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

EN

Factoring Model Law Working Group

Sixth session (hybrid)
Rome, 28 – 30 November 2022

UNIDROIT 2023
Study LVIII A – W.G.6 – Doc. 7
English only
March 2023

SUMMARY REPORT

OF THE SIXTH SESSION

(Hybrid, 28 – 30 November 2022)

TABLE OF CONTENTS

1. The sixth session of the Working Group (the Working Group) to prepare a Model Law on Factoring (MLF) took place in hybrid format between 28 and 30 November 2022. The Working Group was attended by 36 participants, comprised of (i) 10 Working Group Members, (ii) 4 observers from international, regional and intergovernmental organisations, 14 observers from industry associations, government and academia, and (iii) 8 members of the UNIDROIT Secretariat (the list of participants is available in Annex II).

Item 1: Opening of the session by the Chair

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

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

3. *The Working Group adopted the draft Agenda* (UNIDROIT 2022 – Study LVIII A – W.G.6 – Doc. 1, available in Annex I).

Item 3: Consideration of substantive matters

1. Comments received on the Draft Model Law on Factoring (Study LVIII A – W.G.6 – Doc. 3 – Draft Model Law on Factoring)

4. The Working Group commenced its review of the draft Model Law (Study LVIII A – W.G.6 – Doc. 3 – Draft Model Law on Factoring), with reference to the comments received during the public consultation on the draft instrument, which had been held between July and October 2022 (Study LVIII A – W.G.6 – Doc. 5 – MLF online consultation submissions). The Chair suggested that the Working Group should consider the footnotes in Doc. 3 (footnotes) and the table prepared by the Secretariat summarising the comments in Doc. 4 (comments) received during the consultation on an article-by-article basis (Study LVIII A – W.G.6 – Doc. 4 – Summary table of comments). *The Working Group agreed to this approach*.

Title

5. With reference to comments 1 and 2, *the Chair* opened the floor for comments on the title of the MLF. The Chair recalled that at its fifth session, the Working Group had adopted the title "UNIDROIT Model Law on Factoring", with strong support from the industry representatives participating in the meeting. The Chair further recalled that while the scope of the instrument went beyond the traditional notion of factoring, the Working Group had retained the title on the basis that (i) the accepted international usage of the word factoring had expanded over time, and (ii) retaining the current title would strengthen the ability of International Financial Institutions and the private sector to support the implementation and promotion of the instrument.

6. *One expert* noted that the feedback from several banks suggested that the title of the instrument was misleading and did not accurately describe the scope of the instrument. *Various experts and observers* suggested alternative titles, including "Model Law on Factoring and other Receivables Financing" and "Assignment of Receivables in Factoring." *Another expert* noted that enacting States were likely to use their own titles in adopting the instrument through implementing legislation. The expert suggested that the Guide to Enactment could provide alternative titles and allow for enacting States to choose their preferred title, or that the instrument itself could include a bracketed additional title or a footnote explaining the issue. *A third expert* suggested that it would not be possible to identify a perfect title for the instrument. The expert noted the title was not only

a legal matter, but also a promotional and marketing matter, and suggested that it might best be addressed in the Guide to Enactment.

7. *The Working Group decided that the Guide to Enactment should provide at least one alternative title for the Model Law on Factoring that reflected its broader scope.*

Article 1 (Scope of Application)

8. With reference to footnote 1, *the Working Group decided that there was no need to amend Article 1(1) to clarify that the MLF applied to transfers of receivables, whether the transfer was an outright transfer or a transfer by way of security.*

9. With reference to footnote 2, the *Working Group decided that there was no need to provide a general provision in Article 10 indicating that the prior law with respect to transfers applied to the extent specified in Chapter IX (transition).*

10. With reference to footnote 3, *one expert* noted that Article 1(4) provided that the MLF would not interfere with a State's law governing negotiable instruments, but this restriction did not apply to the law governing money or bank accounts. The expert explained that the definition of "proceeds" in Article 2(1)(f) included money, negotiable instruments and funds credited to a deposit account with an authorised deposit-taking institution. The expert concluded that Article 1(4) should either be deleted, or should be expanded to include all three types of assets that were categorised as proceeds under the MLF. The Working Group discussed different approaches, including (i) deleting Article 1(4) and instead excluding negotiable instruments from the definition of "receivable", (ii) deleting Article 1(4) and dealing with the issue in the Guide to Enactment, (iii) retaining Article 1(4) and expanding it to include the law governing money and bank accounts (as consistent with the definition of proceeds), or (iv) retaining Article 1(4) and including a footnote requiring enacting States to explicitly provide for the types of negotiable instruments that should be excluded from the scope of the MLF. *Another expert* noted that the original purpose of Article 1(4) was to protect the rights of a holder in due course and suggested that this policy objective should be retained, regardless of which drafting approach was adopted. *A third expert* explained that there was some unavoidable uncertainty resulting from the fact that the MLF intended to exclude negotiable instruments from its scope, except to the extent that negotiable instruments needed to be covered as proceeds or receivables. The expert concluded that it might be best to deal with the issue in the Guide to Enactment. *One observer representing industry* noted that in China, if a receivable was represented in a negotiable instrument, the judge would apply the law of negotiable instruments rather than the factoring law. *The Working Group decided to (i) remove Article 1(4), (ii) further consider whether negotiable instruments should be excluded from the definition of "receivable", and (iii) further explain the issue in the Guide to Enactment.*

Article 2 (Definitions)

<u>Definition of "competing claimant"</u>

11. *The Working Group agreed to move the definition of "competing claimant" from Article 2(1)(c) to Article 2(1)(a) to correctly follow alphabetical order*.

<u>Definition of "future receivable"</u>

12. With reference to footnote 5, *one observer* suggested that the word "arises" be replaced with "acquired" in the definition of "future receivable", on the basis that it would better align the definition with the use of the term in Article 5(4). Different views were expressed on the matter. Some experts expressed a preference to preserve the existing language, whereas other experts suggested that the

proposed change should be adopted. *One expert* noted that the policy intention of the definition of "future receivable" was to cover both (i) situations where the receivable had not yet arisen, and (ii) where the receivable existed but had not yet been acquired by the transferor. The expert suggested that the current definition did not fully reflect this policy, however the proposal to replace "arises" with "acquired" would not address the issue either. *Another expert* suggested that the definition should be amended to provide "arises or is acquired". At a later stage, *the Working Group decided to add "or is acquired" in the definition of "future receivable".*

Definition of "judgment creditor"

13. *The Working Group agreed to add a definition of "judgment creditor".*[1]

Definition of "proceeds"

14. With reference to footnote 6, *one expert* suggested that the existing drafting incorrectly limited the meaning of "proceeds" in relation to funds credited to a bank account, which implied that only deposit accounts maintained by banks are captured. The expert explained that Article 2(c) of the UNCITRAL Model Law on Secured Transactions (MLST) defined "bank account" as "an account maintained by an authorised deposit-taking institution to which funds may be credited or debited". The expert suggested that the MLF should adopt the same meaning. As the MLF did not include a definition of "bank account", the expert concluded that the definition of "proceeds" should be broadened in relation to bank accounts, in order to properly reflect the MLST approach. *Several experts* agreed to the proposed change. *Another expert* suggested that the MLF could instead include a footnote explaining that States should insert the appropriate terminology that reflected their domestic rules.

15. *The Working Group agreed to amend the definition of "proceeds" to include "right to payment of funds credited to an account with an authorised deposit-taking institution".*

16. *An observer* queried why the definition of proceeds had been restricted and whether it would be preferable for proceeds to be any kind of asset provided by the debtor. *An expert* responded that for factoring transactions, in the majority of circumstances proceeds of a receivable would be money, negotiable instruments or bank accounts. The expert further noted that the restricted definition also ensured that the MLF was less likely to inappropriately encroach on an enacting State's laws governing other types of assets.

Definition of "receivable"

17. *With reference to footnote 7, the Working Group decided to defer the discussion of data-related receivables until later in the meeting.*[2]

18. In relation to receivables arising from payment obligations for credit card transactions, *one expert* suggested that the existing language was unclear as to whether the MLF covered receivables for which the credit card issuer was the debtor, or where the cardholder was the debtor. The expert recalled that during earlier Working Group meetings, there had been the suggestion that the MLF should be limited to receivables arising from credit card transactions where the credit card issuer was the debtor and that the definition of "receivable" might need to be amended to better reflect this policy objective. *Another expert* noted that securitisation transactions usually related to receivables owed by the cardholder rather than the credit card issuer. Under such arrangements,

---

1 See discussion on Article 17, below.

2 See discussion under (b) Other unresolved matters, below.

banks that issued credit cards would transfer receivables owed by credit card users. The expert concluded that it was important for the MLF to apply to such transactions.

19. *The Secretariat* queried whether the Working Group intended for the existing definition of "receivable" to apply to both types of receivables (where the cardholder user was the debtor, and where the card issuer was the debtor). *Two experts* noted that it was rare for receivables owed by the credit card issuer as debtor to be transferred. The experts explained that receivables arising from transactions between the merchant and the credit card issuer (as debtor) were often settled at the close of the day, which made them an extremely short-term receivable and thus unlikely to be transferred. Conversely, receivables arising from transactions between the credit card issuer and the cardholder (as debtor) were often settled after one month or more and thus more likely to be transferred or securitised. *One expert* suggested that "for" be replaced by "under" in Article 2(1)(f)(iii).

20. *The Working Group decided not to change Article 2(1)(f)(iii) of the draft MLF, on the basis that the existing drafting covered receivables arising from credit card transactions for which the cardholder was the debtor, and for which the card issuer was the debtor.*

21. At a later point, *an observer* raised concerns regarding the final sentence of Article 2(1)(f), which provided that "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." The observer noted that if a receivable was refinanced, it ceased to be a receivable and became a new payment right. *An expert* agreed, noting that at its previous session,[3] the Working Group had recognised that where a receivable was refinanced or consolidated it was no longer the same receivable, nor could it be considered as proceeds or the original receivable. Nonetheless, the Working Group had decided that it was important for the MLF to apply to such payment rights, and Article 2(1)(f) was an attempt by the Working Group to achieve the agreed upon policy objective. *Several experts* expressed support for the underlying policy objective, but suggested that the drafting required refinement. *The Working Group asked the Secretariat to redraft the final sentence of Article 2(1)(f) to better reflect the intended policy objective.*

Definitions of "security transfer" and "transfer"

22. With references to footnotes 8 and 9, *an observer* queried whether the creation of a security right in a receivable should be included within the definition of "security transfer".

23. *Several experts* confirmed that the definition of "security transfer" was designed to cover both the transfer of a receivable by agreement, and the creation of a security right in a receivable by agreement. However, *some experts* suggested that the language could be improved. *One expert* expressed a preference for the language used in Article 2(a) of the United Nations Convention for the Assignment of Receivables in International Trade (RC), which provided that "the creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer". *Another expert* suggested that the matter should be dealt with by amending the definition of "transfer" to include the creation of security rights in receivables. *Other experts* suggested that the existing language was sufficiently clear on the issue and did not require amendment. *One expert* explained that the term "security transfer" was used extensively in the MLF and that the existing language ensured that the enforcement rules correctly applied to security transfers and not to outright transfers. *An observer representing industry* emphasised that regardless of the language adopted, it was essential for the MLF to be sufficiently clear that it applied to security rights in receivables.

24. *The Working Group reaffirmed that the MLF should apply to (i) the outright transfer of receivables, (ii) the transfer of a receivable to secure payment or other performance of an obligation,*

---

[3] See UNIDROIT 2022 – Study LVIII A – W.G.5 – Doc. 6, paragraph 67.

and (iii) the creation of a right in a receivable to secure payment or other performance of an obligation. The Chair asked the Secretariat to further consider whether the drafting of the definitions of "security transfer" and "transfer" should be amended to provide further clarity on this issue.

25. With reference to footnote 10, *the Working Group reaffirmed that the MLF would apply to pledge-like security rights in receivables, but that the MLF should not use the term "pledge" itself.*

Definition of "transfer agreement"

26. With reference to footnote 11, *several experts* agreed that the MLF should better distinguish between the definition of "transfer agreement" under Article 2(1)(j) and the requirements for an effective transfer agreement stipulated in Article 5(1). It was suggested that the reference to Article 5(1) in the definition of "transfer agreement" was causing confusion. *The Working Group agreed to delete "that meets the requirements in Article 5(1)" from the definition of "transfer agreement".*

Definition of "transferee"

27. With reference to footnote 12, *the Working Group decided it should be left to a State's agency laws to determine whether a transferee "to whom a receivable is transferred" would include a person acting on the transferee's behalf.*

New definition regarding a "contract giving rise to a receivable"

28. With reference to comment 26 and noting that the expression "contract giving rise to a receivable" was used 12 times in the MLF, *one expert* suggested that the MLF include the definition "receivable contract" for contracts giving rise to a receivable. The expert explained that the proposal was not a substantive change and was simply designed to shorten the length of the instrument. *An observer representing industry* suggested that the term "original contract" from the RC could be adopted. Several other suggestions were made by observers, including "commercial contract", "original commercial contract", and "financial contract". *Several experts and observers* expressed concern that a new definition could risk confusing the contract giving rise to the receivable and the contract for the transfer of the receivable. *The Working Group decided not to include a definition for the term "contract giving rise to a receivable".*

New definition of "signature"

29. *Several experts and observers* suggested that the MLF should include a definition of "signature", which would complement the MLF's definition of "writing". *One observer* suggested that the Working Group could consider relevant instruments prepared by the United Nations Commission for International Trade Law (UNCITRAL) in drafting the definition. *The Working Group decided to add a definition of "signature". The Working Group requested that the Secretariat draft the definition, based on the relevant UNCITRAL texts.*

Article 3 (Party Autonomy)

30. *The Working Group agreed to add Article 8 to the list of articles in Article 3 that could not be derogated from or varied by agreement.*[4]

[4] See discussion regarding Article 8, below.

Article 4 (General Standards of Conduct)

31. *The Working Group adopted Article 4.*

Article 5 (Requirements for the transfer of a receivable)

32. Regarding Article 5(1)(a), *one expert* suggested the language requiring transfer agreements to be "evidenced by a writing that is signed by the transferor" created the impression that a separate agreement signed by the transferor was likely to exist. The expert suggested that it would be preferable for Article 5(1)(a) to be redrafted to provide that a transfer agreement would be effective "if it is in writing, that is signed by the transferor." *Another expert* suggested that Article 5(1)(a) could be simplified to "is in writing signed by the transferor". *One observer* cautioned that the proposed drafting change would also be a policy change, as the proposed drafting would require a transfer agreement itself to be in writing signed by the transferor, not merely evidenced by writing signed by the transferor. The observer noted that the existing drafting was broader, and would allow subsequent writing signed by the transferor that was evidence of the transfer agreement to satisfy the requirement. *The Working Group agreed to replace "is evidenced by a writing" with "is in writing" in Article 5(1)(a).*

33. With reference to footnote 13, *one expert* explained that paragraphs (a), (b) and (c) of Article 5(1) provided the three requirements for a transfer agreement. The expert further explained that the second sentence of Article 5(1)(c) is not a requirement itself, but instead sets out how the third requirement for an effective transfer ("describes the receivable in a manner that reasonably allows its identification") could be achieved. Accordingly, the expert suggested that from a drafting perspective, it would be preferable for the second sentence of Article 5(1)(c) to be a separate paragraph in Article 5. *Several experts agreed*. *One expert* noted that should the proposal be adopted, there would need to be corresponding changes to the rules in Annex 1 that referred to the description requirements for a transfer in Article 5(1)(c). *Another expert* suggested that the language "will be sufficient" in the second sentence of Article 5(1)(c) should be changed to "is sufficient". *The Working Group decided to make the second sentence of Article 5(1)(c) into a separate paragraph in Article 5, and make minor language changes to the provision.*

34. With reference to footnote 14, *one observer representing industry* stated that the current drafting of Article 5(2) presumed that rights in a receivable were rights that allowed the transferor to transfer that receivable. The observer explained that this would not always be the case, noting that pledgors did not always have the right to transfer the receivable subject to the pledge. The observer suggested that Article 5(2) should be amended to provide that a receivable could be transferred where (i) the transferor has rights in the receivable "that allow its transfer", or (ii) the power to transfer it. *One expert* noted that while the theoretical point raised by the observer was correct, the existing language both reflected the standard formulation in the relevant UNCITRAL instruments and covered all possible situations that could arise. The expert concluded that the existing drafting should be retained. *Several other experts agreed*. *One expert* explained that the one of the purposes of the existing drafting was to ensure that where a transferor transferred the same receivable twice to different persons, the second transfer would be able to be effective even though the transferor had already transferred the receivable to the first transferee. *The Working Group agreed not to amend Article 5(2). The Working Group decided that the point raised in footnote 14 should be addressed in the Guide to Enactment.*

35. *The Secretariat* suggested that the Working Group consider changing the order of paragraph 1 and paragraph 2, on the basis that paragraph 2 provided the general rule regarding whether a transferor could transfer a receivable, whereas paragraph 1 provided the specific rules regarding transfer agreements required to effect a transfer. *The Working Group agreed to change the order of paragraphs 1 and 2 of Article 5.*

36. Regarding Article 5(3), *one expert* suggested that the existing drafting might not allow a transferor to transfer (i) all of its receivables within a generic category of receivables, and (ii) all of its receivables, other than a specific type of receivable. Noting that such transfers were permitted under most modern domestic secured transactions laws, the expert queried whether Article 5(3) should be amended or whether the matter could be dealt with in the Guide to Enactment. *Another expert* agreed that the existing drafting of Article 5(3) was somewhat unclear, as Article 5(1)(a) was a transfer rule (a transferor may transfer all of or an undivided interest in receivables), whereas subparagraphs (b) and (c) were description rules which provided how a transferor could describe the types of receivables it wanted to transfer (a generic category of receivables, or all of its receivables). *The Chair* queried whether subparagraphs (b) and (c) should be read restrictively so as not to allow other ways for a transferor to describe the receivables that it wanted to transfer, or should be read broadly as providing non-exclusive methods that a transferor could describe the receivables that it wanted to transfer. *Several experts* noted that the description rules in the second sentence of Article 5(1)(c) overlapped with the transfer rules in Article 5(3)(b) and (c). However, the relationship between the two paragraphs was somewhat unclear, as the second sentence of Article 5(1)(c) allowed for a description of receivables that consisted of "all of the transferor's receivables within a generic category", whereas Article 5(3)(c) allowed for a transferor to transfer "a generic category of receivables". *Another expert* noted that Article 5(1) reflected Article 9 of the MLST and Article 5(3) reflected Article 8 of the MLST, and suggested that should any changes be made, the Guide to Enactment should clearly explain why the MLF was deviating from the approach in the MLST. *An observer* noted that the Convention on International Interests in Mobile Equipment (the Cape Town Convention) had description rules that could address some of the concerns raised by the Working Group. *The Working Group asked the Secretariat to consider possible amendments to Article 5 that would (i) better align Article 5(1)(c) and 5(3)(b) and (c), and (ii) clarify that a transferor could transfer all of its receivables within a generic category.*

37. *One observer* queried why the MLF only allowed transfers provided for by written agreement. The observer noted that English law allowed for transfers of receivables without a written agreement. *One expert* noted that the Working Group had decided that the MLF should only allow transfers provided for in a written agreement on the basis that this approach reflected industry best practice. *One observer representing industry* affirmed that factoring was almost always undertaken under a written transfer agreement and supported the MLF reflecting this approach. *The Working Group reaffirmed that the MLF should only allow for transfers provided for by written agreement.*

Article 6 (Proceeds)

38. *The Working Group adopted Article 6.*

Article 7 (Personal or property rights securing or supporting payment of a receivable)

39. *The Working Group adopted Article 7.*

Article 8 (Contractual limitations on the transfer of a receivable)

40. *One observer* raised a concern with the complete protection from liability from breach of an anti-assignment clause provided to a transferor vis-à-vis the debtor in Article 8(2). The expert noted that earlier international instruments had preserved the right of a debtor to sue the transferor for breach of contract, without invalidating the transfer itself, and suggested that the MLF should follow the earlier precedents. *Several experts* recalled that the matter had been the subject of extensive

discussion at earlier Working Group sessions[5] and that the Working Group had decided to diverge from approach of earlier instruments for several reasons. First, it was noted that the policy objective of the MLF was to facilitate and promulgate factoring in order to increase access to finance in States that enacted the instrument. Industry had indicated that preserving the right of a debtor to sue a transferor for breach of an anti-assignment clause was contrary to the instrument's aim of facilitating factoring. Second, industry had also noted that in many jurisdictions, the preservation of the right of a debtor to sue a transferor for a breach of an anti-assignment clause caused a great deal of legal risk and uncertainty for transferors, which made them reluctant to transfer receivables and thus often stymied potential factoring transactions. Third, it had been noted that during discussions regarding legal reforms in the United Kingdom, it had been suggested that in the vast majority of circumstances the debtor would not suffer damage as a result of the breach of an anti-assignment clause by the transferor, and thus the protection provided by the earlier rule was overstated. Finally, it had been noted that the industry had expressed strong support for the complete override of anti-assignment clauses as reflected in Article 8. *Several experts* suggested that they were sympathetic to the views expressed by the observer and had favoured the retention of the rule reflected in earlier instruments that provided a partial override of anti-assignment clauses. *The majority of experts* noted their support for the complete override of anti-assignment clauses reflected in Article 8. *Several observers representing industry* reiterated their strong support for the complete override of anti-assignment causes reflected in Article 8. *The Working Group reaffirmed its earlier decision regarding the complete override of anti-assignment clauses reflected in Article 8 of the MLF.*

41. In regard to Article 8(2), *one expert* suggested that the rule be rephrased to clarify that no party would be liable to the debtor for breach of an anti-assignment clause. The expert explained that under the current drafting, it might still be possible for a guarantor to be sued by the debtor for the breach of an anti-assignment clause. *An observer* agreed that if the intention of Article 8(2) was to protect any third party from tortious liability vis-à-vis the debtor for inducing a party to breach an anti-assignment clause, the Working Group might wish to consider expanding the scope of the override of anti-assignment clauses in Article 8(2). *Another expert* agreed that a guarantor should not be liable for the breach of an anti-assignment clause, however he suggested that it might be preferable to address the matter in the Guide to Enactment. *The Working Group agreed to retain the current draft of Article 8(2).*

42. *The Secretariat* suggested that Article 8 be added to the list of exceptions to party autonomy under Article 3, as it was a mandatory override of any agreement in the original contract regarding the assignment of receivables that could not be derogated from by parties. *The Working Group agreed to add Article 8 to the list of articles in Article 3 that could not be derogated from or varied by agreement.*

Article 9 (Registration)

43. With reference to comment 83, *one expert* suggested including additional language in Article 9 to clarify that a transfer of a receivable is effective against third parties only if "it is effective between the parties under Article 5" and a notice with respect to the transfer was registered in the Registry. The expert explained that it was clear that this was implicitly understood, however there might be value in explicitly addressing the matter. *Another expert* suggested that it would be preferable to address the matter in the Guide to Enactment. *The Working Group decided that the Guide to Enactment should clarify that the effectiveness of the transfer of a receivable against third parties also requires the transfer to be effective between the parties under Article 5.*

---

[5] See UNIDROIT 2020 – Study LVIII A – W.G.1 – Doc. 4 rev. 1, paragraphs 147 – 162; UNIDROIT 2021 – Study LVIII A – W.G.2 – Doc. 4, paragraphs 28 – 47; UNIDROIT 2020 – Study LVIII A – W.G.3 – Doc. 4, paragraphs 21 – 24; UNIDROIT 2022 – Study LVIII A – W.G.5 – Doc. 6, paragraphs 53 - 55.

Article 10 (Proceeds)

44. *An observer* suggested that read collectively, Articles 9, 10 and 14 appeared to secure the priority in all proceeds, based on order of registration of the notice regarding the transfer of the underlying receivable. The observer noted that was misleading, as priority in relation to certain types of proceeds (such as possession of money or control of a bank account) would be determined by the enacting State's broader legal framework, which could lead to different priority outcomes. The observer concluded that the matter should be addressed either in the MLF or the Guide to Enactment.

45. *The Working Group adopted Article 10.*

Article 11 (Continuity of third-party effectiveness upon a change of the applicable law to this Law)

46. *The Working Group adopted Article 11.*

Article 12 (The Registry)

47. *The Working Group adopted Article 12.*

Article 13 (Competing transfers)

48. *One observer* suggested that the MLST did not sufficiently clarify that the registration of a notice with respect to a future receivable would be effective against third parties from the time of registration of the notice. The observer explained that the proposal was not a policy change, but would improve the clarity of the instrument on an important matter. *One expert* noted that one solution would be to include additional language in Article 13 modelled on Article 29(a) of the MLST, which provided "priority is determined by the order of registration, without regard to the order of creation of the security rights". *Another expert* supported including additional language based on the MLST. *A third expert* suggested that it would be preferable to address the matter in the Guide to Enactment. *An observer representing industry* suggested that the matter was already sufficiently addressed in Article 19(1). *The Working Group decided to include additional language in Article 13, based on Article 29(a) of the MLST.*

49. With reference to footnote 15, the Secretariat queried whether Article 13 should use "time of registration", instead of "order of registration", which was used in other places in the MLF. *One expert* stated that "order of registration" was appropriate in Article 13, as it referred to a priority between competing transfers. *The Working Group agreed to maintain the current language.*

50. *One observer* queried how the MLF dealt with priority disputes between several unregistered transfers. *One expert* suggested that the issue was unlikely to arise in practice, as any transferees that had not registered a notice would quickly attempt to register once a priority dispute arose.

51. *One expert* noted that during the public consultation event on the MLF in October 2022, one participant suggested that the registration system would cause problems for non-notification factoring transactions, as a debtor could become constructively "notified" of a transfer of the receivable they owe, in breach of a non-notification agreement between the transferor and transferee. The expert suggested that the Guide to Enactment should clarify that the registration of a notice would not violate a non-notification clause in a factoring agreement. The expert further explained that most modern registries indexed notices according to an identification number rather than the name of the transferor, which would mitigate the risk of a debtor searching the registry and identifying that a receivable owed by them had been transferred, and thus becoming constructively "notified" of that transfer.

Article 14 (Proceeds)

52. With reference to footnote 16, *one observer representing industry* queried whether it was sufficiently clear under Article 14 that a transferee would not lose its rights to the proceeds of receivables paid into a bank account upon the insolvency of the transferor. *The Chair* agreed that, from a policy perspective, the MLF should ensure that the transferee would not lose its rights in proceeds upon the insolvency of the transferor. The Chair further suggested that the matter should be addressed in the Guide to Enactment and did not need to be addressed in the instrument itself.

53. *One expert* noted that Article 14 was a condensed version of Article 32 of the MLST, and suggested that the language in Article 32 might be a preferable approach as it clarified that priority was a relative concept ("a security right in proceeds has the same priority over a competing claimant as the security right in the asset from which the proceeds arose"). *The Chair* suggested that the drafting in Article 14 on this matter was sufficiently clear and there might be no need to revert to the drafting of the MLST. *The Working Group decided to retain the existing drafting of Article 14.*

54. With reference to comment 14, *one expert* queried whether the MLF needed to address tracing and commingling issues. The expert noted that it might not be necessary, as the majority of factoring transactions would likely be undertaken by professional factoring companies, which would not be commingling proceeds and thus the issues was unlikely to practically arise very often. *One observer representing industry* suggested that either the MLF or the Guide to Enactment could clarify that the principles of tracing reflected in other laws should be applied to the MLF. *Another expert* suggested that if the Guide to Enactment were to address the issue, it should probably be addressed under Article 6 and the meaning of "identifiable proceeds". *The Chair* suggested that there was no need to address the matter in the MLF, and noted that any explanation included in the Guide to Enactment would have to be carefully drafted, as there was no internationally accepted theory of tracing.

Article 15 (Impact of the transferor's insolvency on the priority of a transfer)

55. *One observer* queried whether the term "insolvency proceedings" sufficiently covered different schemes of arrangements. *An expert* responded that the MLF did not provide a definition of "insolvency" or "insolvency proceedings", but it was generally understood that these terms should be understood to cover schemes of arrangement, to the extent that they were available under the applicable insolvency law. The expert confirmed that nothing in the MLF would override the applicable insolvency law regarding these matters. The expert concluded that two options to address the matter would be to (i) put "insolvency proceedings" in Article 15 in square brackets, or (ii) address the matter in the Guide to Enactment. *Another expert* agreed, noting that while Principle 19 of the draft UNIDROIT Principles on Digital Assets and Private Law specifically provided guidance on the application of substantive and procedural insolvency rules in relation to proprietary rights in digital assets, it would be better for the Guide to Enactment to address these matters in the MLF context. *The Working Group decided to address the meaning of "insolvency proceedings" in the Guide to Enactment.*

56. *One observer* suggested that Article 15 had lost an element that was included in Article 35 of the MLST, which was the obligation of the enacting State to list its provisions of insolvency law that gave priority to another claim. The expert explained that the additional language would add transparency to the MLF and certainty for financiers. *Another expert* responded that the matter was addressed in Article 16, which allowed enacting States to identify which preferential claims would have priority in insolvency. *The Working Group decided to retain the existing language of Article 15.*

Article 16 (Transfer competing with claims arising by operation of law)

57. *The Working Group adopted Article 16.*

Article 17 (Transfer competing with rights of judgment creditors)

58. With reference to footnote 19, *one expert* noted that the term "judgment creditor" used in the MLF was not well understood or commonly used in the legislation of most States, and had raised issues for States trying to undertake secured transactions reforms based on the MLST. The expert suggested that the MLF could instead include a definition of "judgment creditor" in Article 2, and require enacting States to define the term to reflect the meaning in their domestic law. The expert further suggested that the Guide to Enactment could also explain that enacting States may wish to use a different term to "judgment creditor". The expert concluded that the proposed approach would also address the issues raised in comment 97, which queried whether the meaning of "judgment creditor" was intended to also apply to garnishee orders.

59. *Several experts supported the proposed suggestion. Another expert* suggested that the MLF Working Group coordinate with the UNIDROIT Best Practices on Effective Enforcement Working Group, to ensure that consistent terminology and description of "judgment creditors" was being used. *The Working Group agreed to remove the text "creditor that has obtained a judgment or provisional order" from Article 17, insert a definition of "judgment creditor in Article 2(1), and coordinate with the UNIDROIT Best Practices on Effective Enforcement Working Group to ensure consistent use of the term "judgment creditor".*

Article 18 (Subordination)

60. With reference to footnote 20, *one expert* explained that in some States the term "subordination" might not allow creditors to share equal priority (which could arise in a "pari passu" priority situation). *Several experts* suggested that Article 18 should use the term "modify" to ensure that it was clear to enacting States that parties should be permitted to modify their priority to enjoy shared priority. *Another expert* agreed with the proposed change, and suggested that the revision should ensure that parties could only modify their priority "in favour of" an existing or future competing claimant. *Yet another expert* noted that in practice, when a factor purchased a receivable from a transferee, it would be more likely to request a release or a partial release from the initial transferee rather than request that the initial transferee subordinate its interest. *The Working Group decided to amend Article 20 to clarify that a person could modify or subordinate the priority of its rights in favour of a competing claimant.*

61. With reference to footnote 21 and the proposal to change "a person" to "transferee", *the Working Group decided to retain the existing language.*

Article 19 (Future receivables and future advances)

62. With reference to footnote 23, *one expert* suggested that there was no need for Article 19(1) to include the language "[receivable] that is described in a notice registered in the Registry", as the rule already provided that priority was determined by time of registration. The expert noted that the use of "time" rather than "order" in Article 19 was appropriate, as the "time" of registration determined the priority for both existing and future receivables, and was not specifically referring to a priority competition between different parties. *The Working Group agreed to remove "that is described in a notice registered in the Registry" from Article 19(1).*

63. With reference to footnote 24, *one observer* noted that in defining "future receivables", Article 2(c) used the language "arises or is acquired", Article 5(4) used "acquires", and Article 19(1) used "is acquired …, or comes into existence". The observer suggested that the language in Article 19(1) might need to be modified, in order to provide clarity and to ensure consistent use of terminology throughout the instrument. *One expert* suggested that Article 19(1) should use "arises or is acquired", and the language "comes into existence" should be deleted. *An observer* queried how a receivable could arise if it had not been acquired. *Another expert* responded that an existing receivable could

have arisen but had not yet been acquired by the transferor. *The Working Group agreed to add "arises or" and remove "or comes into existence" from Article 19(1), and further consider whether some of the commas in the text should be removed.*

64. With reference to the alternative drafting provided in footnote 25 of Doc. 3, *the Working Group decided that the existing drafting sufficiently addressed the issue.*

Article 20 (Irrelevance of knowledge)

65. *The Working Group adopted Article 20.*

Chapter VI (Rights and obligations of the parties)

66. *One observer* suggested changing the title of Chapter VI from "rights and obligations of the parties" to "rights and obligations of the transferor, transferee and debtor", in order to clarify that the debtor was not a party to a transfer agreement. *The Working Group agreed to change the title of Chapter VI to "rights and obligations of the transferor, transferee and debtor".*

Article 21 (Rights and obligations of the transferor and the transferee)

67. With reference to footnote 26, *the Working Group decided that Article 21 did not need to be listed as one of the mandatory provisions in Article 3(1).*

Article 22 (Representations of the transferor)

68. *One expert* suggested that "as at the time of transfer" should be replaced with "at the time of the conclusion of the transfer agreement", on the basis that the proposed language was better aligned to Article 57(1) of the MLST. *The Working Group agreed to change "as at the time of transfer" to "at the time of the conclusion of the transfer agreement" in the chapeau of Article 22.*

69. With reference to footnote 27, the Working Group discussed whether Article 22(1)(a) should provide "the transferor has the right [or power] to transfer the receivable", for consistency with Article 5. *Several experts* suggested that there was no need to include "power" in Article 22. *One expert* instead suggested that Article 22(1)(a) should provide that the transferor has "or will have" the right to transfer the receivable, in order to ensure that the transferor could make representations in relation to future receivables that had not yet arisen. The expert noted that the proposed language change was consistent with Article 22(1)(c), which provided that "the debtor does not and will not have any defences or rights of set-off. *The Working Group agreed to add "or will have" to Article 22(1)(a).*

Article 23 (Right to notify the debtor)

70. With reference to footnote 28, *the Working Group reaffirmed that both a transferor and transferee should be able to send a notification of a transfer, whereas only a transferee should be able to send a subsequent payment instruction*.

71. With reference to footnote 29, *the Working Group reaffirmed that the existing language made it sufficiently clear that a subsequent payment instruction sent by a transferor after the debtor had received a notification was ineffective.*

Article 24 (Right to payment)

72. With reference to footnote 30, *one expert* queried the relationship between Article 24 and 27, and whether Article 24 provided alternative grounds for debtor discharge which were separate from Article 27. *Several experts* responded that Article 27(8) sufficiently addressed the issue, as it

provided that the list of debtor discharge rules in Article 27 were not exclusive. *The Working Group decided to retain the existing language.*

73. With reference to footnote 32, *the Working Group agreed to add "to the debtor" to the end of Article 24(1), on the basis that it provided additional clarity on who the notification of a transfer should be sent to.*

74. With reference to footnote 33, *one expert* noted that the debtor should always be discharged by complying with the discharge rules in Article 27 and never required to pay twice, regardless of the operation of Article 24. The expert suggested that the Guide to Enactment could provide some additional guidance on the different purposes of Articles 24 and 27. *The Working Group agreed that the Guide to Enactment should provide further guidance on the relationship between Article 24 (which provided right to payment rules vis-à-vis the transferor and transferee) and Article 27 (which provided the debtor discharge rules).*

75. *Several experts* suggested that Article 24(2) should be deleted, on the basis that (i) the provision was not useful in factoring arrangements because factors rarely had an interest in receiving returned goods, and (ii) in civil law systems the basis of a transferee's "entitlement" to returned goods was difficult to understand. *One expert* agreed that Article 24(2) has limited value in a factoring context. The expert explained that there were different scenarios under which goods might be returned, but it would be rare that the factor would be in position to receive the returned goods, in part because it was rare for a retailer to factor its receivables in relation to a consumer debtor. *An observer representing industry* explained that there were two scenarios where issues regarding returned goods more commonly arose in relation to factoring transactions. One scenario was where a debtor became insolvent and was unable to pay the receivable and returned the goods to the transferor. The second scenario was where the goods were returned because they did not comply with the underlying contract. Under the second scenario, the transferee might have recourse against the transferor and thus might have an interest in the goods as collateral. The observer suggested that there would be no harm in retaining Article 24(2). *Another observer* commented that under Egyptian law, the transferee had the right to sell any returned goods. *The Secretariat* recalled that corresponding provisions existed in both the RC and MLST, and that the current drafting of Article 24(2) had arisen from the fact that returned goods were not considered to be proceeds under the MLF.

76. After further discussion, *several experts* continued to advocate for the deletion of Article 24(2), on the basis that it was unnecessary, created confusion, was unclear in scope and that its deletion would not restrict the rights of a transferee. *An observer representing UNCITRAL* noted that UNCITRAL did not object to the deletion of Article 24(2), on the basis that the rationale was explained in the Guide to Enactment. *The Working Group agreed to delete Article 24(2) and explain in the Guide to Enactment the circumstances in which a transferee might have an interest in returned goods.*

77. With reference to footnotes 34 and 35, *several experts* queried whether it was necessary to retain Article 24(3) and further queried what the precise meaning of "value" was. *One expert* noted that Article 24(3) was consistent with Article 59(2) of the MLST and that paragraph 390 of the MLST Guide to Enactment provided an explanation of the meaning of "value".[6] *Another expert* noted that Article 35 of the MLF addressed the surplus issue in relation to security transfers. The expert further suggested that it would be unnecessary to include a separate paragraph for the same issue in relation to outright transfers. *Yet another expert* agreed that the transfer agreement between the transferor

[6] Article 390 of the MLST Guide to Enactment provides: the secured creditor has the right to collect the full amount of the encumbered receivable, but has to account for and return to the grantor any surplus remaining after payment of the secured obligation. It should be noted that there cannot be any surplus in the case of an outright transfer of a receivable by agreement; the transferee may then retain the full amount collected, as that will be the "value" of its right in the receivable.

and transferee could address the treatment of surplus in relation to outright transfers. *The Secretary-General* cautioned that a decision to deviate from the MLST on this issue would need to be carefully explained in the Guide to Enactment. *The Working Group decided to delete Article 24(3) from the MLF and to explain in the Guide to Enactment that Article 35 provided how transferors and transferees were to deal with a surplus.*

Article 25 (Principle of debtor protection)

78. With reference to footnote 36 and the requirement that the debtor have the right to pay in a specific currency, *one expert* stated that the parties could deviate from the requirements in their contract. *Another expert* noted that the debtor was not a party to the factoring contract with the transferee, and therefore the right for the transferor to change the currency of payment would need to be in the original contract. *An observer representing industry* referred to the debtor protection rule under the RC, which was similar in wording except that it was not subject to party autonomy. The observer concluded that Article 25 would sufficiently protect debtors in practice. *Another observer representing industry* agreed. *The Working Group decided to retain the existing language.*

Article 26 (Notification of the debtor)

79. With reference to footnote 37, *several experts* agreed with the proposal of including "of that receivable" at the end of Article 26(4), on the basis that it provided additional clarity on when the notification of a transfer would constitute notification of all previous transfers. *An observer* suggested that the Guide to Enactment should explain that Article 26(4) was particularly relevant in "series of transfers" situations under Article 27(5). *The Working Group agreed to add "of that receivable" to the end of Article 26(4), and decided that the Guide to Enactment should explain the circumstances under which the rule would apply, with reference to "series of transfers" in Article 27(5).*

Article 27 (Debtor's discharge by payment)

80. In reference to Article 27(2), *one observer* suggested that "subject to" be replaced with "or" to simplify the drafting. *One expert* disagreed with using "or", and explained that using "or" could be read to allow a debtor to choose freely whether to pay as instructed in the initial notification or the subsequent payment instruction. The expert clarified that the intent was to make the debtor pay following the latest instruction and thus retaining the "subject to" language was preferable. *The Working Group decided to retain the existing language in Article 27(2).*

81. *In response to a suggestion that the order of paragraphs 4 and 5 be changed, the Working Group decided to retain the existing order.*

82. With reference to footnote 40, *the Working Group agreed to replace "a person to whom the receivable has been transferred" with "transferee" in Article 27(5). One expert* suggested that it what now somewhat unclear whether "by the transferee" in Article 7(5) referred to the transferee making notification to the debtor, or the transferee making the transfer. The expert suggested that the Guide to Enactment should clarify that the phrase referred to the transferee sending the notification to the debtor.

83. *Several experts* raised concerns with the current drafting of Article 27(5). *One expert* noted that Article 27(5) has been substantially redrafted during the Working Group's fourth session and suggested that participants refer to the Working Group's past consideration of the paragraph to avoid reconsidering the same issue. *Another expert* suggested that the existing drafting did not provide sufficient differentiation between the rules in paragraphs 2 and 5, and that the "series of transfers" scenario addressed in paragraph 5 was not sufficiently clear. *One expert* clarified that paragraph 2 dealt with the initial notification, whereas paragraph 5 was intended to address subsequent transfers. *One observer* suggested that the language from the corresponding provision in the RC in relation to

a "subsequent assignment" could be used to improve the clarity of the provision. After further discussion, *one expert* suggested that the second sentence of Article 27(5) be redrafted to provide "in the case of a series of transfers from a transferee to a subsequent transferee, the debtor is discharged by paying in accordance with the notification of the last of those transfers". The expert explained that the use of the term "subsequent transferee" was consistent with the language of the RC and provided further clarity that paragraph 5 was dealing with a series of transfers scenario. *The Working Group decided to amend Article 27 to provide "in the case of a series of transfers from a transferee to a subsequent transferee, the debtor is discharged by paying in accordance with the notification of the last of those transfers". The Working Group agreed to further explain the matter in the Guide to Enactment.*

84. *With reference to footnote 41, the Working Group decided to change "in one or more receivables" to "in a receivable" in Article 27(6), as the existing phrasing was not used elsewhere in the MLF.*

85. With reference to footnote 38, the Working Group decided that there was no need to add a new paragraph 8 which provided that "if the debtor receives notification of a transfer from the transferee whom has acted in accordance with Article 27(7), 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". *One expert* suggested that changing the word "unless" to "until" in the fourth sentence of Article 27(7) would sufficiently address the issue. *The Working Group accepted the proposed change and decided to retain the language in the rest of the paragraph.*

Article 28 (Defences and rights of set-off of the debtor)

86. With reference to footnote 42, *several experts* suggested that a debtor's right to set-off should not be limited to debts that had arisen prior to the registration of the notice of transfer, on the basis that the rule in Article 28 was the correct policy approach and was consistent with the rules in Article 18 of the RC and Article 64 of the MLST.

87. With reference to footnote 43, *the Working Group agreed to delete Article 28(3) on the basis that the rule was based on an earlier iteration of Article 8, and Article 8 now provided for a complete override of anti-assignment clauses.*

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

88. With reference to footnote 30, *the Working Group agreed to replace "effect" in Article 29(3) with "effectiveness", on the basis that "effectiveness" was the terminology used in other parts of the MLF.*

89. *One expert* queried whether the reference in Article 29(3) to Article 30(2) should instead be to the entirety of Article 30, on the basis that Article 30(1) also related to the "effectiveness" of a modification. *The Working Group agreed to change the reference in Article 29(3) from Article 30(2) to Article 30.*

Article 30 (Modification of the contract giving rise to a receivable)

90. *One expert* suggested the deletion of "of the transferor" in Article 30(3), on the basis that it was unlikely that a transferor would assert rights against the transferee arising from the modification of the contract giving rise to the receivable between the transferor and the debtor. *Another expert* noted that the current language was consistent with Article 20 of the RC and Article 66 in the MLST. *Yet another expert* expressed support for the proposed deletion, but suggested that there would also be no harm in retaining the existing language. *The Working Group decided to remove "the transferor or" in Article 30(3), and explain the matter in the Guide to Enactment.*

Article 31 (Recovery of payments)

91. *The Working Group adopted Article 31.*

Article 32 (Collection of payment under an outright transfer)

92. *The Working Group agreed to change "at any time after payment becomes due" in Article 32(1) to "at or after the time payment becomes due."*

93. *The Working Group decided to retain the reference to Articles 25 – 31 in Article 32(3) and remove the square brackets from the text.*

Article 33 (Collection of payment under a security transfer)

94. With reference to footnote 46, *one observer representing industry* queried whether Article 33(1) should specify that "after default" referred to a default of the transferor, on the basis that members of the factoring industry could mistakenly presume that references to default in the MLF were referring to debtor default. *One expert* responded that there was no need to amend Article 33, as Article 2 defined "default" as the failure of a person who owed an obligation secured by a security transfer to pay or otherwise perform that obligation. *The Working Group decided to retain the existing language.*

95. *One expert* suggested that "after default" be replaced with "upon default". *Another expert* suggested that "after default" included "upon default" and that suggested that no change was necessary. *The Working Group decided to retain the existing language.*

96. *One observer* queried why Article 82(4) of the MLST (which concerned enforcement rules and collection rules in relation to accounts) had not been included in Article 33 of the MLF. *The Secretariat* recalled that the Working Group had decided to remove the provision from the MLF at its fourth session. *One expert* suggested that it was unnecessary to include a provision corresponding to Article 82(4) of the MLST in the MLF. The expert explained that bank accounts could only be proceeds of receivables under the MLF, and there was no need to include third-party enforcement rules in relation to bank accounts as original collateral. The expert further explained that this approach was consistent with the fact that the MLF did not have specific priority rules in relation to the different types of proceeds under the MLF and that these matters should be addressed by the broader legal framework in enacting States and should not be addressed in the MLF, as doing so would introduce unnecessary complexity. *Another expert* agreed. *The Working Group reaffirmed its earlier decision not to include a provision corresponding to Article 82(4) of the MLST in the MLF.*

97. With reference to footnote 47, *the Working Group agreed to replace "transferor" with "transferee" in Article 33(3).*

98. With reference to footnote 45*, the Working Group agreed to replicate the text in Article 32(3) and add it to Article 33 as a new paragraph 4, in order to align the MLF with the corresponding provisions in the MLST.*

Article 34 (Right of the transferee to sell a receivable)

99. With reference to footnote 48, *the Working Group agreed to rectify a paragraph numbering error in Article 34.*

100. With reference to footnote 49, *the Working Group decided that, as consistent with its earlier decision on footnote 46 in Article 33(1), there was no need to include "after the default of the transferor" at the beginning of Article 34(1).*

101. *One expert* suggested that the meaning of the "intention" of the transferee in Article 34(4) was unclear and might need further explanation. *Another expert* suggested adding "intention to sell the receivable to" would address the issue. *The Working Group agreed to add "to sell the receivable" after "intention" in Article 34(4).*

Article 35 (Distribution of the proceeds of collection or sale of a receivable and liability for any deficiency)

102. With reference to footnote 50, *the Working Group agreed to correct the erroneous reference in Article 35(1)(b) from paragraph 2(c) to paragraph 1(c).*

Article 36 (Post-default rights)

103. *One observer* suggested that Article 36 be moved to the start of the Chapter VII Section 2, on the basis that it provided the basic post-default rights rule for security transfers under the MLF and should be placed before the more technical collection and enforcement rules for security transfers. *The Working Group agreed to move Article 36 to the start of Chapter VII Section 2.*

104. *One observer* queried whether Chapter VII Section 2 should include an additional provision which dealt with the right of a transferee to accept a receivable in total or partial satisfaction of the secured obligation. *An expert* recalled that the Working Group had previously decided that it was unnecessary to include such a provision in the MLF, on the basis that the value of the receivable was already known and thus the proposed remedy was not likely to be used in receivables finance. *Another expert agreed*, noting that the MLF would be primarily regulating the financing of short-term receivables and thus it was unnecessary to include additional provisions allowing for accepting a receivable in satisfaction of an obligation, because once the notice period to effectively exercise this remedy had elapsed the receivable would have already been collected. *Yet another expert* agreed, noting that the issue did not arise in practice. *The Working Group decided not to add anything further to Article 36.*

Article 37 (Mutual rights and obligations of the parties)

105. With reference to footnote 51 and as consistent with the Working Group's decision in relation to the title of Chapter VI, *the Working Group agreed to change the title of Article 36 to "mutual rights and obligations of the transferor, the transferee and the debtor".*

106. One expert noted that Article 37(2)(b) provided that the law governing the rights and obligations between the debtor and the transferor governed the conditions under which the transfer could be invoked against the debtor. The expert suggested that the Guide to Enactment should clarify that where a State enacted the MLF, the complete anti-assignment clause override in Article 8 would be effective, even if Article 37(2)(b) might imply that Article 8 was not applicable.

Article 38 (Effectiveness and priority of transfers)

107. *One observer* noted that Article 38 provided the law applicable to effectiveness and priority of the transfer of the receivable was based on the location of the transferor and Article 40 provided that the law applicable to the enforcement of a transfer was the law applicable to the priority of the transfer. The observer further noted that the applicable law would thus be the same under Articles 38 and 40 and suggested that the two articles be merged. *Several experts* responded that it was preferable to retain the existing drafting of Articles 38 and 40.

108. *One observer* suggested that there had been two main obstacles that had impeded the wider adoption of the RC. The first issue had been the partial override of anti-assignment clauses. The second issue had been that the law applicable to third-party effectiveness and priority of an

assignment was based on the location of the transferor, which the observer suggested had been opposed by industry. With reference to footnote 52, the observer noted that Article 4 of the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to the third-party effectiveness of assignments of claims (2018/0044 (COD)) included a conflict of laws rule based on the location of the assignor, but included a separate applicable law rule for securitisation transactions. The observer suggested that Article 38 should be amended to take into account the European Parliament's work on the matter. *Several experts* opposed the proposal on the basis that many States had already implemented secured transactions reforms which incorporated an applicable law rule for third-party effectiveness and priority of an assignment based on the location of the transferor. *Another expert* noted that the proposal before the European Parliament had not yet been accepted and it would be premature for the Working Group to consider changing Article 38 to reflect a proposal that had not yet been accepted. The expert further suggested that the European Parliament proposal could create problems in relation to having two different governing laws for one receivable. The expert concluded that the MLF was a flexible soft law instrument, and if the European Parliament did adopt the proposal, EU Member States would be able to implement the European rule instead of Article 38. *The Working Group decided to retain the existing drafting of Article 38.*

Article 39 (Transfers of receivables relating to immovable property)

109. *One expert* noted that Article 39 dealt with receivables secured by an interest in immovable property rather than receivables arising from immovable property. The expert suggested that the title was misleading and proposed an alternative title. *Another expert agreed. The Working Group decided to change the title of Article 39 to "priority of transfers of receivables secured by a right in immovable property."*

Article 40 (Enforcement of transfers)

110. *The Working Group adopted Article 40.*

Article 41 (Proceeds)

111. *One expert* suggested that Article 41 was designed to provide for the law applicable to effectiveness of a "transferee's right in proceeds", rather than a "transfer of proceeds". The expert suggested that the article be amended to clarify the issue. Another expert agreed, and suggested that the Working Group should check the MLF for other references to "transfer of proceeds" to verify whether other changes were required. *The Working Group agreed that Article 41 should be amended to refer to a "transferee's right in proceeds", rather than a "transfer of proceeds".*

112. With reference to footnote 53, *one observer* noted that Article 41 was inconsistent with the corresponding rule in Article 89(2) of the MLST, which provided that the law applicable to the effectiveness and priority of security rights in proceeds was the law applicable to the third-party effectiveness and priority of rights in the assets of the same type as the proceeds. The observer suggested that Article 41 should be amended to reflect the substantive rule in the MLST. *The Secretariat* noted that the MLF conflict of laws rules were drafted in 2020 before the definition of "proceeds" had been settled, and suggested that the Working Group should give the matter further consideration. *Several experts* supported the observer's proposal. *One expert* noted that the MLST provided different conflict of laws rules for the different types of assets (such as bank account and negotiable instruments). The expert suggested that it would be unnecessary for the MLF to provide specific conflict of law rules for each different type of proceeds, but nonetheless agreed with the observer's general proposal. *The Working Group agreed that Article 41 of the MLF should be amended to ensure policy consistency with the MLST by providing that the law applicable to the third-party effectiveness and priority of a transferee's right in proceeds was the law applicable to the third-party effectiveness and priority of an interest in an asset of the same kind as the proceeds.*

113. *One expert* queried whether Article 41(1) was necessary, on the basis that Article 38 already provided that the applicable law for the effectiveness of a transfer of receivable was the law of the location of the transferor, and the MLF provided elsewhere that the transfer of a receivable entitled the transferee to the proceeds. *Several experts* suggested that it was preferable for the MLF to have two distinct conflict of laws rules for (i) effectiveness and priority of transfers and (ii) effectiveness and priority of rights in proceeds. *One observer* noted that it was important for the MLF to contain both a substantive rule which provided that the right of a transferee in a receivable extended to the receivable's identifiable proceeds, and a conflict of laws rule regarding the effectiveness and priority of a transferee's right to those proceeds. *The Working Group agreed to retain Article 41(1).*

Article 42 (Meaning of "location" of the transferor)

114. *The Working Group adopted Article 42.*

Article 43 (Relevant time for determining location)

115. *The Working Group adopted Article 43.*

Article 44 (Exclusion of *renvoi*)

116. *The Working Group adopted Article 44.*

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

117. *One observer* queried why Article 45 did not include the public policy rules contained in Article 93 of the MLST. *The Secretariat* noted that the proposal from the conflict of laws subgroup in 2020[7] (which had been adopted by the Working Group at its second session) had suggested that only paragraphs 1 and 6 of Article 93 of the MLST should be included in the MLF, on the basis that almost every State would be expected to already have such public policy rules. *Several experts* suggested that the Working Group should reconsider its earlier decision, as it would be preferable for the MLF to be fully aligned with Article 93 of the MLST, in order to provide certainty in relation to public policy rules. *One observer* agreed, noting that Article 93 of the MLST was based on Article 11 of the Hague Principles on Choice of Law for International Commercial Contracts. *The Working Group decided to align Article 45 of the MLF with Article 93 of the MLST by including the relevant public policy rules.*

118. *The Working Group agreed to remove "ordre public" from Article 45.*

Article 46 (Commencement of insolvency proceedings does not affect the law applicable to a transfer)

119. *One observer* suggested that either Article 46 or the Guide to Enactment should incorporate the substance of paragraph 500 of the MLST Guide to Enactment which provided that "nothing in this article restricts the application of the law of the State in which the insolvency proceedings are commenced to matters, such as the avoidance of fraudulent secured transactions, the treatment of secured creditors, the writing of claims, and the distribution of proceeds." The observer noted that the proposed text reflected recommendation 223 of the UNCITRAL Legislative Guide on Secured Transactions and recommendation 31 of the UNCITRAL Legislative Guide on Insolvency Law. *One expert* noted that the rule could be included in Article 46, as it would not replace the applicable law but would clarify that a State's insolvency law could reverse the result under the applicable law in relation to priority ordering, because of different rules on personal preferences etc. *Several other experts* agreed with the policy but suggested that it would be preferable to address the matter in the

[7] See UNIDROIT 2020 – Study LVIII A – W.G.2 – Doc. 2, page 22.

Guide to Enactment. *The Working Group decided to include the substance of paragraph 500 of the MLST Guide to Enactment in the MLF Guide to Enactment.*

Article 47 (Multi-unit States)

120. *The Working Group agreed to remove the square brackets around Article 47.*

Chapter IX (Transition)

Proposal for new transition rule

121. *One expert* suggested that the Working Group should consider including an additional transitional rule in the MLF that clarified which law (the prior law or the new law) applied to a debtor's defences and set-off arising from an original contract that had been concluded before entry into force of the new law. The expert noted that the issue was not addressed in the MLST. The expert explained that the issue had arisen when Japan amended its obligation law in 2017. The expert further explained that a debtor's defences and right to set-off were relatively broad under the MLF and that in many civil law countries the debtor's defences and right to set-off might be more restrictive. The expert concluded that without an additional rule, Article 49(2) of the MLF would apply the new law to prior transfers, which could be detrimental to the position of the transferee.

122. The issue raised by the expert was discussed at great length. *Several experts* noted that the lacuna in the MLF was potentially broader than the issue identified by the expert, as the position of the debtor might not be appropriately protected by the existing transition rules.

123. *One expert* agreed that Article 49(2) was limited to the law applicable to prior transfers and was silent on debtor's defences and right to set off. The expert noted that further complexity could arise under Article 49, if the original contract was concluded before entry into force of the new law but only some of the receivables were factored under a transfer agreement concluded before the entry into force of the new law, and other receivables were factored under a transfer agreement concluded after entry into force of the new law. The expert explained that under such a scenario, some of the receivables would be governed by the prior law, and some receivables would be governed under the new law.

124. *Other experts* suggested that while it was important for the MLF to address the identified lacuna, it was important not to overstate the scope of the problem. *One expert* noted that most States would provide for a long transition period before entry into force of the new law, which would allow the receivables financing industry to prepare for entry into force of the new law and plan accordingly. The expert further noted that the MLF would predominantly apply to short-term receivables, which further limited the array of complex scenarios that could arise in practice during the transition from the prior law to the new law. *Another expert* noted that Article 28 specifically provided that a debtor had the right to raise against the transferee all defences and rights of set-off arising from the original contract. The expert explained that the debtor would thus have the right to raise defences and rights of set-off arising under the original contract, even after transition to the new law. The expert concluded that the only rights of set-off that the debtor might lose under the new law would be those arising from unrelated contracts (contracts other than the contract giving rise to the receivable). *Several observers representing industry* agreed that in practice the lacuna was unlikely to be significant, because (i) parties would be aware of the new law coming into force and could plan accordingly, and (ii) the MLF was likely to be primarily implemented in States where factoring didn't really exist.

125. *Several experts* queried how the transition rules would apply to an original contract concluded before entry into force of the new law which contained an anti-assignment clause which was effective under the prior law. The experts expressed concern that a debtor that was protected by a valid anti-

assignment clause under an original contract that was concluded before the entry into force of the new law would be overridden under Article 8 of the new law, and the debtor would also lose its defence for discharge by payment to the transferor.

126. *Several experts* stressed that it was important for the position of the debtor not to be undermined by the entry into force of the new law, as the principle of debtor protection was an essential element enshrined in Article 15 of the RC and reflected in Article 25 of the MLF. The experts drew a distinction between two different types of debtor protections; (i) those relating to who the debtor has to pay; and (ii) the amount the debtor has to pay. The experts suggested that the most important aspect was to ensure that the debtor did not have to pay more under the new law than it would have had to pay under the prior law. *One expert* suggested that it was also important that the debtor did not have to pay less under the new law, to ensure that the new law was not detrimental to the transferee. *Another expert* responded that the only theoretical way a debtor could be obliged to pay more under the new law was if they had a pre-existing right of set-off that was unconnected to the contract giving rise the receivable. Under such a scenario, if the prior law had allowed debtor set-off at any time, Article 28(2) of the new law would not allow debtor set-off after the debtor had been notified of the assignment of a cross-claim. The expert explained that the pre-existing prior claim could arise under tort law, contract law or any right that existed under the prior law. The expert concluded that while the issue was somewhat difficult to specifically address in the MLF, it was important to emphasise that this specific instance was the only theoretical circumstance under which a debtor could be required to pay more than it would have had to pay under the prior law.

127. *One expert* cautioned that "prior law" had a defined meaning under Article 49(1) of the MLF and noted that the term might need to be avoided in drafting the new transition rule being contemplated by the Working Group.

128. *After further discussion, the Working Group decided that the MLF should contain a new transition rule that allowed an enacting State to continue to apply certain pre-existing laws where the contract giving rise to the receivable was entered into before the entry into force of the MLF. The Working Group further decided that the new transition rule should require enacting States to list the matters that would be determined by the pre-existing law. The Working Group requested the Secretariat to prepare a drafting proposal for further consideration by the Working Group.*

129. At a later point during the Working Group's sixth session, the Secretariat presented two alternative drafting proposals for the Working Group's consideration.[8] *The Secretariat* noted that the two alternative proposals were substantively consistent and merely provided alternative drafting approaches.

---

[8] The Secretariat's alternative drafting proposals were as follows:

[Alternative A] The law applicable under the conflict-of-laws rules of [the enacting State] that applied to [specific list of issues] immediately before the entry into force of this Law continues to apply where the contract giving rise to the receivable was entered into before the entry into force of this Law.

[Alternative B] If a contract giving rise to a receivable was entered into before the entry into force of this Law, the following matters are determined by the law applicable under the conflict-of-laws rules of [the enacting State] that applied immediately before the entry into force of this Law:

a. Article 8(2)
b. Article 25
c. Article 26
d. Article 27
e. Article 28
f. Article 29
g. Article 30
h. Article 31.

130. *Several experts* expressed a preference for Alternative B. *One expert* noted that where a long-term original contract existed and the pre-existing law was more debtor-friendly than the MLF, any receivables factored under the new law would still be subject to the older debtor-friendly provisions. The expert suggested that the new provision could include a sunset provision after which the new law would apply. *Several experts* suggested it would be preferable not to include a sunset provision, on the basis that the debtor protection principle should remain in place and should not sunset. *One expert* noted that if the Working Group had to choose between allowing a financier to buy receivables under a pre-existing long-term contract as opposed to eroding the accrued rights of the debtor under a pre-existing contract, it would be preferable to protect the debtor and accept that the receivable might not be financeable under the new law.

131. *One observer* queried why the new provision was limited to the contract giving rise to the receivable and did not apply to other agreements between the debtor and transferor. The observer noted that it was possible that an anti-assignment clause could be contained in an overarching agreement between the debtor and transferor rather than the contract giving rise to the receivable, and that under the current drafting such an anti-assignment clause would be overridden by the new law. *The Working Group agreed that the new provision should be limited to the original contract giving rise to the receivable rather than other agreements between the transferor and debtor.*

132. *One observer* queried why the new provision referred to the law applicable under the conflict of laws rules of the enacting State, rather than the applicable law of the forum. The observer alternatively suggested that the new provision could simply apply the "law that applied immediately before entry into force of this law". *One expert* responded that the proposed rule correctly referred to the conflict of laws rules of the enacting State because the rule would only apply if the litigation occurred in the enacting State. *Another expert* noted that the conflict of laws rule was necessary as it was possible that the conflict of laws rule in the enacting State itself could have changed over time. The expert noted that the Guide to Enactment could explain why the conflict of laws rule was necessary and explain that the practical result of the conflict of laws rule would be for the law of the forum to apply. *The Working Group agreed that the new provision should refer to the law applicable under the conflict of laws rules of the enacting State.*

133. *Another observer* noted that it was clear that the new provision contemplated two possible changes between the pre-existing law and the new law: (i) a change in the substantive rules governing the original contract between the transferor and debtor, and (ii) the conflict of laws rules in the enacting State. The observer noted that the reference in the new provision to the "law applicable under the conflict of laws rules of [the enacting State] immediately before entry into force of the new law" could confuse a reader into thinking that the listed articles were conflict of laws rules rather than the substantive provisions. The observer suggested that as a drafting matter, the new provision could be refined, or the matter could be addressed in the Guide to Enactment. *An expert* responded that it was clear that the articles listed were substantive provisions and were unrelated to conflict of laws, so there was only one possible interpretation when reading the article as a whole.

134. *The Working Group decided that the new provision should list the specific articles that would be affected by the pre-existing law where the contract giving rise to the receivable was entered into before the entry into force of the MLF.* In reference to the listed articles, *one expert* queried whether the new provision should also list the Articles regarding the rights and obligations between the transferor and transferee in Articles 21-24, or whether those articles were already covered by the transition rule in Article 49(2). *Another expert* responded that Article 51 already dealt with the effectiveness of a prior transfer between the parties. The expert explained that Articles 21 and 22 would be subject to party autonomy and entry into force of the new law would not affect them. The expert further explained that in relation to Articles 23 and 24, there would be no prejudice to the transferor or transferee that needed to be addressed by the new provision.

135. *The Working Group agreed to include the following provision at the end of Chapter IX of the MLF:*

"Article 54 - Transitional rules for the rights and obligations of the debtor

If a contract giving rise to a receivable was entered into before the entry into force of this Law, the following matters are determined by the law applicable under the conflict-of-laws rules of [the enacting State] that applied immediately before the entry into force of this Law:
a. Article 8(2)
b. Article 25
c. Article 26
d. Article 27
e. Article 28
f. Article 29
g. Article 30
h. Article 31"

Article 48 (Amendment and repeal of other laws)

136. *The Working Group adopted Article 48.*

Article 49 (General applicability of this Law)

137. With reference to footnote 57, *the Working Group agreed to rectify the numbering error in Article 49(1).*

138. *One expert* queried why "applicability" was used in the titles of Articles 49, 50 and 50, whereas "application" was used in the title of Article 53. *The Chair* suggested that it was inconsistent use of terminology, rather than a substantive difference. *The Working Group decided to make the use of "applicability" and "application" consistent throughout Chapter IX of the MLF.*

Article 50 (Applicability of prior law to matters that are subject of proceedings commenced before entry into force of this law)

139. *The Working Group adopted Article 50.*

Article 51 (Applicability of prior law to effectiveness of a prior transfer between the parties)

140. *The Working Group adopted Article 51.*

Article 52 (Transitional rules for determining the third-party effectiveness of a prior transfer)

141. *The Working Group adopted Article 52.*

Article 53 (Application of prior law to the priority of a prior transfer as against the rights of competing claimants arising under prior law)

142. *The Working Group adopted Article 53.*

Article 54 (Entry into force of this Law)

143. *The Working Group agreed to move Article 54 to the start of Chapter IX.*

Annexe A - Registry Provisions

Clause 1 (Definitions)

144. *The Working Group adopted Clause 1.*

Clause 2 (Transferor's authorisation for registration)

145. *One observer* queried why Clause 2 did not incorporate Article 2(6) of Chapter IV of the MLST, which provided that the Registry may not require evidence of the existence of the grantor's authorisation. *One expert* recalled that the Registry subgroup had decided to limit the registration rules in the MLF to those rules that addressed the functionality of the registry and not include rules that related to duties of the registrar. The expert explained that this policy decision was made on the basis that registry design and operation had evolved since the MLST was adopted, and there was no need to burden the MLF with registry rules that related to public policy and administrative matters. *The observer* suggested that the Guide to Enactment should provide that the absence of Article 2(6) from the MLF should not be interpreted so as to require evidence of a grantor's authorisation in order to effect registration of a notice.

146. *The Working Group adopted Clause 2.*

Clause 3 (One notice sufficient for multiple transfers)

147. *One observer representing industry* queried what was meant by registration of a single notice related to transfers under one or more than one transfer agreements. *One expert* responded that as a notice would only be effective where it identified the grantor, it was very unlikely that the provision would allow one notice to apply to transfers by different transferors, unless it was a group of related companies. As such, the expert explained that the main use of Clause 3 was to allow a series of sale of receivables between two parties to be covered by one notice, rather than requiring the parties to make a new registration each time a new transfer agreement was entered into. *The Working Group decided that the Guide to Enactment should explain that "transfers under one or more than one transfer agreement" generally meant one or more transfer agreements between the same parties instead of multiple transfer agreements between different parties.*

148. *The Working Group adopted Clause 3.*

Clause 4 (Advance registration)

149. With reference to footnote 58, the Working Group discussed whether the phrase "before a transfer" was redundant and could be removed from the provision. *Several experts* suggested that it would be preferable to retain the language, as it was helpful in clarifying that notices related to future transfers could be registered before the transfer took place.

150. *The Working Group adopted Clause 4*

Clause 5 (Conditions for access to registry services)

151. *The Working Group adopted Clause 5.*

Clause 6 (Rejection of the registration of a notice or a search request)

152. *One observer* queried why the MLF had diverged from the corresponding provision in the MLST. The observer explained that the MLST consistently used the word "reject", whereas Clause 6 of the MLF used the terminology "must not permit" in paragraph 1 and "must not accept" in paragraph 2. *An expert* responded the "reject" language in the MLST reflected an older style approach to registry

systems, which contemplated the registrar actively considering notices. The expert explained that modern electronic systems prevented a registration from even being made in the first place, rather than being subsequently rejected. The expert concluded that the language change was designed to better reflect that a registry should not allow a registration to be made in the first place if it did not comply with the requirements in Clause 6. *The Working Group reaffirmed that Clause 6 should use "not accept" rather than reject, and asked the Secretariat to ensure that the wording was used consistently throughout the provision.*

Clause 7 (Information required in an initial notice)

153. *The Working Group adopted Clause 7.*

Clause 8 (Transferor's identifier)

154. *The Working Group* identified a number of issues regarding Clause 8.

155. With reference to footnote 59, *one expert* noted that the current drafting of Clause 8 was misleading as it appeared that a registrant could choose whether to enter the transferor's name or other identifier in a notice. The expert explained that the actual intent of Clause 8 was to require the enacting State to designate whether a transferor had to be identified by name or by other identifier. *Several* experts agreed that Clause 8(1) should be amended to clarify that the enacting State needed to make a decision regarding the transferor's name or other identifier, and that it was not intended to be a choice left to the registrant.

156. *Another expert* noted that Clause 8 should allow a State to choose both an identifier and a name, as it was likely that some natural persons might not have the relevant identifier. The expert suggested that the rule could provide for a "waterfall" which clarified the primary registration identifier, and then additional identifiers if the primary identifier could not be used. *An observer representing UNCITRAL* noted that UNCITRAL's MLST Registry Guide provided that the transferor's name was the basic identifier, and that other unique identifiers could be used as additional identifiers. *The Working Group agreed that Clause 8 should be amended to clarify that the enacting State had to specify the name or other identifier required to identify the transferor in a notice.* A variety of drafting approaches were proposed by different experts. *Several experts* suggested that square brackets should be used in different places to indicate to enacting States that these provisions could not be enacted without alteration by the enacting State, and that the Guide to Enactment could provide additional information. *After further discussion*, *the Working Group decided to amend Clause 8(1) to provide that "where the person to be identified in an initial or amendment notice as the transferor is a natural person, the transferor's identifier is [the name or other identifier of that person, to be specified by the enacting State as it appears in the relevant official document to be specified by the enacting State]".*

157. *The Working Group also agreed to separate the second sentence of Clause 8(1) into a new paragraph and to place the sentence in square brackets, in order to improve the clarity and readability of the provision.*

158. *One expert* queried whether Clause 8(3) was necessary. The expert noted that he had never seen the provision implemented in any regulation or law. *Several experts* responded that the paragraph should be retained, and distinguished it from Clause 18 which provided the rules related to a post-registration change of the transferor's identifier. *Another expert* queried why paragraph 3 applied only to natural persons under paragraph 1 and not to legal persons under paragraph 4. The expert noted that the existing structure followed the MLST, but could not recall why the MLST had adopted such an approach. *The Working Group decided to amend paragraph 3 so it applied to both natural persons under paragraph 1 and legal persons under paragraph 3. The Working Group further agreed to change the order of paragraphs 3 and 4 of Clause 8.*

159. *The Working Group agreed that the Guide to Enactment should provide further information for enacting States regarding how the transferor's identifier(s) should be specified under Clause 8 of the MLF.*

Clause 9 (Transferee's identifier)

160. *Several experts* suggested that Clause 9 be amended to conform its language to the changes made to Clause 8. *One expert* cautioned that there were important substantive differences between Clauses 8 and 9. The expert explained that transferees under Clause 9 were likely to be foreign entities and thus much less likely to have a uniform identifier. *Another expert* noted that under Clause 18, the legal consequence of making an error in relation to the transferee's identifier was less serious than making an error in relation to the transferor's identifier. *Yet another expert* noted that Clause 9 had no corresponding provision to Clause 8(3), which required the enacting State to specify the manner in which the transferor's name or other identifier was determined if it was legally changed. The expert noted that there was no need to include a corresponding rule in Clause 9, because the name of the transferee was not a searchable criterion under Clause 16. *The Working Group agreed that the Guide to Enactment should provide information on the differences between Clauses 8 and 9.*

161. *One observer* queried why Clause 9 did not contain a provision corresponding to Article 10(3) of the Model Registry Provisions in Chapter IV of the MLST. The observer explained that Article 10(3) required the enacting State to specify whether additional information needed to be included in a notice in special cases, such as whether the secured creditor was subject to insolvency proceedings. The observer concluded that the matter could alternatively be dealt with in the Guide to Enactment. *An expert* responded that there was no need to include a provision corresponding to Article 10(3) of MLST Chapter IV as its omission had no legal effect and simplified the MLF's registry provisions.

162. *The Working Group decided to make conforming amendments to the placement of the square brackets in Clause 9, in order to reflect the changes to Clause 8.*

Clause 10 (Description of receivables)

163. *The Working Group adopted Clause 10.*

Clause 11 (Time of effectiveness of the registration of a notice)

164. *The Working Group adopted Clause 11.*

Clause 12 (Period of effectiveness of the registration of a notice)

165. *The Working Group adopted Clause 12.*

Clause 13 (Information required in an amendment notice)

166. *The Working Group agreed to change "notice" to "registered notice" in Clause 13(2), on the basis that the paragraph related to the changing of information for a notice that had already been registered.*

Clause 14 (Compulsory registration of an amendment or cancellation notice)

167. With reference to footnote 60, *the Working Group agreed to change "transfer" to "transferor" in Clause 14(2)(c).* With reference to comment 187, *the Working Group also agreed to include a comma after "initial notice" in line 2 of Clause 14(4).*

168. *One expert* queried the meaning of "the security transfer has been extinguished" in Clause 14(2)(c). The expert noted that the obligation secured by the security transfer could be extinguished,

but suggested that the security transfer itself could not be extinguished. *Another expert* responded that the language was consistent with the corresponding language in the MLST. The expert agreed that while the language was slightly clumsy it was correct, as once all of the secured obligations under a security transfer were fulfilled the security transfer was effectively "extinguished".

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

169. *The Working Group adopted Clause 15*.

Clause 16 (Search criteria)

170. *The Working Group adopted Clause 16*.

Clause 17 (Search results)

171. *The Working Group adopted Clause 17*.

Clause 18 (Registrant errors in required information)

172. *The Working Group adopted Clause 18*.

Clause 19 (Post-registration change of transferor's identity)

173. *The Working Group adopted Clause 19*.

Clause 20 (The registrar)

174. *The Working Group adopted Clause 20*.

2. Other unresolved matters (Study LVIII A – W.G.6 – Doc. 2)

The treatment of data-related receivables

175. *The Secretariat* recalled that at its fifth session, the Working Group had decided that data-related receivables should be included within the scope of the MLF, but had not yet agreed on how the policy should be achieved.[9] The Secretariat noted that intersessional work had been undertaken on the matter, and thanked UNIDROIT Scholar Ms Zeynep Ülkü Kahveci for preparing the background research and drafting proposal in Doc. 2. The Secretariat explained that the drafting proposal was based on comparative research undertaken on how data contracts were being defined internationally, including by UNCITRAL, under the ALI-ELI Principles, and by the Japanese Ministry of Economy, Trade and Industry. *The Secretariat* concluded that the Working Group should consider including an additional sub-paragraph to Article 2(1)(f) of the MLF which provided:

"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;
(iii) ***the provision or processing of data; or***
(iv) the payment obligation for a credit card transaction.

---

[9] See UNIDROIT 2022 – Study LVIII A – W.G.5 – Doc. 6, paragraph 87.

176. *Several experts* questioned what the relationship was between data-related receivables in Article 2(1)(f)(iii), the "supply or lease of goods or services" in Article 2(1)(f)(i) and "the assignment or licence of intellectual property" in Article 2(1)(f)(ii). The experts noted that there was overlap between the supply of services and the provision or processing of data, and in certain circumstances there could also be overlap between the assignment or licence of intellectual property and the provision or processing of data. *The Chair* responded that overlap between the different categories in Article 2(1)(f) was not necessarily problematic, as all of the categories give rise to receivables. *The Chair* further explained that the proposed approach avoided the MLF having to make clear decisions regarding whether data "provision or processing" was the supply of goods or services, which remained an unresolved issue internationally. *Some experts* suggested that the "provision or processing of data" could be included in the "supply or lease of goods or services" in Article 2(1)(f)(i). *One observer* explained that the processing of data should not be categorised as solely a service, as the processing of data sometimes led to the generation of new data, which could be considered to be a "good" in some jurisdictions. *Another expert* suggested that "arising from one or more of the following" could be included in the chapeau of Article 2(1)(f) to clarify that the four categories giving rise to receivables overlapped and were not mutually exclusive. *The Working Group agreed to add "arising from one or more of the following" to the chapeau of Article 2(1)(f), and to provide extensive guidance on the matter in the Guide to Enactment.*

177. *One observer representing UNCITRAL* noted that UNCITRAL would further consider the proposed definition internally. *The observer* queried whether it might be preferable to address the matter less explicitly by not using the word "data" and instead explaining how data transactions might already by covered under the existing 2(1)(f). *The Chair* responded that the Working Group appeared to favour explicitly addressing the issue, due to the large and growing importance of data-related transactions to the global economy. *An expert* noted that the initial definitions adopted by UNCITRAL which formed the basis of the Secretariat's drafting proposal had not yet been adopted by UNCITRAL, and only currently existed in a working document. The expert cautioned that if UNCITRAL were to change its approach, the MLF's treatment of data-related receivables could quickly become outdated. *The Chair* responded that the proposed approach appeared to be broad and general enough so that future potential terminological changes by other international institutions would not unduly limit the definition of receivable in relation to data-related transactions.

178. *One observer representing UNCITRAL* queried why the proposed definition referred to the "provision" of data rather than the "supply" of data. *Another observer* responded that under the ALI-ELI principles, "provision" was considered to be a broader term than "supply" as it also encompassed the transfer of data, and thus seemed more appropriate for inclusion in the MLF.

179. *One expert* agreed that the MLF should not attempt to define "data", but queried whether the Guide to Enactment should provide any limitations on what should be considered "data". *Another expert* noted that the MLF was intended not to apply to financial receivables, and suggested that the Guide to Enactment would need to provide clear guidance on how "the provision or processing of data" related to both financial receivables and digital assets to ensure that the proposed additional language did not unduly expand the scope of the MLF to transactions that the Working Group did not intend to cover.

180. *One observer representing industry* queried whether the proposed definition resolved the issue that some factors faced where a receivable could not be transferred due to data protection or privacy issues. *The Chair* noted that these matters could not be resolved in the MLF and would be regulated by the enacting State's broader legal framework. *The Chair* noted that the issue could be further explained in the Guide to Enactment.

181. *The Working Group agreed to add "the provision or processing of data" to the definition of receivable under Article 2(1)(f)(iii) of the MLF.*

Other matters

182. *One expert* queried whether Chapter III should be amended to provide that the debtor should not be considered as a "third party" for the purposes of the chapter. The expert explained that under Article 9, it was clearly intended that the debtor not be considered a third party, because the transfer of a receivable would be effective against a debtor once the debtor had been notified, regardless of whether a notice relating to the transfer had been registered. The expert concluded that the matter could alternatively be dealt with in the Guide to Enactment. *Another expert* agreed, and suggested that there might be merit in addressing the matter directly in the MLF. *A third expert* cautioned against expressly providing that the debtor was not a third party in the MLF, and suggested that the matter be dealt with in the Guide to Enactment. *The Working Group decided that the Guide to Enactment should clarify that the debtor would not be considered to be a third party under Chapter III of the MLF.*

183. *One observer representing industry* noted that for reverse factoring transactions, industry practice was often for the transfer not be registered. *Another observer representing industry* agreed that for certain types of factoring, such as non-notification factoring or reverse factoring, it was common for the transferee not to register a notice related to the transfer. The observer noted that this created the risk that the transferor might fraudulently assign a receivable a second time, and if second transfer was registered then it would have priority. The observer concluded that this was the reasonable risk that the transferee would have to consider in deciding not to register a notice in a reverse factoring scenario, and that the MLF did not need to be amended to address the issue.

184. *One expert* queried whether the MLF should address the requirement to notify the debtor when a secured obligation had been satisfied. The expert explained that the MLF imposed an obligation on the transferee to register a cancelation notice, but did not impose a corresponding obligation to inform the debtor that it no longer must remit payments to the transferee. *The Working Group decided that the MLF did not need to address this issue.*

185. *The Working Group finished its review of the Model Law on Factoring. The Working Group approved the draft instrument, and agreed to submit the Model Law to the UNIDROIT Governing Council at its 102nd session in 2023, with a recommendation that the Governing Council adopt the Model Law on Factoring.*

Item 4: Organisation of future work

186. *The Secretariat* noted that the updated Model Law on Factoring and the report from the Working Group's sixth session would be circulated to the Working Group in early 2023. Working Group members would then have one more opportunity to review the instrument and submit any final comments. If necessary, the Working Group could hold a short virtual meeting in March 2023 to address any additional issues that were identified. The Secretariat further explained that the French version of the MLF would be finalised by the end of March 2023, and the English and French versions of the instrument would be circulated to the Governing Council in April 2023.

187. The Secretariat noted that should the Governing Council adopt the MLF at its 102nd session in May 2023, the Secretariat would prepare physical and electronic versions in English and French for publication before the end of 2023.

188. The Secretariat finally noted that Working Group members would be invited back to begin the development of a Guide to Enactment for the Model Law on Factoring. The Secretariat noted that the project would begin in the second half of 2023 and that the first Working Group meeting would be scheduled in due course.

Item 5: Any other business

189. No other business was raised.

Item 6: Closing of the session

190. *The Chair* thanked all participants for their contributions over the past three years to develop the Model Law on Factoring. *The Chair declared the session closed.*

ANNEX I

AGENDA

1. Opening of the session by the Chair

2. Adoption of the agenda and organisation of the session

3. Consideration of substantive matters:

   (a) Comments received on the Model Law on Factoring during the public consultation (Study LVIII A – W.G.6 – Doc. 4, Study LVIII A – W.G.6 – Doc. 5)

   (b) Any other unresolved matters (Study LVIII A – W.G.6 – Doc. 2)

   (c) Preliminary draft Model Law on Factoring (Study LVIII A – W.G.6 – Doc. 3)

4. Organisation of future work

5. Any other business

6. Closing of the session

ANNEX II

LIST OF PARTICIPANTS

EXPERTS

Mr Henry GABRIEL (Chair)
Professor of Law
Elon University
United States of America

Mr Giuliano CASTELLANO
Associate Professor
Asian Institute of International Finance Law (AIIFL)
Hong Kong

Mr Neil COHEN
Jeffrey D Forchelli Professor of Law
Brooklyn Law School
United States of America

Mr Michel DESCHAMPS
Université de Montreal
McCarthy Tetrault
Canada

Mr Marek DUBOVEC
University of Arizona
International Law Institute
United States of America

Mr Alejandro GARRO
Adjunct Professor of Law
Colombia Law School
United States of America

Ms Louise GULLIFER
Rouse Ball Professor of English Law
University of Cambridge
United Kingdom

Ms Megumi HARA
Professor of Law
Chuo University
Japan

Ms Catherine WALSH
Professor of Law
McGill University
Canada

Mr Bruce WHITTAKER
Senior Fellow
University of Melbourne
Australia

INTERGOVERNMENTAL ORGANISATIONS

EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (EBRD)

Mr Milot AHMA
Acting Counsel
Financial Law Unit, Legal Transition Team

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL)

Mr Jae Sung LEE
Legal Officer
International Trade Law Division

INTERNATIONAL NON-GOVERNMENTAL ORGANISATION

INTERNATIONAL CHAMBER OF COMMERCE	Ms XU Jun Deputy General Manager Global Transaction Banking Department Bank of China
KOZOLCHYK NATIONAL LAW CENTER (NatLaw)	Mr Spyridon BAZINAS Lead Advisor United States of America

PRIVATE SECTOR REPRESENTATIVES

APEC FINANCIAL INFRASTRUCTURE DEVELOPMENT NETWORK	Mr Chris WOLHERT Business Leader Commercial Distribution Finance Asia Wells Fargo Bank
FACTOR CHAIN INTERNATIONAL (FCI)	Mr Peter MULROY Secretary General Mr Ulrich BRINK FCI Legal Committee Germany Mr Saibo JIN FCI Legal Committee China
SECURED FINANCE NETWORK	Mr Richard KOHN Co-General Counsel United States of America
WORLD OF OPEN ACCOUNT	Mr Bob TROJAN Senior Advisor United States of America

OTHER OBSERVERS

Mr Orkun AKSELI Professor of Commercial Law The University of Manchester Law School	Mr Ole BÖGER District Court Judge Hanseatic Court of Appeal Bremen
Ms María DEL PILAR BONILLA Consultant of the Office of Technical Assistance of US Treasury (OTA)	Sir Roy GOODE Emeritus Professor of Law University of Oxford

Ms Sofia Meiling HUANG
Professor of Roman Law and Comparative law
Zhongnan University of Economics and Law
Executive Director of Sino-Italian Institute

Ms Elham MABROUK
Lecturer
Cairo University

Ms Shighadi MWAKIO
Deputy Registrar, MPSR
Business Registration Service
Office of the Attorney-General & Department of Justice
Kenya

Ms Zeynep Ülkü KAHVECI
Researcher

SECRETARIAT

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

Mr Ignacio TIRADO
Secretary-General

Ms Anna VENEZIANO
Deputy Secretary-General

Mr William BRYDIE-WATSON
Senior Legal Officer

Mr Chen MIAO
Legal Officer

Ms Philine WEHLING
Legal Officer

Mr Camilo SALDIAS
Pro Bono consultant

Ms Katerina PAMPOUKI
Intern

Ms Stephanie (Yue) ZHAI
Intern