla possibilità che, in mancanza di scelta di legge, la legge applicabile sia quella che disciplina il contratto di trasferimento così come stabilito dalla LMF, si osserva compatibilità con l'art. 1652 del CCC, in quanto stabilisce che "In assenza di scelta dalle parti del diritto applicabile, il contratto è regolato dalle leggi e dagli usi del Paese del luogo di adempimento. Se non è designato, o non risultasse dalla natura del rapporto, resta inteso che il luogo di adempimento è quello del domicilio attuale del debitore della prestazione più caratteristica del contratto", qualificando il trasferimento come la suddetta "prestazione più caratteristica del contratto".

ii. Il comma 2 dell'articolo 37 della LMF stabilisce che la legge applicabile ai diritti e agli obblighi tra il debitore e il cedente è la legge applicabile a "(a) I diritti e gli obblighi reciproci del debitore e del cessionario; (b) Le condizioni alle quali il trasferimento può essere invocato nei confronti del debitore, compreso se può essere fatta valere una limitazione al diritto del cedente di trasferire il credito da riscuotere dal debitore; e (c) se gli obblighi del debitore sono stati assolti."

Tale redazione è compatibile con l'articolo 2651 lettera d) del CCC, il quale stabilisce che "d) gli usi e le pratiche commerciali generalmente accettate, i costumi e i principi del diritto commerciale internazionale, sono applicabili quando le parti li hanno introdotti nel contratto. "

iii. Gli articoli 38, 42 e 43 della LMF si riferiscono alla localizzazione del cedente.

L'articolo 38 della LMF stabilisce che "la legge applicabile all'efficacia e alla priorità di un trasferimento è la legge dello Stato in cui è localizzato il cedente".

Inoltre, l'articolo 42 della LMF chiarisce il significato di quest'ultima espressione: "il cedente è localizzato: a) nello Stato in cui ha sede la sua attività; (b) Se il cedente ha la sede in più di un Stato, nello Stato in cui è esercitata l'amministrazione centrale del cedente; e (c) se il cedente non ha una sede di attività, nello Stato in cui ha la residenza abituale".

Infine, l'articolo 43 della LMF specifica che i riferimenti alla localizzazione del cedente vengono applicati: "(a) Per questioni relative all'efficacia del trasferimento tra cedente e cessionario, alla localizzazione del cedente al momento del presunta creazione del trasferimento; e; (b) per le questioni di opponibilità ai terzi e prelazione, alla localizzazione del cedente nel momento in cui si verifica il problema."

Nel caso degli articoli di riferimento, si rileva parziale compatibilità con l'articolo 2613 del CCC, che definisce il domicilio e residenza abituale della persona umana come "a) il suo domicilio, nello Stato in cui risiede, con l'intenzione di stabilirsi in esso; b) la sua residenza abituale, nello Stato in cui vive e stabilisce legami duraturi per un tempo prolungato. [] Nel caso non avesse un domicilio conosciuto, si considera quello dove ha la sua residenza abituale oppure, la sua semplice residenza.

IV. L'articolo 39 della LMF stabilisce che "nel caso di trasferimento di un credito garantito da un diritto nei beni immobili, la legge applicabile alla priorità della trasmissione del credito rispetto al diritto di un reclamante concorrente che è iscrivibile al registro dei beni immobili in cui possono essere registrati i diritti sull'immobile in questione è la legge dello Stato sotto la cui autorità è tenuto il registro della proprietà inmobiliare".

Questo articolo è compatibile con gli articoli 2663 e 2667 del CCC che rispettivamente stabiliscono che "La qualità del bene immobile è determinata dalla legge del luogo della sua situazione" e che "I diritti reali sugli immobili sono disciplinati dalla legge del luogo della sua situazione".

v. L'articolo 44 della LMF, denominato "Esclusione di rinvio", afferma che il riferimento "alla legge" di uno Stato come la legge applicabile a una materia si riferisce alla legge in vigore in quello Stato diversa dalle sue norme di diritto internazionale privato.

Vi è coerenza con quanto previsto dall'articolo 2596 del CCC, il quale indica che «Quando, in un rapporto giuridico, le parti scelgono la legge di un determinato Paese, si intende che si sceglie il diritto interno di quello Stato, salvo l'espresso riferimento in senso contrario».

Si interpreta che, in materia contrattuale, se i soggetti celebrano un affare giuridico in cui concordano quale è il diritto applicabile, se ne deduce che si riferiscono al diritto privato. Il diritto prescelto ha come funzione quella di evitare norme di conflitto. Pertanto, la scelta è della legge materiale, escluso il rinvio, a meno che non vi sia alcun riferimento espresso in senso contrario.

vi. L'articolo 45 della LMF stabilisce che "1. Le disposizioni del presente capitolo non impediscono a un tribunale di applicare leggi imperative della legge del foro che si applicano indipendentemente dalla legge applicabile in base alle disposizioni di questo capitolo. 2. Il presente articolo non consente al tribunale di sostituire le disposizioni del presente capitolo relative alla legge applicabile all'opponibilità dei terzi e alla priorità del trasferimento".

Il comma 1 citato è in linea con quanto prescritto dall'articolo 2599 del CCC, il quale stabilisce che "le norme internazionalmente imperative o di inmediata applicazione del diritto argentino si impongono sull'esercizio dell'autonomia della volontà ed escludono l'applicazione del diritto estero scelto dalle norme di conflitto o dalle parti. Quando è applicabile una legge estera, trovano applicazione anche le sue disposizioni internazionalmente imperative, e quando gli interessi legittimi lo richiedono, possono riconoscersi gli effetti di disposizioni internazionalmente imperative di Stati terzi che hanno legami stretti e palesemente preponderanti con il caso".

Va ricordato che il CCC accetta, sotto il nome di norme vincolanti a livello internazionale, un tipo di norme rigorosamente obbligatorie che si basano su nozioni di ordine pubblico. La loro presenza esclude l'applicazione e il funzionamento di norme indirette e, quindi, fa uso giuridico del diritto estero.

D'altra parte, si rilevano problemi di compatibilità del comma 2 con quanto previsto dall'art. 2600 del CCC, il quale indica che "le disposizioni di diritto estero applicabili devono essere escluse quando portano a soluzioni incompatibili con i principi fondamentali dell'ordine pubblico che ispirano l'ordinamento argentino".

vii. Infine, l'articolo 47 del disegno di legge LMF, tra parentesi quadre nella versione in esame, afferma che "Se la legge applicabile ad una questione è la legge di uno Stato che comprende uno o più territori unitari, ciascuno dei quali ha le proprie regole di legge in relazione a tale questione: (a) qualsiasi riferimento in questo capitolo alla legge di uno Stato significa la legge in vigore nell'unità territoriale; e (b) le regole interne di conflitto di leggi di quello Stato, o in mancanza di tali regole, di quell'unità territoriale determina l'unità territoriale la cui legge si applicherà".

Tale articolo è compatibile con l'articolo 2595 del CCC, il quale stabilisce che «Quando è applicabile un diritto estero: [ ] b) se vi sono vari sistemi giuridici covigenti con competenza territoriale o personale, o si susseguono ordinamenti legali diversi, il diritto applicabile è determinato dalle regole vigenti nello Stato di appartenenza di tale diritto e, in mancanza di tali regole, dal sistema giuridico in disputa che presenti i legami più stretti con il rapporto giuridico in questione.