



**Model Law on Factoring
Guide to Enactment Working Group
First session (hybrid)
Rome, 8 – 10 April 2024**

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MODEL LAW ON FACTORING GUIDE TO ENACTMENT SECTION SUMMARIES

I. INTRODUCTION

1. This document provides summaries of each proposed section in the Guide to Enactment (GtE) for the UNIDROIT Model Law on Factoring (MLF). The purpose of these section summaries is to set out the core content of each section for discussion and approval by the Working Group at its first session. Review of the core content will then allow the preparation of the draft sections of the GtE, for consideration by the Working Group at its second session.
2. During its initial planning meetings in early 2024, the Working Group tentatively adopted a draft structure in the MLF, consisting of four parts and 22 sections (as set out below).
3. Rather than asking each Working Group member to draft a section each of the Guide to Enactment, the Working Group created small “review teams” for each section. Each review team will be responsible for deciding on the content and structure of each section. Each review team works with a primary drafter, who will prepare the actual draft chapter, for review by the Working Group. Each review team will also provide feedback on their assigned sections. Under this model, each Working Group member is responsible for providing advice on several different parts of the GtE, however only three Working Group members, along with the Secretariat, “hold the pen”.
4. In advance of the first Working Group session, the primary drafters prepared summaries of their assigned sections, and circulated the draft section summaries to their review teams for comment. Due to the limited time available for the preparation of these section summaries, not all sections have been fully completed or contain the full set of comments received by the review teams.
5. The Secretariat would like to express its gratitude to Working Group members for the significant work undertaken in preparing and reviewing these section summaries, and in particular to Louise Gullifer and Neil Cohen in their capacities as primary drafters.

MODEL LAW ON FACTORING GUIDE TO ENACTMENT – OUTLINE OF PROPOSED STRUCTURE

#	Title	Content/notes	Primary drafter	Subgroup
PART I – PURPOSE AND OVERVIEW				
1	Introduction to the MLF Guide to Enactment	Introduce the instrument, explain why it has been drafted.	Secretariat	NA
2.	Factoring and receivables finance	Introduce business practices, explain what factoring and receivables finance is, types of factoring arrangements.	Secretariat	NA
3.	Introduction to the MLF	<p>a. Highlight risks arising from weak legal framework</p> <p>b. Core legal principles of the MLF</p> <p>c. Economic and other benefits (societal benefits, fraud prevention etc)</p> <p>Set out the core legal principles of the MLF, which States should adhere to (and will be explained/referred to throughout the article-by-article commentary in Part IV). The economic and other benefits section will be very short (1 page or so).</p>	Secretariat	NA
4.	Overview of the MLF	Short chapter-by-chapter overview of the MLF, factual and legal in approach (not a sales pitch), set out the most important aspects of each Chapter.	Louise Gullifer	NA
5.	<p>[Coordination of the MLF with other international instruments]</p> <p>Section is bracketed – Working Group may decide to remove once it has been reviewed.</p>	<p>Very brief explanation of relationship with:</p> <p>Factoring Convention</p> <p>Assignment Convention</p> <p>Model Law on Secured Transactions</p> <p>Make section short and ensure it does not generate concern or confusion for implementing States.</p> <p>Note that this section could also be included in Part III.</p>	Secretariat	NA
PART II – IMPLEMENTATION OF THE MODEL LAW ON FACTORING				
1.	Implementation of the Model Law on Factoring within the existing legal framework	<ul style="list-style-type: none"> - States which have undertaken modern secured transactions reforms - States which have undertaken limited secured transactions reforms - States that have not undertaken secured transactions reforms - Standalone law or within a broader code - Implementational Issues (guidance on sensitive cases, e.g. where States have implemented factoring laws that significantly deviate from the MLF approach, such as factoring registries that only apply to the outright transfer of receivables). <p>This section explains how the MLF will fit within the implementing states existing ST laws, with guidance on avoiding setting up separate registries etc.</p>	Louise Gullifer	Marek Dubovec Megumi Hara Giuliano Castellano

		Reference the transitional provisions in Chapter IX of the MLF.		
2.	Implementation of the Model Law on Factoring in different legal systems	Additional explanation on special considerations that might need to be taken into account when the MLF is implemented in States with common law, civil law and sharia/Islamic traditions.	Neil Cohen	Marek Dubovec Alejandro Garro
PART III – COORDINATION OF THE MODEL LAW ON FACTORING WITH GENERAL LAW, REGULATION AND OTHER MATTERS				
1.	Coordination of the MLF with domestic law	How the MLF fits with both the general private law of the implementing State (e.g. contract law), as well as the broader general law. Explain that the MLF supplements/modifies the general private law with more specific rules for the types of transactions within the scope of the MLF, but that the general law continues to apply to the transactions outside the scope of the MLF. ¹ Explain interaction with general law rules that simply interacts with the MLF and that the MLF does not purport to change (consumer protection, insolvency law, negotiable instruments) and other general law rules on which the MLF is deliberately silent (writing requirements, electronic signatures etc).	Louise Gullifer	Marek Dubovec Catherine Walsh Michel Deschamps
2.	The Model Law on Factoring and the digital economy	a. Platforms b. Digital currency ('digital money') c. Domestic electronic commerce laws d. Digital assets and private law – explain that receivables can be linked to digital assets (tokenisation), explain link with the UNIDROIT Principles on Digital Assets and Private Law.	Louise Gullifer	Marek Dubovec Giuliano Castellano
3.	The Model Law on Factoring and Regulatory Matters	a. Banks b. Monetary authorities c. Banking and financial licensing laws	Secretariat	Giuliano Castellano Marek Dubovec
4.	Other Matters	Guidance on other aspects relevant to factoring that may be relevant to implanting States, such as value added tax, credit insurance, currency controls, etc. This section would not provide policy guidance on how these matters should be dealt with, just some basic information on how they may relate to or be effected by the implementation of the MLF.	Secretariat	Giuliano Castellano Marek Dubovec
PART IV – ARTICLE-BY-ARTICLE GUIDE				
1.	General instructions on reading the MLF	Terminology (no need to adopt exact terminology in MLF, can adapt to equivalent domestic law terms) Explanation of bracketed text	Secretariat	NA

¹ Also illustrate how the MLF debtor discharge rules and rights and obligations of parties rules relate to equivalent rules in the general private law for transactions outside the scope of the MLF.

		(This has been moved from Part II section I)		
2.	Chapter I – Scope and General Provisions		Louise Gullifer	Bruce Whittaker Marek Dubovec
3.	Chapter II – Transfer of a Receivable	Will be prepared by the Secretariat as a model section for the article-by-article part, for consideration by the WG at its first session April.	Secretariat	Louise Gullifer Neil Cohen
4.	Chapter III – Effectiveness against third parties of a transfer of a receivable		Louise Gullifer	Michel Deschamps Megumi Hara
5.	Chapter IV – The Registry System		Louise Gullifer	NA
6.	Chapter V – Priority of a Transfer		Louise Gullifer	Bruce Whittaker Megumi Hara
7.	Chapter VI – Rights and Obligations of the Transferor, Transferee, and the Debtor		Louise Gullifer	Bruce Whittaker Michel Deschamps
8.	Chapter VII – Collection and Enforcement		Neil Cohen	Michel Deschamps Alejandro Garro
9.	Chapter VIII – Conflict of Laws		Neil Cohen	Catherine Walsh Michel Deschamps Marek Dubovec
10.	Chapter IX – Transition		Neil Cohen	Catherine Walsh Megumi Hara Alejandro Garro
11.	Annexe A – Registry Provisions		Bruce Whittaker	Catherine Walsh Alejandro Garro Megumi Hara
ANNEXES				
1	Model Law on Factoring		Secretariat	NA

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PART I – PURPOSE AND OVERVIEW			
CHAPTER I – SECTION 1			
INTRODUCTION TO THE MLF GUIDE TO ENACTMENT			
Drafter: Secretariat		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
Introduce the instrument, explain why it has been drafted.			
1.		To be prepared.	It is suggested that the Introduction be drafted at a later point, once there is consensus within the Working Group on the core content.
CHAPTER I - SECTION 2			
FACTORING AND RECEIVABLES FINANCE			
Drafter: Secretariat		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
Introduce business practices, explain what factoring and receivables finance is, types of factoring arrangements.			
1.		<p>The FCI have suggested the following introduction to the MLF (submitted by Ulrich Brink on 18 March 2024):</p> <p><i>This Model Law is intended to promote factoring and other receivable-based asset financing.</i></p> <p><i>In all asset-based financing transactions the creditor strives to be primarily satisfied by the value of the asset in question. It is expected that the value of the asset will be sufficient to cover the claim. Whether or not the creditor is entitled to additional proceeds, or whether the client must provide additional means in case of a loss depends on the individual arrangements between the parties.</i></p> <p><i>In loan arrangements the creditor expects to be repaid by the debtor on due date. The ability of the debtor to repay is the main concern of the</i></p>	

		<p><i>creditor. In addition, the creditor may or may not request additional collateral which will be used only in case of default.</i></p> <p><i>Assets to be used in asset-based finance transactions can be physical assets, such as machinery or real estate, intellectual property, or other immaterial goods. This law deals with receivables as assets, as many small and middle-sized companies often lack sufficient physical assets to cover an obligation, while a great number of receivables arise from their workflow that are due for payment after a certain amount of time. Factors use that value in receivables prior to their due date to provide finance for their clients. Most of these receivables arise from the sale of goods or services, some from other business activities. For the factor, the perspective is on the ability of the debtor to pay, while the ability of the transferor to pay is of lesser importance. Therefore, through factoring, suppliers have better access to finance at affordable rates.</i></p> <p><i>Factors have developed a variety of methods to finance such receivables. In most cases, they purchase the receivables and have them transferred to the factor, who thereby becomes the owner. Typically, the factor provides finance by paying a part or all of the purchase price to the client, or by providing an advance for the purchase price, so the client will see funds well before the due date of the receivable. In non-recourse factoring the factor also provides protection against bad debts ("default protection") so payment by the factor is made even if the debtor of the receivable is unable to pay or becomes insolvent. Ledgering and maintenance of accounts often is provided by the factor as a service, and so is dunning and collection.</i></p> <p><i>While large ticket factoring is often based on a non-notification policy, it is common in SME factoring to notify the debtor of the transfer of the receivable, and request payment on due date directly to the factor.</i></p> <p><i>While factoring was created on the distribution side, it can also be used on incoming invoices ("Reverse Factoring"), sometime combined with traditional factoring to cover the whole supply chain. Technological</i></p>	
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		<p><i>innovation nowadays also allows the sale of receivables to investors by using virtual platforms.</i></p> <p><i>As factoring techniques have developed over the years, a further growth of factoring in the future can be expected in an expanding economy, driven also by the technological evolution.</i></p> <p><i>Outside the factoring world, other methods of asset-based receivable finance were created, such as securitization. A special-purpose company acquires receivables by way of purchase and refinances the deal by issuing commercial papers on the capital market.</i></p> <p><i>While acknowledging that not all different methods of receivable finance are common practice in all countries, UNIDROIT suggests that the text be applicable to all such variants to avoid priority conflicts between different methods, and to allow competitors a level playing field.</i></p>	
<p>CHAPTER I - SECTION 3</p> <p>INTRODUCTION TO THE MLF</p>			
Drafter: Secretariat		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
		<ul style="list-style-type: none"> a. Highlight risks arising from weak legal framework b. Economic and other benefits (societal benefits, fraud prevention etc) c. Core legal principles of the MLF <p>Set out the core legal principles of the MLF, which States should adhere to (and will be explained/referred to throughout the article-by-article commentary in Part IV).</p> <p>The economic and other benefits section will be very short (1 page or so).</p>	
1.	Risks arising from a weak legal framework	<ul style="list-style-type: none"> - Lack of certainty around whether receivables can be transferred. - Lack of certainty around formalities required for a transfer. - Lack of certainty around priority between competing transfers and outright transfers/transfers by way of security. - Imbalanced rights between parties. 	<p>Not sure whether Chapter I(3) should start with this.</p> <p>Should we also include here a “sales pitch” introduction to the MLF</p>

		<ul style="list-style-type: none"> - Lack of certainty in relation to cross-border transactions (applicable law) - All of these risks have a chilling effect on the availability of credit, especially for MSMEs 	(noting that Chapter I(4) is not meant to be a “sales pitch”).
2.	Benefits	<ul style="list-style-type: none"> - MLF facilitates access to credit, especially for MSMEs (referencing materials from the ERBD New Finance Report (https://www.ebrd.com/what-we-do/sectors/legal-reform/access-to-finance.html), broader societal benefits of MSME finance (boost job creation, raise income, reduce vulnerability and increase investments in human capital). - MLF facilitates cross-border trade and strengthens supply chains (referencing materials from Financial Inclusion Trade Roadmap, https://www.baft.org/wp-content/uploads/2023/04/Financial-Inclusion-in-Trade-Roadmap-202326.pdf), creating broader economic benefits. - Fraud prevention (transparency through registration of transfers lessens risk of fraudulent activity) 	
3.	Core principles of the MLF	<ul style="list-style-type: none"> - The rules of the MLF reflect a set of core principles: <ul style="list-style-type: none"> a. Facilitation of receivables finance (e.g. override of anti-assignment clauses) b. Transparency and predictability for commercial transactions (e.g. registry provide transparency) c. Fair and balanced rules for parties (e.g. debtor protections and discharge rules) d. Simplification of legal requirements and lowering of costs (e.g. simple formal requirements for a transfer agreement). e. Non-interference with the enacting State’s broader legal framework - 	<p>These principles are for discussion by the Working Group (both in terms of whether we want core principles, and whether these are the right ones).</p> <p>The concept here is that we want to communicate the overriding policy rationale behind some of the more important articles. If we can do so by connecting these articles to “core principles”, it might assist in preventing States from implementing the MLF in a way that omits the most important articles</p>

			and thus doesn't really improve the domestic legal framework.
CHAPTER I - SECTION 4 OVERVIEW OF THE MLF			
Drafter: Louise Gullifer		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
Short chapter-by-chapter overview of the MLF, factual and legal in approach (not a sales pitch), set out the most important aspects of each Chapter.			
1.	General overview	<ul style="list-style-type: none"> - The fact that the MLF is divided into a number of chapters and that this section is an overview chapter by chapter. - Any other general points not covered below. 	<p>It is hard to say what goes here for now: best to consider that later on in the project.</p> <p>GENERAL NOTE: I have drafted this summary quite fully as it seemed silly to do a summary of a summary. Advice would be very welcome on</p> <ul style="list-style-type: none"> (a) The level of detail, ie what is included or not included. I took as my guiding principle what I thought a State official would want to know about the MLF if she didn't read beyond the end of Part I of the GtE (b) The tone. It is meant to be a bit more 'colloquial' than the Law itself and to be reasonably easy to read.
2.	Chapter 1: Scope and General Provisions	<ul style="list-style-type: none"> - The scope of the MLF is clearly delineated by definitions of many terms used within it. The Law applies (and only applies) to transfers of receivables. 	

		<ul style="list-style-type: none"> - A transfer of a receivable is defined widely as either an outright transfer or a security transfer, in each case by agreement. If a receivable is transferred, the transferee also obtains a right to the proceeds of that receivable.* - The scope, however, is limited by the definition of 'receivable' which, very broadly speaking, is limited to 'trade receivables'. Thus, a receivable is a contractual right to payment of money arising from the supply of what is supplied in the course of trade, such as goods, services, data (or data processing) and intellectual property. Thus, for example, receivables arising from the making of loans and other financial transactions are not included. - Importantly, the definition of 'receivable' as a right to payment in (broadly speaking) a trade contract means that rights to payment in instruments that are independent from the trade contract, such as negotiable instruments and letter of credit, are not included in the Law, and existing domestic law will continue to apply.* [Moreover, policy based domestic law rules such as those in consumer protection law and those limiting the transfer of specific types of receivables are not affected by the Law.**] - As a general matter, most (though not all) of the provisions in the Law can be varied by parties' agreement, and the rights and obligations under the Law must be exercised or performed in good faith and in a commercially reasonable manner. 	<p>[*is this the place to explain briefly why security transfers are included, although most receivables financing is done by outright transfers?]</p> <p>[can we leave credit card transactions out of the overview?]</p> <p>[*cross-ref to III(1) or somewhere else where this could be discussed in more detail. But it is important to have this point stated clearly early on in the GtE] [**again, this could either go in III(1) or be discussed in a bit more detail there]</p>
3.	Chapter 2: Transfer of a Receivable	<ul style="list-style-type: none"> - Under the Law, receivables can be transferred by an agreement between the transferor and the transferee. The formal requirements for an agreement are minimal, and it can describe the transferred receivables generically: it is not necessary to identify specifically every receivable transferred. 	

		<ul style="list-style-type: none"> - Future receivables can be included in a transfer agreement, with transfer taking place when they become present receivables. For example, the agreement can cover all the transferor’s present and future receivables. - Moreover, a receivable can be transferred effectively despite an agreed limitation on the right of the transferor to transfer it,* which is likely to increase the availability of receivables financing. 	<p>[*this is rather shortform: should it include the fact that the agreement has to be between the debtor and the transferor?]</p>
<p>4.</p>	<p>Chapter 3: Effectiveness Against Third Parties of a Transfer of a Receivable</p>	<ul style="list-style-type: none"> - A transfer of receivables will only be effective between the parties to the transfer agreement unless it is registered in the registry. Registration is the only way to make a transfer effective against third parties. - A transfer that is effective against third parties remains effective if the transferor enters into insolvency proceedings. 	<p>[Strictly speaking this comes in chapter 5 but it is so critically linked to ‘effectiveness against TPs’ that I think it should be mentioned here: it can be seen as part of the meaning of ‘effectiveness against TPs’]</p>
<p>5.</p>	<p>Chapter 4 and Annexe A: The Registry System</p>	<ul style="list-style-type: none"> - The Law provides detailed rules for the establishment and operation of the registry; these are found in Annexe A. The registry is a notice filing system, that is, a notice relating to one or more transfers can be registered either before or after the actual transfers have taken place, and is designed to inform anyone searching the registry that a transfer may have taken place. It will then be up to that person to make further enquiries as to whether the transfer has taken place, and the details of the transfer. 	<p>[I’m not sure how much detail to include here. I have tried to summarise the main points so that a State can see how the Registry works without getting bogged down in too much detail. Some text is in square brackets as I thought it might be too much detail]</p>

		<ul style="list-style-type: none">- A notice contains quite minimal information: identification of the transferor and the transferee, plus a description of the transferred receivables that allows them to be identified [and the period of effectiveness of the registration]. - The notice is effective from the time that its information is accessible to searchers; as will be seen below, that time is the priority point for the transfer(s) included in the notice. A notice is effective for a specified length of time, although this can be renewed. - Provision is made in the Law for notices amending or cancelling a registered notice. This is largely to deal with errors in registration or a change in circumstances (such as a change of the identifier of a party, or the withdrawal of some receivables from a transfer agreement), but also to deal with the situation where the initial registration was not authorised by the transferor. - The main search criterion is the identifier of the transferor. Thus, any errors in registration of that identifier which make it not possible for a searcher to retrieve the notice (and any other errors which would seriously mislead a searcher) render the notice ineffective. Other errors, however, do not. Moreover, the priority rules incentivise the registration of an amendment notice as soon as possible if the transferor’s identifier changes. - [The Registrar has powers to take steps to preserve the integrity of the registry record, including the removal of a notice where the period of effectiveness has expired or a cancellation notice is registered. The Registrar can correct the registry record if any notice is removed in error.]	
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		<ul style="list-style-type: none"> - It is up to the implementing State to decide the fees to be charged for the use of the Registry and the limit on liability for the Registrar. 	
6.	Chapter 5: Priority of a transfer	<ul style="list-style-type: none"> - There is one simple priority rule: a 'first to file' rule. This means that the order of priority between competing transfers is the order in which notices relating to transfers are registered. - This priority rule also applies to the proceeds of transferred receivables. - The priority rule applies even if a notice is registered before a transfer actually takes place. It also applies irrespective of any knowledge of any competing transfer. - The order of priority outside the insolvency of the transferor largely survives within insolvency proceedings, but domestic insolvency law could provide for specific claims to have preferential status. - [The Law also contains rules as to the priority status of judgment creditors and preserving inter-party subordination]. 	<p>[I think the place to explain what 'competing transfers' means is in the article specific discussion]</p> <p>[This could be too detailed for the summary]</p>
7.	Chapter 6: Rights and Obligations of the Transferor, Transferee and Debtor.	<ul style="list-style-type: none"> - The relationship between a transferor and transferee is largely governed by the agreement between them, but the Law provides for certain rights and obligations which will exist unless varied by the parties' agreement under the party autonomy principle. - For example, the transferor makes certain representations to the transferee about the transfer and the receivable, but does not represent that the debtor can pay the receivable. [The effect of an untrue representation will be a matter of the applicable national law*] - The Law provides various rules governing the protection of the debtor when a transfer takes place, which reflect the balancing of interests between that of the debtor (that its position vis a vis the 	<p>[*this could go into III(1)].</p>

		<p>receivable does not change) and the transferee (that it has an unrestricted right to the receivable and its proceeds). The balance is carefully constructed so that, while consent of the debtor to a transfer is not required for an effective transfer, the debtor's position only changes once it has been given relevant information about the transfer and who it needs to pay to obtain a discharge of the receivable.</p> <ul style="list-style-type: none"> - It is possible under the Law for a debtor not to be notified of a transfer at all (non-notification receivables financing), in which case the debtor is discharged by paying the transferor, and the transferor must then pay the proceeds to the transferee. - A debtor can be given information by a notification of a transfer or by a payment instruction, either of which must be in writing. If a debtor is notified of a transfer, it must, to be discharged, pay the identified transferee unless it receives a payment instruction in which case it must pay as instructed. - The Law provides more detailed rules about who the debtor must pay to be discharged in various situations where a receivable has been transferred more than once.* - The debtor is further protected under the Law by being able to assert defences or set-offs against the transferee, except those that are unconnected with the receivable and that arose after the debtor was notified of the transfer. - Similarly, any modification of the contract giving rise to the receivable made before the debtor is notified of the transfer binds the transferee. 	<p>[*I thought the detail of this was probably for the article specific chapter]</p>
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8.	Chapter 7: Collection and Enforcement	<ul style="list-style-type: none"> - An outright transferee can collect a receivable once it is due, subject to the operation of the debtor protection rules, for example, if the debtor has a set-off that is effective against the transferee. - The rules in the Law in relation to enforcement of a security transfer are more complicated, since the security right only extends to the amount of the secured obligation, and so rules are required to protect the debtor or anyone else interested in any surplus value in the receivable. The rules in the Law mirror those on enforcement in the UNCITRAL Model Law on Secured Transactions as they apply to enforcement of a security right in receivables.* 	<p>[*is it enough just to say this here? Given that the MLF is chiefly about outright transfers (and is meant to be simple) I thought that the detailed enforcement rules could be discussed in the article-by-article section.]</p>
9.	Chapter 8: Conflict of Laws	<ul style="list-style-type: none"> - The Law provides rules identifying the applicable law in relation to various issues that arise in relation to transfers of receivables. - These include the mutual rights and obligations of the transferor, transferee and debtor, the effectiveness and priority of transfer and the enforcement of transfers. - A national court or arbitral tribunal can still apply mandatory provisions or public policy of a State other than that of the applicable law. 	<p>[This is a rather minimalistic approach, but I thought that the detail of conflict of laws rules would be better dealt with in the article specific chapter.]</p>
10.	Chapter 9: Transitional Provisions	<ul style="list-style-type: none"> - The Law includes transitional provisions dealing with the effectiveness and priority of a transfer made before the Law came into force, which would have been a 'transfer' under the Law had it been in force. 	<p>[Again, a bit minimalistic for the same reason as the previous section.]</p>

CHAPTER I - SECTION 5

COORDINATION OF THE MLF WITH OTHER INTERNATIONAL INSTRUMENTS

Drafter: Secretariat		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
<p>Very brief explanation of relationship with:</p> <p>Factoring Convention</p> <p>Assignment Convention</p> <p>Model Law on Secured Transactions</p> <p>Make section short and ensure it does not generate concern or confusion for implementing States.</p> <p>Note that this section could also be included in Part III.</p>			
1.	Introduction	<ul style="list-style-type: none"> - Introduce long history of ST reforms led by UNIDROIT and UNCITRAL. - Explain how MLF builds upon rules and principles from earlier instruments. - Note the general complementarity of the MLF with earlier instruments (without over-emphasising this point). - Possibly note shift from hard law to soft law instruments. 	<p>This entire section was bracketed by the WG during its initial call in January 2024.</p> <p>It was also noted that this section could be included in Part III.</p> <p>Make section short and ensure it does not generate concern or confusion for implementing States.</p>
2.	UNIDROIT Convention on International Factoring	<ul style="list-style-type: none"> - Introduce the Factoring Convention, origin and purpose. - Explain how it has a different purpose (focus on international factoring) and different scope (narrower definition of factoring). - Note the current status (number of member states, currently in force). 	<p>Should this section go through the relevant international instruments in chronological order, or in order of relevance (i.e. putting the MLST first)? The Secretariat favours chronological order, but sees the merit of an alternative approach.</p>
3.	United Nations Convention on the Assignment of Receivables in International Trade	<ul style="list-style-type: none"> - Introduce the Convention, origin and purpose. - Explain how it has a different purpose (focus on international receivables) but note consistency with MLF on major issues. 	

		- Note the current status (number of member states, not currently in force).	
4.	UNCITRAL Model Law on Secured Transactions	<ul style="list-style-type: none"> - Introduce the MLST, origin and purpose. - Explain comprehensive scope of MLST. - Note that the MLF has been adapted from the MLST (similar structure rules etc), designed to be consistent, MLF as possible stepping stone to future reforms. - Note the current status (number of implementing States). 	
5.	Other instruments	<ul style="list-style-type: none"> - FCI Model Law on Factoring - AFREXIMBANK Model Law on Factoring 	Should the GtE reference other standards not created by intergovernmental standard setting bodies, such as the FCI and AFREXIMBANK instruments?
PART II – IMPLEMENTATION OF THE MODEL LAW ON FACTORING			
CHAPTER II - SECTION 1			
IMPLEMENTATION OF THE MODEL LAW ON FACTORING WITHIN THE EXISTING LEGAL FRAMEWORK			
Drafter: Louise Gullifer		Subgroup: Marek Dubovec, Megumi Hara, Giuliano Castellano	
Subsection	Subject	Content	Notes/Issues for Working Group
		<ul style="list-style-type: none"> a. States which have undertaken modern secured transactions reforms b. States which have undertaken limited secured transactions reforms c. States that have not undertaken secured transactions reforms d. Standalone law or within a broader code e. Implementational Issues (guidance on sensitive cases, e.g. where States have implemented factoring laws that significantly deviate from the MLF approach, such as factoring registries that only apply to the outright transfer of receivables). <p>This section explains how the MLF will fit within the implementing states existing ST laws, with guidance on avoiding setting up separate registries etc.</p> <p>Reference the transitional provisions in Chapter IX of the MLF.</p>	

1.	Introduction	This section explains (a) the need for, and the benefits from, the implementation of the MLF in States depending on the current nature of their secured transactions law and (b) how the MLF can fit within the existing ST laws of implementing States	
2.	Benefits of MLFs	<ul style="list-style-type: none"> - Explain that the benefits of the MLF for a State will depend on its existing law related to receivables financing. - If a State did not have a law that enabled the development of a receivables financing market, the MLF would provide a model for a complete law. This could provide a stepping stone to a full secured transactions law based on the MLST. - If a State had a comprehensive secured transactions law, it might still want a separate receivables financing law, which could include relevant regulatory provisions. - Even if a State’s secured transactions law was consistent with the MLST, it may have omitted some aspects specific to receivables financing which it could include from the MLF. - If a State has a fully functioning law on receivables financing, it could still take inspiration from the MLF to update its law and bring it in line with international standards. 	<p>[the subgroup were of the view that trying to work out a classification of States according to the state of ST reform in a State was not going to work and would be disliked by many States. We decided on an approach that highlighted the use a State could make of the MLF depending on it existing law.]</p> <p>[Megumi to send a couple of paragraphs on her thoughts on this]</p>
3.	Form of Implementation	<p>Various possibilities:</p> <ul style="list-style-type: none"> - A standalone law, which could include aspects of regulation. This has been the most common form of reform approach reflective of the fact that central banks and regulatory authorities take a leadership role in the reform. - Amendment to existing code, such as a civil code. The civil code may contain a chapter on factoring contracts that primarily governs contractual relationships. It may cover only outright transfers, which 	<p>[Megumi to send a couple of sentences re. the Japan case]</p>

		<p>are effective against third parties without any form of registration. This chapter may be revised to provide a foundation for a standalone factoring law that comprehensively deals with transfers of receivables and resulting relationships. A code reform would also affect other sections and chapters, such as on assignments and pledges of intangible rights.</p> <ul style="list-style-type: none"> - More integrated amendments to existing legislation. The legal framework may govern receivables finance through a combination of a code and specific law(s). 	
4.	Examples of challenges in implementation.	<ul style="list-style-type: none"> - Attempts to define “factoring” along the lines of the Ottawa Convention. - Attempts to confine the scope to outright transfers, as that is how factoring has been “traditionally” defined. - Attempts to confine the scope to short-term receivables, defined as those where the maturity does not exceed a statutorily fixed period of time. - Attempts to exclude transfers of overdue receivables. In some jurisdictions, a factoring framework has been used primarily to collect overdue debts, so factoring has built a bad reputation. - [The idea would be to highlight some of the actual challenges, explain how the MLF deals with them, and then briefly explain the potential challenges (if any) of taking those approaches.] 	[Marek has added some examples for discussion]
5.	Transitional provisions	<ul style="list-style-type: none"> - Chapter 9 transitional provisions could be referenced on the basis that whatever implementation takes place, the transitional provisions are likely to be important, although their significance will vary depending on the extent of the changes brought about by the implementation. For instance, in case the types of transfers and receivables covered by the MLF are already governed by a secured 	[is this the right place for this discussion?]

		transactions law and “registrable in a collateral registry”, the transitional provisions would be less significant as compared to a framework where transfers of receivables are not registrable.	
CHAPTER II - SECTION 2			
IMPLEMENTATION OF THE MODEL LAW ON FACTORING IN DIFFERENT LEGAL SYSTEMS			
Drafter: Neil Cohen		Subgroup: Marek Dubovec, Alejandro Garro	
Subsection	Subject	Content	Notes/Issues for Working Group
Additional explanation on special considerations that might need to be taken into account when the MLF is implemented in States with common law, civil law and sharia/Islamic traditions.			
1.	Introduction	<ul style="list-style-type: none"> - Explain that the Model Law is just that – a model. It is designed to serve as a model for states seeking to modernize and optimize their legal rules governing transfers of receivables (both outright transfers and transfers for security). - [There are different types of factoring arrangements, and the MLF seeks to regulate different forms of receivables financing. Thus, the transfer may involve the outright “sale” or “assignment” of title or full ownership from the transferor (“assignor”) to the transferee (“assignee” or “factor”), namely, an “outright transfer”). The MLF also governs a transfer entered into for the purpose of creating a security right in the receivable, that is, a “security transfer”. - The MLF is based on the assumption that, to the extent that the transferee is entitled to rely on the value of a receivable, or the encumbered receivable for the payment of a secured obligation, the risk of non-payment is reduced and this is likely to have an impact on the availability and cost of credit.] 	Make section short and ensure it does not generate concern or confusion for implementing States.

		<ul style="list-style-type: none"> - The Model Law, by its nature, also serves a second important function – harmonization of law. Because receivables, as intangible assets, can be traded across state borders at little cost, it is beneficial to efficient commerce in receivables (and to the parties that benefit from that efficiency) for the legal structure governing that commerce to be the same or similar in the relevant states. <p>The Model Law is also consistent with the United Nations Convention on the Assignment of Receivables in International Trade and with the UNCITRAL Model Law on Secured Transactions (“MLST”) insofar as the MLST addresses transfers of receivables. Thus, the Model Law can serve as a step toward eventual implementation of those instruments.</p> <ul style="list-style-type: none"> - [The benefits flowing from the harmonization of the factoring law are enhanced in those jurisdictions which have adopted the MLST insofar as the MLST addresses transfers of receivables. Thus, the MLF can serve as a step toward eventual adoption and implementation of the MLST. - The adoption of the MLF, therefore, is useful both to States that currently do not have a functional, integrated, comprehensive and effective secured transactions laws as well as to those that already have such laws but wish to modernize them and harmonize them with the laws of other States that have adopted the MLST or secured transaction laws that are generally consistent with the MLST. - The adoption of the MLF in a manner largely consistent with enactments in other states, both as to substance and to form – to the extent feasible – also reduces friction in cross-border transactions.] 	
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		<ul style="list-style-type: none"> - [The benefits of the modernization of the domestic law on factoring its harmonization with the laws of other States on receivables financing does not deprive enacting States of the necessary flexibility. The MLF provides options and leaves a number of matters, referred to within square brackets, to the enacting State.] Yet, as discussed below, it is likely that states will implement the Model Law in a variety of ways. 	
2.	Implementation issues	<ul style="list-style-type: none"> - While the Model Law is designed so that it can be implemented in states with a wide variety of legal systems and traditions, it is not anticipated that the text of the Model Law will necessarily be enacted verbatim (or nearly so) by many states. [E.g. States may have various reasons for modifications. For instance, they understand factoring as financing of short-term receivables and include a duration of the receivables (e.g., up to 2 years). If the maturity of the receivable is longer, the factoring law does not apply. <p>In Ukraine, they expressly excluded a transfer of overdue receivables as the Central Bank did not wish to create a framework for “debt collectors”, as they put it.]</p> <p>[It is expected that some provisions might be omitted for various reasons. For instance, the existing law may already deal with subordination, the law applicable to mutual rights and duties, etc. Then, the question is whether the local drafting convention would be to duplicate such rules or rely on the general framework.]</p> <ul style="list-style-type: none"> - Rather, enactment of legislation based on the Model Law must exist comfortably within a state’s legal traditions and customs. [Adapting the MLF to the legal system and culture may call for some changes to the terminology and drafting technique. Any modification, however, should not depart from the fundamental provisions of the MLF, such as those providing for party autonomy (Art. 3) and general standards of conduct (Art. 4), as well as those providing for the extension of the transferee’s rights to identifiable proceeds (Art. 	The Working Group will need to seek further expertise from experts in Shari’ah law to prepare this section.

		<p>6), the need to register notice of the transfer for its effectiveness against third parties (Art. 9), establishing clear priority rules (Arts. 13-19), protecting the rights of the debtor of the receivable (Arts. 24-30), or facilitating the collection and enforcement of the receivables (Arts. 31-35). Otherwise, the enacting State may not be able to obtain the full economic benefits derived from the MLF or achieve the minimum level of harmonization with other States that enact the MLF.] [For instance, most States would not be familiar with the term “transfer”. Instead, their legislation, and future factoring laws, would refer to “assignment”. As long as the breadth of assignment matches that of transfer under MLF, there should not be a problem.]</p> <ul style="list-style-type: none"> - Thus, even states that seek to enact legislation entirely consistent with the Model Law on matters of substance may structure that legislation differently in order also to be consistent with those legal traditions and customs. - Similarly, enacting states will also take care to craft their legislation so as to be consistent with fundamental precepts of their legal systems. - Such precepts may be based on a written or unwritten constitution or similar basic law. - Such precepts may also follow from binding religious precepts such as Shari’ah, where rules concerning riba and gharar, among others, may be relevant to transactions in receivables. - Setting up an effective and efficient regime of receivables financing requires more than mere enactment of the MLF, which is only a first 	
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		<p>step. A process of “post-enactment acculturation” may be required in order to implement the MLF. Its adoption should be accompanied by a relatively thorough commentaries explaining the origins and purposes of the MLF, supplemented by academic writings providing illustrations how the law can and should work in practice. A reliable case-law reporting system will go a long way towards developing a consistent interpretation of the MLF. The failure of many legal transplants in various jurisdictions confirms that the benefits of a new law, no matter how well conceived on paper, may be frustrated without a concerted effort at educating business people, potential financiers, lawyers, judges, arbitrators and other stakeholders.]</p>	
3.	Traditional forms of legislation	<ul style="list-style-type: none"> - [As previously noted, the MLF has been designed for implementation in States with different legal traditions. There is not one model governing either the style of drafting or where the rules introduced by the MLF will be located within the overall legal structure.] - [Whether the rules on factoring should be incorporated into a civil or commercial code or integrated into a stand-alone statute is a matter to be decided by the enacting State.] - Civil law systems, with their traditional concepts of codification, will often have addressed many topics covered by the Model Law in their existing codes. [For instance, in Ukraine, we did not use the term “receivable” but “right to payment of a monetary sum”, which is a term already included in their Codes. So, it would be confusing to refer to two distinct terms for the same asset. Other laws may not define receivable or some equivalent term at all, in which case “receivable” may be used to carve out these rights of payment from the broader category of claims.] Therefore, in civil law systems, an enacting state will need to consider whether to codify the Model Law as a standalone piece of legislation or, rather, to integrate its provisions into the existing structure. [The prevalent approach (based on my involvement in several reform projects) is for code 	

		<p>provisions (typically governing factoring contract) to be amended. The amendment sets out the foundation for the enactment of a supplementary law. Accordingly, the 10 or so articles in a code are not amplified substantially, but rather adjusted to align with the approaches contemplated for a standalone law.]</p> <ul style="list-style-type: none"> - In common law systems, with their traditions that include significant areas in which law is developed in the context of cases as well as areas that have been the subject of modern codification, enacting states will also need to consider how to integrate language and concepts of the Model Law into existing structures. [What matters is that lawyers be able to provide reliable advice to potential lenders and borrowers, and that judges and arbitrators can understand, interpret, and apply the law in a consistent manner.] [I am not involved in any factoring law reform project in a common law jurisdiction. All my projects are in civil law. What do we mean by “existing structures”? I would assume that common law jurisdictions, such as the many African jurisdictions that apply English law would enact a statute, just like they enacted secured transactions laws.] - In both civil law and common law systems, enacting States will likely make decisions about vocabulary and level of detail that will operate smoothly within the context of their systems [and the actual role played by credit institutions in the enacting States. Thus, in order for the rules of the MLF to be incorporated upon existing legal institutions, the enacting State may need to rely on existing and well understood legal concepts, rather than transplanting unfamiliar legal terms. For instance, rather than importing the term “<i>receivable</i>” the enacting State may prefer to rely on the existing concept of a “<i>credit</i>”, “<i>monetary claim</i>”, “<i>payment right</i>”, a “<i>contractual right to payment of a monetary sum</i>”, or a “<i>right to be paid a monetary sum arising from a contract</i>”. This should not pose any problem as long 	
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		<p>as the so-called “<i>credit</i>” or “<i>right to payment</i>” matches that of the MLF (Art. 2 (g)). Other legal systems may prefer to refer to identify the voluntary transmission of a receivable as an “<i>assignment</i>”. Again, this terminological adjustment should pose no problems as long as the breadth and legal consequences of the “<i>assignment</i>” matches the meaning of Art. 2 (j) MLF].</p> <ul style="list-style-type: none"> - [The enacting State may decide to omit some provisions of the MLF because issues such as mutual rights and obligations of the parties under a transfer agreement (Art. 20 MLF) or a subordination agreement (Art. 18 MLF) may already be covered by general contract or property law. - In other instances, however, the enacting State may find it necessary or unavoidable to coin a new word to express a key concept in the MLF not found in existing or prior law. For example, the transferee’s right to proceeds (Art. 14 MLF) and the very notion of “<i>proceeds</i>” (Art. 2 (f) MLF) may introduce a major change of the scope and mechanism of real subrogation and the creditor’s right and mechanism to trace movable assets (tangible and intangibles). In this case, the enacting State must decide not only the concept to be fashioned, but also whether the optimal location for this change may be introduced into the general law of property, rather than limiting its effect to the law of factoring. - In most civil law jurisdictions, some of the provisions of the MLF on the effects <i>inter partes</i> of the transfer of a receivable (Arts. 5-8 MLF) intersect with general rules applicable to obligations and contracts. And many other rules on third-party effectiveness, registration and priority (Arts. 9-19 MLF) are closely related to general rules on property and rights <i>in rem</i>. These matters pertain to the traditional domain of the civil codes, whereas rules on collection and 	
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		<p>enforcement are generally part of the codes of civil procedure. Moreover, receivables financing may also be touched by the rule of debtor-creditor law, banking law and practice and insolvency, areas traditionally covered by commercial codes and ancillary statutes. It is up to the enacting State to determine the optimal location of these substantive modifications to prior law and that choice is likely to be influenced by the organization of the codes as well as the legislative and drafting styles prevailing in that State at the time of adoption of the MLF.]</p>	
<p>4.</p>	<p>The [higher] value of [international] harmonization</p>	<ul style="list-style-type: none"> - As noted above, it is anticipated that enacting states will implement the Model Law in a variety of ways, tailored to traditions and the nature of their legal systems. [It was also noted that an important objective of the MLF is to promote the availability of receivables financing across national borders. This policy objective is sought to be achieved by reducing legal uncertainty with respect to a number of issues arising in cross-border transactions. The adoption of workable conflict-of-law rules (Arts. 36-46 MLF), particularly those on third-party effectiveness and those determining who is entitled to receive payment as between the transferee and a competing claimant (including creditors of the transferor, another transferee, or the transferor’s insolvency administrator), go a long way in addressing legal barriers to the collection of receivables from foreign debtors.] - [A State enacting the MLF would be well advised to ratify or accede to some of the international instruments elaborated UNIDROIT, HCCH and UNCITRAL providing for the creation of security rights in movable assets (whether tangible or intangible). Unfortunately, these instruments have met only relative success. The UNIDROIT Convention on International Factoring (“Ottawa Factoring Convention”) has only been ratified or accessed by a few countries. The Assignment Convention, which in 2001 –more than twenty years ago”- was submitted for consideration by the General Assembly, has not yet come into force. 	

		<ul style="list-style-type: none">- A State that ratifies or accedes to the Assignment Convention, but not yet have an efficient and modern factoring law will benefit by the adoption of the MLF because the Assignment Convention only applies, subject to limited exceptions, to the assignment of “international receivables” and to the “international assignment” of receivables. Moreover, the Assignment Convention does not address many substantive law issues that are addressed by the MLF, leaving those questions to the otherwise applicable domestic law.- Conversely, in order to promote effective international receivables financing, a State enacting the MLF would be well advised to ratify or accede to the Assignment Convention. The Assignment Convention provides a higher level of uniformity and transparency than the MLF. States that are parties to the Assignment Convention share the same rules –except to the extent the Assignment Convention allows reservations--, whereas States adopting the MLF have compatible but not exactly the same rules.- Lenders, factors, or potential transferees may be more inclined to extend receivables financing to exporters, at more affordable costs, if the States were they and the debtors of the receivables are located in Contracting states to the Assignment Convention. Better understanding of the legal mechanisms applicable to the receivables owed to the exporters is likely to increase confidence that they will be able to collect on the receivables.]- But enactment of the Model Law in a manner largely consistent with enactments in other states, both as to substance and to, to the extent feasible, form, will result in greater value because this can reduce friction in cross-border transactions. [We can highlight	
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		particularly the harmonizing effect of the conflict of law rules for the perfection and priority, which is critical for cross-border transactions.]	
PART III – COORDINATION OF THE MODEL LAW ON FACTORING WITH GENERAL LAW, REGULATION AND OTHER MATTERS			
CHAPTER 3 - SECTION 1			
COORDINATION OF THE MLF WITH DOMESTIC LAW			
Drafter: Louise Gullifer		Subgroup: Marek Dubovec, Catherine Walsh, Michel Deschamps	
Subsection	Subject	Content	Notes/Issues for Working Group
How the MLF fits with both the general private law of the implementing State (e.g. contract law), as well as the broader general law.			
Explain that the MLF supplements/modifies the general private law with more specific rules for the types of transactions within the scope of the MLF, but that the general law continues to apply to the transactions outside the scope of the MLF.²			
Explain interaction with general law rules that simply interacts with the MLF and that the MLF does not purport to change (consumer protection, insolvency law, negotiable instruments) and other general law rules on which the MLF is deliberately silent (writing requirements, electronic signatures etc).			
1.	Introduction	<ul style="list-style-type: none"> - This section addresses how the MLF fits with the general law of the implementing State - It discusses: <ul style="list-style-type: none"> - The situation where transfers fall within the MLF; - The situation where transfers fall outside the MLF; - The interaction between the MLF and general law in relation to issues on which the MLF is silent. 	<p>[One difficulty in relation to this section is how it fits with II(1), which already addresses 'fit' with existing secured transactions law.]</p> <p>[Having done the article-by-article sections now, there are a number of situations where a State will need to consider interaction with existing secured transactions law. Should these be mentioned in section 4 below or should they go in II(1)? I</p>

² Also illustrate how the MLF debtor discharge rules and rights and obligations of parties rules relate to equivalent rules in the general private law for transactions outside the scope of the MLF.

			will put together a list for the WG: this is at the bottom of the page.]
2.	Transfers within the MLF	<ul style="list-style-type: none"> - Transfers of 'receivables' (that is, 'receivables' as defined in the MLF, as opposed to transfers of receivables of types that do not fall within the MLF. - Explain the need for an implementing State to consider what existing law relating to transfers of MLF receivables needs to be repealed or amended. 	[We were not sure whether this should go here but it certainly needs to go somewhere.]
3.	Transfers falling outside the MLF	<ul style="list-style-type: none"> - The MLF does not apply to transfers of receivables, contractual rights and other transferable rights which do not fall within the definition of 'receivables' in Art 2(g). Prima facie, the general law of an implementing State would continue to apply to these types of transfers. - These transfers could be for a financing purpose or not for a financing purpose (eg sale of a business). In some States the former category would be covered by secured transactions law. - Many States have a general law of 'assignment' (or some other term) which covers transfers of receivables generally and sometimes other contractual rights eg rights to non-monetary performance and other rights eg intellectual property rights. This law would continue to apply to non-MLF transfers. - The general law of 'assignment' may include provisions which are very similar to that in the MLF, for example, in relation to debtor discharge. This is particularly the case in relation to MLF chapter VI (rights and obligations of the parties). In this case, the implementing State has to consider two things: 	<p>[the interaction with secured transactions law is covered in II(1) but see note above.]</p> <p>CW: I like the explanation here of the two possible implementation strategies for MLF matters that typically would be addressed in a State's general assignment law. For clarity, perhaps integrate the implementation strategies mentioned here and the various points made in section 4 below on defences and set-off into a single</p>

		<ul style="list-style-type: none"> - First, where the rules are similar but not entirely the same, whether the MLF rule (and language) should also apply to non-MLF transfers. This would avoid any discrepancy, and could also improve the general law. In this case the language of the relevant provisions should match. - Second, where the existing rule is very similar to the MLF, whether the implementation of the MLF should use the language of the existing provision instead of the language of the MLF. This might be advisable in order to avoid discrepancies between transfers of receivables (as defined by the MLF) and other receivables [or rights]. 	<p>discrete general section on the interaction between the MLF and a State’s general law of assignment and referencing in that section all the provisions of the MLF that would typically be addressed in a State’s general assignment law - i.e. all the matters covered in MLF Chap VI]</p> <p>[LG: I have added a sentence referencing Chapter VI as I think this is a good point (and could be expanded in the full draft to give examples of particular provisions as you suggest). However, the reference to ‘defences and set-off’ below is not really about the law of assignment: it is about the law of set-off (i.e. that some countries treat set-offs entirely as defences) and the wider point that the law of set-off needs to align with that of assignment, which I think belongs in a separate list of possible interactions.]</p>
<p>4.</p>	<p>Interaction between MLF and general law</p>	<ul style="list-style-type: none"> - There are many areas of general law which apply to MLF transfers. A State would need to consider whether the interactions are satisfactory, and whether any changes should be made to the general law or to the MLF as a result. This section gives some examples, rather than a comprehensive list. - Contract law. The general law of contract would apply to agreements to transfer receivables to the extent that the MLF does not provide a rule. For example, contract law would apply to issues as to formation of a transfer agreement not covered by Art 5(2) or to the formation of an agreement not to raise defences or set-off not 	

		<p>covered by Art 28(1), to the interpretation of the terms and conditions of the agreement referred to in Art 20(1) and what is required to modify the contract giving rise to the receivable mentioned in Art 29(1).</p> <ul style="list-style-type: none"> - Law of guarantees. The term 'debtor' in the MLF could in some circumstances include a guarantor of the receivable, depending on the applicable law. However, a State's law on guarantees as to protection of the guarantor, when a guarantor's obligation to pay arose and the extent and nature of that obligation (joint, several) [any other aspects?] would continue to apply. Art 7(2) would override any anti-assignment clauses concerning guarantees, which is likely to be a change to the existing law. <p>Electronic commerce law. A State's law on electronic commerce would normally provide that 'writing' would include an electronic document and that a signature could be electronic. If a State's law does not do this, the State should consider passing such a law, so that the requirements of writing and signing in the MLF can be achieved electronically.</p> <ul style="list-style-type: none"> - Set-off and defences. The general law would apply to define what amounted to a valid set-off or a valid defence as referred to in Art 27. This is an example of where the MLF could be adapted to dovetail with existing law. For example, in Ukraine, there was no concept of a defence that is distinct from set-off that would be relevant in the context of Art 27, and so the equivalent provision was drafted to refer only to set-off. - Agency law. It would be up to the general agency law of a State whether a transferee to whom a receivable has been transferred (Art 2(I)) included someone acting on behalf of a transferee*. Also, Clause 7 of the Registry Rules provides that the requisite 	<p>[See WG4:88, WG5:51. The extent to which a guarantor may become a debtor (when its obligation to pay the receivable arises) will probably vary between jurisdictions, but since the transferee gets the benefit of personal rights securing payment, won't a guarantor become a debtor if it has to pay the transferee? We may need to explain the interaction with guarantee law in more detail, as (presumably) once the obligation on the guarantor to pay arose, the MLF provisions in ch VI part 2 and ch VII would apply to the guarantor as debtor (see Art 31(2)). This point also arises in IV(1) (definition of 'debtor')]</p> <p>[This point is also covered in III(3). We need to decide what is the best place for it, and the other places can cross-refer]</p>
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		<p>identification of a transferee in a notice can be satisfied by the identification of a representative of that transferee. This provision would override any contrary provision of the domestic law.</p> <ul style="list-style-type: none"> - Consumer protection law. The MLF does not affect a State’s consumer protection law (Art 1(2)). - Freestanding payment obligations. [See note] - Insolvency. The MLF provides that a transfer of a receivable (as defined) that is made effective against third parties remains so effective and retains its priority if the transferor enters into insolvency proceedings (Art 15). However, this is subject to priority given to specified claims under a State’s insolvency law (such as preferential creditors) and a State is given the option of providing an amount for each category of claim (Art 16). Apart from these specific provisions, a State’s insolvency law will continue to apply to MLF transfers. - Regulation. The interaction between the MLF and regulatory law is dealt with in III(4). - Financial law. Some States have a specific ‘financial law’ which applies to financial transactions. If so, it may be necessary for a State implementing the MLF to adjust the language, and maybe the content, to fit in with that State’s financial law. The financial law may, for instance, define the content of “financing agreements” that would encompass the MLF transfer agreement. Typically, the requirements for an effective financing agreement would go beyond the minimal requirements set out in Article 5 of the MLF. 	<p>[*This picks up a point made in WG6 report para 27]</p> <p>[MLF/negotiable instruments should be discussed under ‘scope’ and cross-referenced here.]</p> <p>[Art 16: It is unclear to me whether Art 16 is meant to apply (a) only within insolvency (b) only outside insolvency or (c) both within and outside insolvency. Art 36 of the MLST which is the equivalent appears to follow (c). However,</p>
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			<p>WG5:17 seems to say that it only applies outside insolvency i.e. (b). WG 6:56 seems to assume that it applies within insolvency (perhaps (a) or perhaps (c)). I have assumed (c) for now]</p>
		<p>Situations where coordination with secured transactions (or similar) law needed (from article-by-article commentary):</p> <ul style="list-style-type: none"> - Art 6 proceeds. The extension of the transferee’s right in the receivable to its proceeds could lead to a priority contest between the transferee X and another person Y with right in the proceeds In other situations, such as where Y has a security interest over money proceeds as primary collateral, the other law governs the priority dispute. In this example, this is likely to be the applicable secured transactions law. [discussion of priority where a secured creditor has control of a bank account is in IV(3) Art 10] - Identification of proceeds: will depend on applicable law of tracing. - Art 7(1) covers two situations: which applies in any specific case will depend on the applicable law. The first is where the benefit of the personal or property right could transfer to Y without a new act of transfer. In that case, Y obtains the benefit under Art 7(1). The second is where the applicable law requires a new act of transfer for Y to obtain the benefit of the personal or property right. - Art 13 Art 13 only applies to competing ‘transfers’, that is, transfers made in accordance with the MLF or made effective against third parties under the MLF (Art 11). Another person could have rights in 	

		<p>a receivable through a means other than transfer. Eg where a receivable is 'proceeds' under an applicable secured transactions law under which a security right in, for example, goods automatically extends to their proceeds. An enacting State whose secured transactions law has this effect will need to coordinate that law with the MLF (WG 1: 216-217)</p> <ul style="list-style-type: none"> - Art 14 However, the right of X, a transferee, who has a right in proceeds because a receivable has been transferred to it (Art 6) and who has registered a notice in respect of the transfer (Art 9) may still be in competition with the rights of other people which arise by other means. In that situation, the rights of those people will not have been made effective against third parties by registration in the MLF registry, but by registration in another registry or another method such as control). Therefore, priority will not be determined by the rule in Art 13 (WG5:13, WG6:44, SS 86). - [An example of the situation mentioned in the previous paragraph is where the right of X in funds in Y's bank account (as proceeds of a receivable transferred to X) is in competition with a secured creditor Z who has a security right in the funds in Y's bank account. Z has registered its security right in the State's collateral registry. Other law will apply to the priority between X's right and Z's right. Under some secured transaction laws, the right of a person who has control of the bank account will have priority over the right of a person who has made its right effective against third parties by other means. X might then want to take control of the bank account by means of a control agreement as well as registering a notice in respect of the transfer to it.] - Art 17. Applicable law as to when a judgment creditor has rights in the collateral. 	
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CHAPTER III - SECTION 2			
THE MODEL LAW ON FACTORING AND THE DIGITAL ECONOMY			
Drafter: Louise Gullifer		Subgroup: Marek Dubovec, Giuliano Castellano	
Subsection	Subject	Content	Notes/Issues for Working Group
		a. Platforms b. Digital currency ('digital money') c. Domestic electronic commerce laws	
Digital assets and private law – explain that receivables can be linked to digital assets (tokenisation), explain link with the UNIDROIT Principles on Digital Assets and Private Law.			
1.	Introduction	Very brief. Saying that this section deals with the interaction between the MLF and various aspects of the digital economy and its legal environment.	
2.	Platforms	<ul style="list-style-type: none"> - Explain that there are now many electronic platforms on which receivables are [bought and sold] [traded]. - Explain briefly the chief types of platforms. Many deal solely in reverse factoring, although there are others that enable businesses to sell receivables on a peer-to-peer basis. - The legal regime governing platforms can vary, for example: <ul style="list-style-type: none"> - a factoring law might provide for the establishment of a national platform typically administered by a governmental body. - A factoring law might not refer specifically to any platform, but financial institutions might establish them for their customers. - For these platforms to operate efficiently under the MLF they should be linked to the registry (this is particularly important when the sales are of single receivables, which is very common on a platform). The platform itself is not a registry of transfers under the MLF, which means that a transfer made on the platform is effective 	

		<p>between the parties but not against third parties unless the platform is linked to the MLF registry so that notices of transfers made on the platform are registered in the registry.</p> <ul style="list-style-type: none"> - Give some examples of platforms and make the point that it is easier to link it with the registry when the platform is run by a public body (example of UAE). In 2020, the Emirates Development Bank launched the National Supply Chain Finance platform, which initially focused on reverse factoring.** - Description of how receivables are typically uploaded to a platform and how transfers typically take place.* - Application Programming Interface (API) can be used for private platforms. - Stress need for capacity building. <p>Open banking/finance [suggestion from Giuliano]</p>	<p>[**Giuliano: Apart from UAE, do we have other examples of platforms? Since we mentioned that platform types are on a spectrum (from private exchanges to public-led institutions), it might be helpful to have a few short examples of the main types. Of course, private receivables-trading platforms could not be identified.</p> <p>*Marek account of how platforms work</p> <ol style="list-style-type: none"> 1. Seller delivers goods and submits an invoice (paper or e-invoice) to the Buyer outside of the platform. 2. Buyer inspects goods, approves invoices, creates a digital invoice file, and uploads it to the platform. The platform will verify the authenticity of the invoice ie, if it has been uploaded by a previously authorized user. 3. Seller receives a confirmation from the
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			<p>platform that the invoice has been uploaded. Seller may access it in its user account.</p> <p>4. Seller may designate individual invoices for financing after which prospective factors would be able to submit their bids through the platform.</p> <p>5. Factor pays for the receivable by crediting a bank account of Seller, a confirmation of which is received by the platform.</p> <p>6. Buyer receives a notification about the sale of the receivable from the platform.</p> <p>7. On the due date, the Buyer pays the amount of the receivable to Factor through a bank transfer, a confirmation of which is received by the platform.</p> <p>8. Platform “de-lists” the paid invoice.</p>
3.	Digital currency	- A brief section pointing out that where the MLF referred to money this could include digital currency.	[This section can be brief since a discussion of types of digital currency (and whether digital assets can be digital currency) is out of place here, and also will go out of date very quickly.]

		<ul style="list-style-type: none"> - It will be up to an implementing State whether and how it defines 'money' in Art 2(f) and 'monetary' in Art 2(g). 	<p>[This point probably should be made somewhere else in the MLF and the "digital currency" part can then refer to it.] MD: The conflict of laws section may point out that a State X that implements the MLF may define "money" broadly to include "digital currency", but a transfer may be governed by the law of State Y, which defines it narrowly (location of the transferor). I don't think we need a deep analysis, and simply pointing this out, if we need to at all, might suffice.</p>
4.	Domestic electronic commerce laws	<ul style="list-style-type: none"> - Explain that the MLF is intended to cover electronic writing and signatures. - It does not define 'writing' (arts 5(2)(a), 25(1), 28(1) and (3), 34(3)(b) of the MLF and clauses 2(1), (2) and (3) and 14(4) of the Registry Provisions) or 'sign' (arts 5(2)(a), 28(1) and (3) of the MLF) as it is assumed that a State would have already enacted an e-commerce law that would ensure functional equivalence between paper and electronic writing and signatures. A State should review these laws and ensure the approaches taken in them recognize the effect of new technologies, such as distributed ledger technologies. 	<p>[this point could go in III(1) and III(3) could cross-refer or vice versa]</p> <p>[I have made this point (at the moment) in the article-by-article sections each time writing/signature is mentioned, as it was typically discussed in some detail in the WG at each point. We need to decide where the substantive discussion of electronic writing and signatures goes and then there can be cross-references. Personally I think this current section is a good place for this discussion]</p>
5.	Digital assets and Private Law	<ul style="list-style-type: none"> - Explain that 'digital asset' in this section has the same meaning as in the DAPL Principles, i.e. an electronic record capable of factual control. 	<p>[MLF/negotiable instruments should be discussed under 'scope'.]</p>

		<ul style="list-style-type: none"> - Digital assets can be linked to contractual rights to payment in three situations (maybe give actual examples): <ol style="list-style-type: none"> 1. Where the resulting linked asset is the functional equivalent of a negotiable instrument, and the applicable law gives the same effect to a digital negotiable instrument as a paper one. Here the MLF would not apply [cross-refer to where the scope of the MLF is discussed re negotiable instruments] 2. Where the resulting electronic document has the legal effect (under the applicable law) that transfer of the digital asset [and only transfer of the digital asset] transfers the receivable (electronic invoice or 'controllable account') but it is not an electronic negotiable instrument. [more elaboration needed on possible priority conflict between a transfer of such a digital asset (and therefore the receivable) and a security right created over eg all assets and perfected by registration] 3. Where the resulting electronic document is functionally equivalent to a paper record of the invoice, so that the legal effect of a transfer of the electronic document does not, of itself, transfer the receivable. - The MLF does not apply in situation (1) and applies in situation (3) in the sense that unless the receivable is transferred in accordance with art 5 of the MLF it is not transferred. Therefore, the transfer of the electronic document would not transfer the receivable: there would need to be a transfer agreement which met the requirements of Art 5. The MLF also applies in situation (2) but it needs to be pointed out that the transfer would need to be registered despite the transfer of the digital asset to be effective against TPs. 	<p>[Megumi to draft a short paragraph on the Japanese 'registered electronic receivables' law which might fall under (2) or might not be a digital asset at all as it is recorded on a registry]</p>
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CHAPTER III - SECTION 3			
THE MODEL LAW ON FACTORING AND REGULATORY MATTERS			
Drafter: Secretariat		Subgroup: Giuliano Castellano, Marek Dubovec	
Subsection	Subject	Content	Notes/Issues for Working Group
		a. Banks b. Monetary authorities c. Banking and financial licensing laws	
1.		To be finalised.	
CHAPTER III - SECTION 4			
OTHER MATTERS			
Drafter: Secretariat		Subgroup: Giuliano Castellano, Marek Dubovec	
Subsection	Subject	Content	Notes/Issues for Working Group
		Guidance on other aspects relevant to factoring that may be relevant to implanting States, such as value added tax, credit insurance, currency controls, etc. This section would not provide policy guidance on how these matters should be dealt with, just some basic information on how they may relate to or be effected by the implementation of the MLF.	
1.		To be finalised.	
PART IV – ARTICLE-BY-ARTICLE GUIDE			
CHAPTER IV - SECTION 1			
GENERAL INSTRUCTIONS ON READING THE MLF			
Drafter: Secretariat		Subgroup: NA	
Subsection	Subject	Content	Notes/Issues for Working Group
		Terminology (no need to adopt exact terminology in MLF, can adapt to equivalent domestic law terms) Explanation of bracketed text (This has been moved from Part II section I)	
1.		To be completed.	

CHAPTER IV - SECTION 2			
CHAPTER I – SCOPE AND GENERAL PROVISIONS			
Drafter: Louise Gullifer		Subgroup: Bruce Whittaker, Marek Dubovec	
Subsection	Subject	Content	Notes/Issues for Working Group
			<p>General notes.</p> <p>[We probably want a discussion of the name of the MLF but we need to think where it should go]</p> <p>[Do we want to say anything about consistent interpretation (WG 3:181, SS 12), and where should it go?</p>
1.	Article 1	<ul style="list-style-type: none"> - The scope of the MLF is defined through the definitions of 'transfer' and 'receivable' in Art 2, together with the provision in Art 1(1) that it applies to transfers of receivables. - There are some specific savings for national law in Art 1. - In relation to both Art 1(2) and (3) it should be noted that the MLF does apply to consumers, both as transferors and as transferees (as well as consumers as debtors). For example, a consumer might provide services to people in the local community for which the consumer charged a fee, and then transferred the receivables for financing and other purposes (consumer as transferor). Some platforms (see III(3)) enable consumers to buy uploaded invoices as a type of peer to peer lending (consumer as transferee). However, the typical consumer situation found in [factoring][receivables financing]** is where the debtor is a consumer. 	<p>[see discussion at WG1.101- 120. I don't know whether we need examples. I put them in for discussion].[see also paras. 61-63 of Issues Paper of WG1 for different situations where consumers act as debtors.</p> <p>[** I am not sure whether to refer to 'factoring' (as a generic term to cover the various business models) or 'receivables financing'. When I remembered, I have put both in square brackets and the WG can</p>

		<ul style="list-style-type: none"> - Art 1(2) makes it clear that the MLF does not affect the operation of any consumer protection law in a State. Consumer protection law could have the effect of protecting consumers as debtors, but also as transferors or transferees. An enacting State is advised to ensure that the relationship between the MLF and consumer law is made clear in the implementing legislation.* - Many States have policy-based rules which prohibit the transfer of certain very specific types of receivables, such as the wages of individuals, social security payments and receivables arising out of national security contracts. While some of these types of receivables would not fall within the definition of ‘receivable’ in Art 2(g), it is possible that some would.** - For example, consumers as transferors are included in the MLF and so wages could be included in ‘supply of services’. [It was considered the best approach was to have a wide scope of who could be a transferor, but then for an enacting State to exclude the transfer of any type of receivable, such as wages, for policy reasons]. - [explanation of policy exclusion of national security contracts] - Art 1(3) therefore makes it clear that the MLF is not intended to override policy-based statutory provisions limiting what receivables are transferable. An enacting State is advised to make this clear in the implementing legislation, especially if these statutory provisions are in another piece of legislation. 	<p>decide which is easier to understand.]</p> <p>[* I am not sure whether we need to include this instruction every time we mention some interaction, but I put it in for discussion. A general statement somewhere (III(1) would probably suffice.) [Consumer law is also discussed in III(1)]</p> <p>[**see discussion at WG1.101-120]</p> <p>[This point is from Marek. I don’t fully understand it, but we can discuss it at the WG]</p>
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		<ul style="list-style-type: none"> - Furthermore, if the local factoring law includes regulatory aspects, such transactions would be outside the scope as they would not fall under the regulatory perimeter. 	
2.	- Article 2(a) Competing Claimant	<ul style="list-style-type: none"> - The definition of 'competing claimant' is important in relation to certain provisions about priority. The definition must be understood in relation to a receivable which has been transferred to a transferee X. X therefore has rights in the receivable. A competing claimant is a person Y who also has rights in the receivable, even though there may not actually be any competition on the facts. Y may not be a transferee, its rights may arise in a way other than from a transfer. For example, Y could be a judgment creditor with rights in the receivable (see Art 17) - The following are examples of where there is a competition and where there is not, but in both cases X and Y are both competing claimants. - If the transfer to X is an outright transfer, then any rights that Y has will be in competition with those of X*. - If the transfer to X is a security transfer, whether Y's rights are in competition with those of X will depend on the value of the receivable and the amount of the secured obligation. For example, Y may also have a security right in the receivable, but the value of the receivable is greater than the sum of the secured obligations owed to X and Y (plus the costs of recovery) so that both X and Y will get paid in full out of the proceeds. In that situation, there is no competition between the rights of X and the rights of Y but X and Y are still both competing claimants.. 	<p>[I have split up Art 2 into separate boxes for now, as there is a lot to say about some definitions e.g. 'receivable'.]</p> <p>[Do we need to say that Art 2(a) is based on 2(e) MLST?]</p> <p>[*This point needs more explanation as it is hard for some people, especially in civil law countries, to understand. However, it is also explained in the commentary to Art 5(1) (when explaining what a 'power to dispose' means' so there could just be a cross-reference here.]</p>
3.	Art 2(b) Debtor	<ul style="list-style-type: none"> - Explain that the definition of 'debtor' includes a person who will become a debtor of a future receivable (WG3: 121-122). This is the case even though, on a literal reading, such a person does not fall 	

		<p>within the wording, since that person does not (when the receivable is a future one) 'owe' the receivable.</p> <ul style="list-style-type: none"> - If a State has a literal approach to interpretation, and the interpretation of the wording in the MLF to include a person who will become a debtor in the future is likely to cause difficulties, extra wording could be included in the definition in Art 2(b). For example, it could read 'a person who owes payment of a receivable, or, in the case of a future receivable, the person who will owe payment of that receivable' - A debtor of a future receivable can be notified if they can be identified (Art 25(3)) - The definition of 'debtor' also could include a person who has guaranteed the receivable once that person's obligation to pay had arose (depending on the applicable law). (WG3: 125, WG4:88, WG5:51) <ul style="list-style-type: none"> o Explanation of the ramifications of this, i.e. which sections of MLF were likely to apply to guarantors, but only once a guarantor's obligation to pay arose (ch VI part 2 and Ch VII). o Note that parties could vary or derogate from the MLF in their agreement, and might want to do this in relation to guarantors (WG5:51). Interaction between guarantee law and MLF to be dealt with in III(3). - [explanation that 'short form' debtor was used rather than 'debtor of the receivable' as longer form not necessary WG3:123-124] 	<p>[WG4:87: It was suggested that the GtE provide sample wording for 'literal' States)]</p> <p>[We need to discuss whether this is correct (i.e. whether under some systems a guarantor would at some stage be someone who 'owes payment of a receivable' as opposed to owing some other kind of obligation e.g. an obligation to pay damages to the creditor or some other kind of obligation to the creditor) and also what explanation about guarantors is needed where]</p>
<p>4.</p>	<p>Art 2(c) Default</p>	<ul style="list-style-type: none"> - This definition of 'default' is quite restrictive, and only is relevant to when a receivable is subject to a security transfer. The term is limited to default under the secured obligation. (WG5:81) 	<p>[The Secretariat suggest that this point is not included in the GtE but it seems to me quite useful to</p>

		<ul style="list-style-type: none"> - The term 'default' is not used in the MLF for failure to pay a receivable. 	<p>mention it briefly, especially to include the second bullet]</p>
5.	Art 2(d) Future receivable	<ul style="list-style-type: none"> - There are two situations in which a receivable is a 'future receivable' (WG3:26, WG6:12) - The first is where the receivable has not yet arisen at the time of the transfer agreement. For example, a manufacturing business X that supplies a particular retailer Y could transfer to Z all its present and future receivables owed by Y. In that context, the receivables relating to supply contracts that had not been entered into at the time of the transfer agreement would be future receivables, as would any receivables arising from existing contracts where the goods had not yet been supplied. (WG2:11-12) 	<p>[There are various times when a future receivable could be said to stop being a 'future receivable' (and becomes a 'present receivable) and I am not sure precisely which is right under the MLF.</p> <ol style="list-style-type: none"> (1) When the receivable actually becomes due and payable. (I assume this is not when a receivable becomes 'present' because then virtually all factored receivables would be future receivables as they are usually transferred when credit has been given to the debtor) (2) When the obligation to pay arises (ie when it would be payable if credit were not extended). This would usually be once the goods etc had been supplied. (3) when the contract giving rise to the receivable is entered into. <p>It would be really useful if we could discuss this and it could be explained here in the GtE as quite a lot of the commentary to ch VI depends on this]</p>

		<ul style="list-style-type: none"> - A future receivable in this category is transferred at the time it arises, if the transferor has rights in it or the power to transfer it (Art 5(5)*) - The second is where the receivable has arisen but has not yet been acquired by the transferor. For example, a transfer agreement between an export factor and an import factor may cover present and future receivables. A receivable that was owed to a client of the export factor but had not yet been transferred to the export factor would be a future receivable in the context of the transfer agreement between the export and the import factor. - A future receivable in this category is transferred when the transferor acquires rights in it or the power to transfer it (Art 5(5)) (WG3:29) - A debtor can be notified of the transfer of a future receivable provided that the information that must be contained in a notification (identification of the receivable) is ascertainable and the debtor can be identified (Art 25(3)). In the example above, Y could be notified of the transfer to Z of all the present and future receivables it owes to X. - Relationship between future receivables and fraud. 	<p>[*Art 5(5) doesn't actually say that the receivable is only transferred when it arises but it doesn't make sense to say that the transferor has rights in the receivable until it has arisen. WG3:27]</p> <p>[Industry representatives to check that this example makes sense and uses the correct terminology]</p> <p>[I am less sure how and whether Art 25(3) applies to the second category of future receivables. Maybe we could discuss this.]</p> <p>[Fraud: WG3:28. I am not sure what to put here, and it is probably best to leave it out].</p>
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6.	Art 2(e) Judgment creditor	<ul style="list-style-type: none"> - Explain what is meant by 'judgment creditor' as in many States this is not a term that is used. (WG6:48) Possible coordination with the UNIDROIT Project on Best Practices in Effective Enforcement - It is up to the enacting State to decide on its own definition in order to fit in with its other law (WG 6:58, SS91). It is important, however, that the definition is consistent with Art 17, and with the specification made by the enacting State in Art 17 as to the steps that need to be taken for the judgment creditor to acquire rights in the receivable. 	[Should we provide some examples of such steps here, such as garnishing a receivable by notifying the debtor? Or is that best done in the commentary to Art 17 (I have already drafted it in there)]
7.	Art 2(f) Proceeds	<ul style="list-style-type: none"> - [Based on 5(j) receivables convention]. The definition of proceeds is limited to cash proceeds. - Non-cash proceeds are not included since including them might result in the MLF registry becoming a collateral registry (WG4:77) and also could encroach on an enacting State's law governing other types of assets (WG6:16). Also, in the context of factoring, the proceeds of receivables are usually money, negotiable instruments or bank accounts (WG6:16). - 'Proceeds' does not include returned goods as MLF would not work in relation to them.* If a transferee wants rights in respect of returned goods, it can provide for these in the transfer agreement. 	<p>[the idea of 'cash proceeds' comes from insolvency law (WG4:77)]</p> <p>[*This come from WG3:134, which refers to something Neil said, ie that 'the law would not work in relation to returned goods for a number of reasons' but I am not sure what the reasons were, or whether we want to discuss them here. There is also a discussion of returned goods in WG4:78 but this seems rather inconclusive, but the policy of not including them is confirmed in WG5:106). See also WG6:75-76 where the decision was taken to delete the provision in (now) art 23 that said that a factor was entitled</p>

		<ul style="list-style-type: none"> - 'Proceeds' includes interest as this is part of the receivable itself (WG3:130, WG5:69). - There are three types of cash proceeds in the definition. Each will be considered separately. 	<p>to returned goods, on the basis that (a) returned goods were not considered to be proceeds under the MLF, (b) factors rarely received returned goods, (but could if the debtor was insolvent or the goods were faulty) (c) the provision could be confusing, and its omission did not restrict the rights of a transferee (I assume that this means that if a factor wanted such a right it could provide for it in the transfer agreement). This discussion will be reflected in IV(5)]</p> <p>[The explanation of the meaning of money also applies to the term 'monetary' in Art 2(g) (below)]</p> <p>[See discussion of the definition of 'receivable' below]</p> <p>[would claims under letters of credit ever constitute proceeds? Presumably not, unless the letter of credit was a negotiable instrument? That is why I put this point here]</p>
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		<ul style="list-style-type: none"> - Explanation of the meaning of 'money' (WG4:36). Money is not defined in the MLF as the meaning of 'money' differs in different domestic laws, and also can change over time. It is up to an enacting State to decide whether to define 'money' and how to make its meaning consistent with the rest of its domestic law. While money should include 'digital currency' (see GtE III(3)) it would be up to a State to decide what counted as 'digital currency' (see also WG4:76, eg whether it included crypto assets), taking into account its own law on money what counts as legal tender in that State. - Explanation of why 'negotiable instrument' mentioned here (because it is a common form of 'cash proceeds' of a receivable in a factoring context (WG6:16). Also reminder that MLF did not apply to transfers to negotiable instruments since they did not fall within the definition of 'receivable' (WG6:10) - Claims under letters of credit would not normally constitute proceeds (WG4:77) - Art 2(f)(iii) refers, broadly speaking, to a bank deposit. However, deposits are also taken by institutions that are not banks. The term 'an authorised deposit-taking institution' is used to include, but not be limited to, banks. The wording in (2)(f)(iii) mirrors the definition of bank account in Art 2(c) of the MLST. A enacting State should consider inserting the terminology that best reflected its domestic law. (WG6:14) - Explain 'proceeds of proceeds' (WG3:133). Proceeds of proceeds are anything that is received in respect of proceeds. For example, the proceeds of a receivable could be a negotiable instrument. If the obligation under the negotiable instrument is paid in money, that money is 'proceeds of proceeds', as is the funds in the bank account 	<p>[Am I right in thinking that only money, negotiable instruments and funds in a bank account can be proceeds of proceeds?]</p>
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		<p>into which that money is paid (WG2:24). Proceeds of proceeds must, however, be within the definition of proceeds, that is, money, negotiable instruments or funds in a bank account.</p> <ul style="list-style-type: none"> - It is possible, however, that a receivable (R2) could be received in respect of proceeds, i.e. proceeds of another receivable (R1) (WG5:67, SS60). Since R2 is not within the definition of 'proceeds' it cannot be proceeds of proceeds, and it is up to other law whether the transferee of R1 has rights in R2. - The position where a receivable is refinanced is discussed below in relation to art 2(g) (WG3:129, WG5: 68) 	<p>[I don't understand the discussion in WG5:67. If something that is not cash proceeds be 'proceeds of proceeds'? then R2 (in the example) cannot be proceeds of proceeds.]</p>
<p>8.</p>	<p>Art 2(g) Receivable</p>	<ul style="list-style-type: none"> - The definition of 'receivable' is critical to the delineation of the scope of the MLF, since the MLF only applies to transfers of 'receivables'. The consequent need for clarity is why the definition of 'receivable' lists what is included as a 'receivable' rather than consisting of a general definition with exceptions. (WG4:33) - A receivable is defined as a contractual right to payment. The definition therefore does not include rights to payment based on tort claims or tax debts or any other non-contractual receivables (WG4:34) - The contract referred to in the phrase 'contractual right to payment' is the trade contract, that is, the contract for the relevant performance set out in Art (g)(i) to (iv). For example, the contract referred to could be a contract for the supply of goods, or a contract for the provision of data. It does not refer to a separate right to payment (which could be contractual) arising from an instrument. For this reason, rights to payment in instruments that are independent from the trade contract, such as negotiable instruments and letter of credit, are not included in the Law, and existing 	<p>[WG3:6-10 also says that the GtE should encourage a transition to modern financing practices and away from the use of negotiable instruments. I am not sure whether we should include this in the GtE, but if we do it should be in the financing practices section.]</p>

		<p>domestic law will continue to apply. (WG3:6-10, WG6:10. On the inclusion/exclusion of negotiable instruments, see WG1:26 – 49).</p> <ul style="list-style-type: none"> - The right to payment in the definition is of a 'monetary sum', that is the right is a right to payment of money. See [art 2(f) discussion] for a discussion of the meaning of 'money'. (WG 4:36) - The sub-paragraphs (i) to (iv) set out the subject matter of the trade contracts, the receivables arising from which are included within the definition of 'receivable'. These sub-paragraphs are not mutually exclusive: it is possible that a contract could fall into more than one category. This does not matter: as long as the contract falls into one or more categories, the MLF applies to transfers of receivables arising from such a contract. (WG6:176). This approach is particularly important because of the rise of 'bundled' contracts which include different categories in one contract, for example, a contract could include the supply of goods (ie computing equipment), a license of intellectual property and the provision of data* (WG3:14). - This approach also has the result that the categories do not need to be treated as precise (and discrete) definitions. For example, it can sometimes be difficult to determine whether a contract is for services or for the provision or processing of data (WG4:49 on databases, WG6:176). Under this approach that does not matter. - The counter-party to the 'trade contract' can be anyone, whether a private person or entity or a public authority. The definition of 'receivable' therefore includes debts owed in relation to public administration debt procurement (WG3: 138). However, there may be statutory restrictions on the transfer of receivables arising from 	<p>[There is discussion in III(3) of electronic equivalents to negotiable instruments.]</p> <p>[*Neil first raised the point of 'bundled' contracts in WG3. I think we should give an example but am not wedded to this one if someone can come up with a better one]</p>
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		<p>certain public procurement contracts. Such restrictions would fall within Art 1(3).</p> <ul style="list-style-type: none"> - The following paragraphs discuss the various categories in subparagraphs (i) to (iv). - (i) Supply or lease of goods or services. There is no express exclusion of financial services but it is intended that loans and other financial receivables are not included in the definition of 'receivable'. This is in order not to encroach on financial markets law (WG4: 47) [and also because the override of anti-assignment clauses in Art 8 is not appropriate for loan and other financial contracts (WG4:52)]. Netting agreements, foreign exchange transactions and inter-bank payments are also not included (WG4:60) However, receivables arising from the provision of services by financial advisers could be included if an enacting State wished (WG4:52). It is up to an enacting State to make it clear how receivables arising from these various types of financial contracts are not included within the scope of the MLF in a way that best fits with the State's domestic law (WG4:38, WG4:40 – 41, WG4: 44-45) - [should we say anything about insurance contracts as contracts for services? (ie whether the receivables for payment of premiums are included) WG4:39 -40] - The definition of receivables does not include receivables arising from contracts for the sale or lease of real estate (WG3:17). This is because of the difficulties of coordinating such an inclusion with the domestic law of real estate and also because such receivables are rarely factored. 	<p>[There is probably more to say on real estate, but I could not find any discussion of it in the reports after WG3. This is probably enough.].</p>
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		<ul style="list-style-type: none"> - (ii) assignment or license of intellectual property (see WG4:42, WG4:49). Explain that 'intellectual property' included copyright, trademarks, geographical indications [?], industrial designs, patents, topographies of integrated circuits and trade secrets (from TRIPS agreement) (WG5:27-28). [Explain that a license was included as well as an assignment.] - (iii) provision or processing of data (WG4:49, WG5:87 (data hard to define, UNCITRAL work on definition of 'data')). The term 'provision' of data is wider than just supply of data (WG6:179, ELI Principles). Data is not defined in the MLF, but carries its usual meaning. However, the phrase 'provision or processing of data' is not intended to include contracts for the supply of digital assets, that is, electronic records that are capable of factual control (DAPL)(WG6: 179)'. - Explain that (iii) does not include financial contracts as explained above (WG6:179). - Some States may have data protection or privacy laws which prevent or prohibit the transfer of some receivables arising from some contracts for the provision or processing of data. Such a restriction would fall within Art 1(3) and such transfers would not be covered by the MLF.* - (iv) payment obligation for a credit card transaction (WG3:19) The definition includes both (a) receivables owed by credit card users to the credit card issuer and (b) receivables owed by the credit card issuer to the merchant. The latter type of receivables are typically settled at the close of day, and so are short-term and very rarely financed. The former are typically only settled after a month or more, and so are often the subject of receivables financing 	<p>[*WG6:180 discusses whether the MLF can help factors who have difficulties when there are restrictions on the transfer of data-related receivables due to data protection or privacy laws. The answer is that the MLF can't help with this, and the actual position seems to me that such restrictions fall within Art 1(3), so I have included that]</p>
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		<p>(WG4:58, WG5:87). Moreover, in some States the former type are treated as trade receivables [eg US WG3:19].</p> <p>Refinancing of receivables. (WG3:129, WG5:68, WG6:21). If a receivable is refinanced, there will be a new refinancing agreement between the transferor and the transferee. If this happens, the original receivable may no longer exist and the replacement payment obligation may not be a 'trade receivable' within the definition in Art 2(g)(i) – (iv). However, it is intended that the new payment obligation be included within the scope of the MLF, and so Art 2(g) expressly states that such a resulting payment obligation is a receivable, and its transfer is within the scope of the MLF. The same applies to the consolidation of receivables. (WG5: 68)</p>	<p>[I do not really understand the detail of a refinancing transaction or the consolidation example so this explanation is probably wrong. I would be grateful for an explanation of the (typical) process of refinancing so that I can try and explain it better.]</p>
<p>9.</p>	<p>Art 2(h) Registry</p>	<ul style="list-style-type: none"> - When implementing the MLF, the enacting State needs to establish a registration system, in which notices can be registered and which can be searched, in accordance with the rules set out in Annexe A. - This registry will need to be established by an authority within a State, and it is for the enacting State to specify the relevant authority in the definition of 'registry'. 	<p>[We should cross-refer here to III(1) which will discuss a situation where a State already has a (secured transactions) registry so it would not establish a new one.]</p>
<p>10.</p>	<p>Art 2(i) Security transfer</p>	<ul style="list-style-type: none"> - The term 'security transfer is intended to include anything which under a State's law is a security assignment, any other type of security right created by the grantor and any other transactions that have the function of security. (WG3:156, WG4:102, WG5:88, WG6:22-24). - In implementing Art 2(i), a State has two options. Either (1) it can list transactions regarded as security transfers (Art (2)(i)(i)) and 	<p>[*It is not clear to me how the first approach is to work. A State may</p>

		<p>then adopt the language of Art (2)(i)(ii) to cover other transactions which are functionally security rights, or (2) it can just adopt the language of (2)(i)(ii), which is a functional definition of a security right.</p> <ul style="list-style-type: none"> - A State that already has a functional approach to secured transactions might want to take the second option or it could take the first approach. - A State that took a formal approach to secured transactions would probably want to take the first approach. [see note*] However, in that situation, it might also want to list transactions that created security rights rather than are viewed as security transfers [I have in mind here non-possessory pledges, or charges, which are not viewed as transfers] under Art 2(i)(i). In that case, 2(i)(ii) would serve as a 'catch-all' for transactions that had the function of security but which were not viewed as security transfers or rights. 	<p>have three types of transactions: (1) security transfers, (2) security rights that are not transfers and (3) other transactions that have the function of security. English law is an example of this: (1) mortgages (2) charges (3) other things e.g. maybe Quistclose trusts. I would have thought the obvious thing to do is then to list everything in (1) and (2) above under Art 2(i)(i) and then use Art 2(i)(ii) as a catch-all for functional equivalents. But that is not what 2(i)(i) says: it seems to be limited to security transfers. I have drafted something which treats 'security transfers' in 2(i)(i) as including the creation of security rights, but is that too expansive an approach?]</p>
11.	Art 2(j) Transfer	<ul style="list-style-type: none"> - The term 'transfer' includes an outright transfer and a security transfer. An outright transfer is where all rights in a receivable are transferred from the transferor to the transferee. What is meant by 'security transfer' is discussed in detail under Art 2(i) above. - Security transfers are included in the definition of 'transfer' (and therefore within the scope of the MLF) for several reasons. - First, it is very important that the same priority rules should apply to all consensual rights in a receivable as otherwise priority issues could be covered by different rules leading to uncertainty and circularity problems. By including security transfers within the MLF, 	

		<p>the priority rules in Chapter V apply to outright and security transfers. Implementing the MLF by only addressing outright transfers causes difficulties in relation to priorities (WG3:159, example of Egypt)</p> <ul style="list-style-type: none"> - Second, in some States, factoring is done by pledge, though this could change as the MLF is implemented more widely (WG 1:76, 80, WG3: 157, 158). - Third, including security transfers obviates the need to characterise a transfer as an outright transfer or a security transfer. (WG1:71, 80) [This type of characterisation has caused problems in some States as sometimes the line can be difficult to draw]. The presence of recourse provisions in a transfer agreement will, therefore, have no effect on whether the transfer falls within the MLF (WG1:89-96) However, the rules under the MLF in relation to collection of the receivable and enforcement (chapter VII) differ depending on whether the transfer is an outright transfer or a security transfer (see ch VII sections 1 and 2). Therefore the need to characterise may still arise in some circumstances*. [guidance on relevance of recourse to this exercise (WG1:89) - Fourth, the inclusion of security transfers was supported by the industry. - The word 'transfer' was chosen for use in the MLF rather than the word 'assignment' (WG3:143 – 161). In some States the two words mean the same but in others 'transfer is wider eg includes novation (WG4:101). It is up to the enacting State to choose the most appropriate word to fit with its domestic law(WG3:149). 	<p>[*there is a reference in WG1:185 to discussion in the GtE of recharacterization issues. I am not sure what these are (with a functional approach there is little need for a process of recharacterization) but given the differences in the enforcement provisions applicable to outright transfers and security transfers, there could be recharacterization issues arising in that regard.]</p>
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		<ul style="list-style-type: none"> - While the focus of the MLF is on outright transfers made for financing purposes, the MLF includes outright transfers made for other purposes, for example, a transfer of receivables on the sale of a business (WG4:52) or a transfer of receivables for collection (WG3: 104 – 111)(WG1:50-56) - A transfer (outright or security) includes the transfer of part of or an undivided interest in a receivable (Art 5(4)(a)) (WG3:160)(WG2:13-15) - The definition of 'transfer' includes the rights of a transferee arising from a transfer as in the priority rules in the MLF (e.g. some priority rules) this reading is necessary to make sense of the provisions. (WG5:8). In other parts of the MLF [is this entirely correct?] the term 'transfer refers to a process, while in the priority chapter it refers to the rights of a transferee, since it is those rights that are in competition with the rights of another (competing) transferee. Thus, for example, if A made a security transfer of a receivable to B and then made an outright transfer of the same receivable to C, B's rights in the receivable arising from the security transfer to B are in competition to those of C arising from the outright transfer to C. 	
12.	Art 2(k) Transfer agreement	<ul style="list-style-type: none"> - A transfer agreement is an agreement between a transferor and a transferee [for the transfer of a receivable]. (WG3:165-165). A debtor will not be party to a transfer agreement* (WG6:66). In the circumstances set out in Art 5 it has the effect of transferring a receivable falling within its scope (see WG6:26). Apart from the requirements set out in Art 5, domestic contract law governs the question of whether a transfer agreement is an enforceable contract (see GtE III(1)). - The scope of a transfer agreement will depend on its context and what the parties agree. 	<p>[*MD: This aspect should be highlighted as I have seen several stakeholders confused and explaining that in reverse factoring the debtor is a party to a transfer agreement.]</p> <p>[A discussion of different types of transfer agreements could go into the discussion of Art 5, or in I(2) i.e.</p>

		<ul style="list-style-type: none"> - In some circumstances it could be an agreement for the transfer of a single, present, receivable. This is likely to be the case if a receivable is bought on some kinds of platform (see III(3)) - In other circumstances, it could be an agreement for the transfer of many receivables, described generically, both present and future. [describe a 'Master Agreement'? see WG4:66, WG5:89] - The default set of rights and obligations between the transferor and the transferee set out in Chapter VI Section 1 can be included in a transfer agreement and can be varied by the transfer agreement. The transfer agreement will [be likely to][also] set out other rights and obligations between the parties that are not included in the MLF. 	<p>the description of different business practices rather than here.]</p>
<p>13.</p>	<p>Art 2(l) Transferee</p>	<ul style="list-style-type: none"> - The transferee is the recipient of the receivable under the transfer agreement. The words 'in whose favour' are included to cover security transfers since in that situation all rights to the receivable is not necessarily transferred. (WG3:166) - It is up to the agency law of the enacting State whether the term 'transferee' includes an agent of the transferee (WG6:27) (see GtE III(1)) 	
<p>14.</p>	<p>Art 2(m) Transferor</p>	<ul style="list-style-type: none"> - The transferor of a receivable is the person who transfers it. Agency law will determine whether that person is transferring on its own behalf (in which case it will be the transferor) or on behalf of someone else (in which case that person will be the transferor). - A person is a 'transferor' under the MLF if it enters into a transfer agreement in relation to a future receivable, even though the 	

		<p>transfer to be effective against third parties, the additional step of registration (Art 9) has to be taken. It also sets out the additional rights a transferee of a receivable has in the proceeds of that receivable and in any rights securing or supporting the receivable. Importantly, from the aspect of access to finance, it includes an override of contractual limitations on transfer.</p>	
2.	Art 5 Requirements for the transfer of a receivable	<ul style="list-style-type: none"> - Art 5(1) makes it clear that an agreement between the transferor and the transferee is necessary to transfer a receivable. It is, however, not sufficient. - For a receivable to be transferred the transferor has to have either rights in the receivable or the power to transfer it. - The first situation is where the transferor has rights in the receivable. Under the usual 'nemo dat' rule, a transferor will only be able to transfer the rights in the receivable which it has (see below for where a transferor has the power to do more than this). Although, in theory, a transferor's rights in the receivable can be of any kind and extent, the most usual situation in the [factoring][receivables financing] context is where the transferor owns the receivable, that is, it is owed the receivable under a 'trade contract' (see definition of 'receivable') or it is the transferee of the receivable under an outright transfer. In order for the transferor to have rights in a receivable, the receivable has to have arisen, that is, it must not be a future receivable (in the sense of the first situation described in the definition of 'future receivable'*) - The second situation is where the transferor has the power to transfer the receivable. This refers to the situation where a transferor does not have rights (or sufficient rights) in the receivable enabling it to effect a transfer as described in the 	<p>[*this kind of cross-reference will be able to be done more concisely when we have para numbers etc]</p>

		<p>previous paragraph, but under an exception to the nemo dat rule contained in the MLF [or in other applicable law**] it can nevertheless transfer the receivable so that the transferee obtains rights in the receivable. The [main][only] exception to the nemo dat rule contained in the MLF is the situation where the application of the priority rule in Art 13 results in a transfer by a transferor without rights in the receivable has priority over a transfer by a transferor with rights in the receivable. For example, if X (the owner of a receivable) transferred the receivable [outright] to Y on Day 1 but did not register a notice in relation to the transfer until Day 20, and, in the meantime, X transferred the receivable [outright] to Z on Day 5 and Z registered a notice on Day 10, Z would have priority over Y. When X transferred the receivable to Z, X had the power to transfer the receivable, but not any rights in the receivable.</p> <ul style="list-style-type: none"> - Art 5(2) sets out the requirements for an effective transfer agreement. [Apart from the requirements set out in Art 5, domestic contract law governs the question of whether a transfer agreement is an enforceable contract** (see GtE III(1))] - Art 5(2)(a) Explain the reasons for the requirement of writing and signature in a transfer agreement <ul style="list-style-type: none"> o To ensure that the transferor agrees to the transfer (cautionary) o To ensure that there is satisfactory evidence of the transfer. This could be important, for example, if the debtor requested proof of the transfer under Art 26(7). o It reflects industry practice (WG6:37) 	<p>[**could there be a nemo dat exception under applicable law? I think not (or at least there should not be as the priority rule in 13 is exclusive) but I left it in for discussion]</p> <p>[Explanation of power to transfer WG5:39,SS72]</p> <p>[**This sentence also appears in the commentary on the definition of 'transfer agreement' in Art 2(k). WG to decide where it should go. Also that commentary includes discussion of different types of transfer agreement, i.e. single receivables, Master agreements etc. WG to decide where this should go]</p>
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		<ul style="list-style-type: none"> - [Should there be a discussion of the difference between 'in writing' and 'evidenced in writing'?***] - A State's electronic commerce law will determine precisely what electronic documents count as 'writing' and what counts as an electronic 'signature' (see GtE III(3)) - Art 5(2)(b). Explain the reasons for identification. <ul style="list-style-type: none"> o Certainty. o To enable a third party, such as a debtor to know who the parties are. This could be important, for example, if the debtor requested proof of the transfer under Art 26(7). - Art 5(2)(c). The requirement that the transferred receivables must be described so that they can reasonably be identified is important as it enables the subject matter of the transfer to be identified. This is important for certainty and also would provide proof of the transfer to a debtor (Art 26(7)). - However, Art 5(3) makes it clear that the transferred receivables do not need to be individually identified. They are sufficiently identified in either of the situations described in Art 2(5)(3): where the agreement says 'all of the transferor's receivables' and where it says 'all of the transferor's receivables within a generic category'. An example of the latter would be 'all of my receivables arising from the sale of motor vehicles'. - This provision on how transferred receivables should be identified in a transfer agreement compliments the provision in Art 5(4), which sets out what can be transferred under a transfer agreement. Thus, 	<p>[***I hope not!]</p>
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		<p>Art 5(3) relates to the way in which the categories of receivables included in Art 5(4)(b) and (c) can be identified in a transfer agreement.</p> <ul style="list-style-type: none"> - Art 5(4)(b) and (c) also permits the transfer of all of a transferor’s receivables within a generic category other than a specific type of receivable, or all its receivables other than a specific category, on the basis that the greater categories include lesser categories.**** (WG6:36. SS 73) In these situations, care would need to be taken to reasonably identify the transferred receivables. - Art 5(4)(a) permits the transfer of a part of a receivable, or an undivided interest in a receivable. An example of ‘part of’ a receivable is where an invoice enumerated various sums for particular services but the resulting receivable related to all the enumerated services, the transferor could transfer the parts of the receivable relating to some services and not others. [Is that what is meant by ‘part’ of a receivable?]. The transfer of an undivided interest in a receivable could be, for example, the transfer of half of a receivable, or the transfer of \$500 out of a \$1200 receivable. [In either case, the transfer would be an outright transfer of a part of or an undivided interest in the receivable, rather than a security transfer, since there is no secured obligation.] - Art 5(5) makes it clear that where a receivable is a ‘future receivable’ in the second sense, that is, where the receivable has arisen but has not yet been acquired by the transferor [ref to discussion of definition of future receivable in Art 2(d)], the transfer of the receivable does not take place until the transferor acquires rights in the receivable or the power to transfer it. The point made above (that a receivable cannot be transferred until it has arisen) is implicit in Art 5(5). 	<p>[**** I put this in as it was mentioned in the WG and in the spreadsheet, but it does seem to me to be obvious and a non-point]</p> <p>[I struggled to differentiate between ‘part’ or ‘an undivided interest’: I may have got it wrong.]</p>
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3.	- Article 6 Proceeds	<ul style="list-style-type: none"> - The extension of the transferee's right in the receivable to its proceeds could lead to a priority contest between the transferee X and another person Y with right in the proceeds. - Since the proceeds (as defined in the MLF) will be money, a negotiable instrument or funds in a bank account, the applicable priority rule will not be the rule in Art 13 unless Y's right arises because it is also a transferee of the receivable. In other situations, such as where Y has a security interest over money proceeds as primary collateral, the other law governs the priority dispute. In this example, this is likely to be the applicable secured transactions law. [discussion of priority where a secured creditor has control of a bank account is in IV(3) Art 10] - For the transferee's right to extend to the proceeds, the proceeds must be identifiable. This requirement is particularly important where the proceeds consist of funds in a bank account which also contains other funds, although it could also apply to other types of cash proceeds. The applicable law of [tracing] would normally govern identifiability. [WG6:54 SS76] 	<p>[Is it OK to use 'bank account' as shorthand for the lengthier phrase used in Art 2(f)?]</p> <p>[in WG6:54 it was stated that the tracing reference needed to be carefully drafted as tracing rules vary a lot]</p>
4.	Article 7 Personal or property rights securing or supporting payment of a receivable	<ul style="list-style-type: none"> - Explain the operation of Art 7(1). Art 7(1) applies where a receivable is supported or secured by a personal right (such as a guarantee or a right under a credit insurance agreement) or a property right (such as a security right). Broadly, it is intended that the transferee of the receivable Y obtains the benefit of that right. - However, Art 7(1) covers two situations: which applies in any specific case will depend on the applicable law. The first is where the benefit of the personal or property right could transfer to Y without a new act of transfer. In that case, Y obtains the benefit under Art 7(1). The second is where the applicable law requires a new act of transfer for Y to obtain the benefit of the personal or 	<p>[could we use the word 'supported' for personal right and 'secured' for property right or do they both apply to both?]</p> <p>[Are these examples of personal rights correct/sufficient?]</p>

		<p>property right. [example?] In that case, the transferor is obliged to transfer that benefit to Y. It is likely that in many case the transfer agreement would include an obligation to that effect, and/or under existing domestic law in an enacting State (in which case coordination with the MLF would be required). Art 7(1), however, provides legal certainty in this regard. (WG 5: 56-64).</p> <ul style="list-style-type: none"> - Art 7(1) is not intended to contradict an enacting State’s existing law on letters of credit. (WG 4:96,SS 80) We need a more detailed explanation of this statement and the goals of Art 7 (WG4:97 SS 97) - Art 7(2) deals with two situations. The first is where there is an agreement between the transferor and the debtor limiting the transferor’s right to transfer the receivable. Notwithstanding such a limitation, the transfer of the receivable is effective (as provided for in Art 8) and the transferee obtains the benefit of any personal or property right securing or supporting the receivable (as provided in Art 7(2)). - The second situation is where there is an agreement between the transferor and the debtor limiting the ability of the transferee to have the benefit of the personal or property right. Notwithstanding this agreement, the transferee does obtain the benefit of the personal or property right under Art 7(1) and (2). 	
5.	Art 8 Contractual limitation on the transfer of a receivable	<ul style="list-style-type: none"> - ‘Trade contracts’ not infrequently include a contractual term prohibiting transfer of any resulting receivable or limiting transfer to specific situations, such as where the debtor consents to the transfer. Art 8(1) provides that notwithstanding such a term, a transfer of a receivable arising from such a contract is effective. For example, if the contract between X (a seller) and Y (a buyer) for the supply of 1 tonne of potatoes contained a term prohibiting the 	[Note SS 83, WG 6:106 in relation to conflict of laws rules in Art 36(2)(b) (should go into commentary on ch VIII)]

		<p>transfer of the receivable arising from that contract, X could still transfer the receivable to Z under the MLF.</p> <ul style="list-style-type: none"> - Explanation of benefits of anti-assignment override to access to credit. Because of its importance, Art 8 cannot be derogated from or varied by the parties (Art 3(1)). - Art 8(1) is limited to agreements between the debtor and a transferor. Thus, if the transferor X had agreed with another person, for example, a bank lender, that X would not transfer any of its receivables, that agreement would not fall within Art 8(1). Instead, other law would determine the effect of that agreement on the transfer to Z. - However, the limit in the previous paragraph includes agreements with 'a' transferor, and not necessarily with the initial transferor (that is, the party to the trade contract X). Thus, if Y made an agreement with Z limiting the transfer of the receivable, any transfer by Z to A would nevertheless be effective.* This drafting in Art 8(1) was so as to broaden the effect of Art 8(1), given its beneficial impact on access to credit. (WG5:55) - Art 8(2) has the effect that the term in the contract between the debtor and a transferor is entirely ineffective, and no one can be liable for breach of the agreement or for inducing its breach just because it has knowledge of the term. Thus, in the example above, Y cannot sue X (who is a party to the agreement) for damages or avoid the agreement because the transfer was made in breach of the term. Nor can the debtor sue other persons who are not party to the agreement under any tort or other liability in relation to the breach. Art 8(2) specifically mentions 'a transferor' (that is, a subsequent transferor other than X) and 'a transferee' (Z), but any 	<p>[*I am not quite sure whether the situation mentioned by Ole in 4:173, SS 78, falls within this scenario or the previous one or neither. Perhaps we could ask Ole to explain it further and then take a view whether it needs discussing in the GtE.]</p>
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		<p>other person is included. This would include any person who knew about the agreement and was in some way involved in the transfer from X to Z (for example, by inducing X to transfer the receivable to Z).</p> <ul style="list-style-type: none"> - If, under an enacting State’s law, a guarantor was likely to be a party to the trade contract, it is possible that that guarantor would not fall within any of the categories of people given immunity in Art 8(2) as it would not be a transferor, a transferee or a non-party. In that situation A State might consider providing specifically for a guarantor to have immunity (WG 6:41, SS 82) - In preparing the MLF, the choice was made for Art 8(2) to render a limiting term entirely ineffective rather than permitting a debtor to sue the transferor or the transferee for breach of the term (but not avoid the trade contract) as is found in some other national laws and the MLST Art 13(2). - There were a number of reasons for this decision (WG6:40, WG 1:152-258): <ul style="list-style-type: none"> - (1) preserving the right of the debtor to sue is contrary to the aim of facilitating factoring - (2) preservation of right to sue had caused a lot of legal uncertainty in many jurisdictions and had had a chilling effect on factoring - (3) in most situations the debtor won’t suffer any damage from breach of the clause as it will have to pay anyway. - (4) strong industry support - [Should we also include some of the arguments against an absolute override (WG1:159 – 162) 	
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		<ul style="list-style-type: none"> - In some States, there are statutory provisions limiting the effect of a provision that has the effect of Art 8 in relation to specific types of contracts for policy reasons, such as reasons of national security. Enacting States are urged to limit such provisions to important matters of public policy as otherwise confidence in the new factoring law could be undermined. (WG3:23 SS 79) [A State might, however, prohibit transfer of some types of contracts completely, in which case this falls within Art 1(3)] (WG1:153) 	
CHAPTER IV - SECTION 4			
CHAPTER III – EFFECTIVENESS AGAINST THIRD PARTIES OF A TRANSFER OF A RECEIVABLE			
Drafter: Louise Gullifer		Subgroup: Michel Deschamps, Megumi Hara	
Subsection	Subject	Content	Notes/Issues for Working Group
1.	Introduction	<ul style="list-style-type: none"> - This section deals with the effectiveness of a transfer of a receivable against third parties. If the conditions set out in Art 5 are satisfied, the receivable is transferred as between the transferor and the transferee, but in order for the transfer to be effective against third parties, the additional step of registration (Art 9) has to be taken. Registration under Art 9 also determines the order of priority between competing transfers (Art 13) 	
2.	Art 9 Registration	<ul style="list-style-type: none"> - Art 9 provides that the only way of making a transfer of a receivable effective against third parties is to register a notice with respect to it. Other methods of third party effectiveness that may exist in an enacting State, such as the giving of notice to a debtor, do not apply under the MLF and must therefore be repealed (WG5;10, SS85). For transitional provisions, see Art 51 - The rules as to registration are set out in Annexe A. Clause 4 of Annexe A makes it clear that a notice can be registered before the transfer agreement is entered into or before the transfer is made, and a registered notice can cover the transfer of future receivables. 	

		<ul style="list-style-type: none">- A transfer will only be effective against third parties if it is effective between the transferor and the transferee, that is, if the requirements and conditions set out in Art 5 are fulfilled (6:43, SS75).- Thus, for example, if a notice relating to a transfer is registered before the transfer agreement is made, the transfer(s) covered by that agreement will only become effective against third parties when the agreement is actually made and all the other conditions are fulfilled. If a notice relating to a transfer is registered after the transfer agreement is made, but relates to future receivables, the transfer of those future receivables will only be effective against third parties when the receivables arise, or the transferor obtains rights in the receivables or the power to transfer them, as the case may be. (refer back to discussion of Art 2(d) and Art 5)- The third parties against whom a transfer becomes effective include any insolvency representative of the transferor or any other person if insolvency proceedings are commenced against the transferor (Art 15).- The purpose of registration is to give public notice of a transfer (or the possibility that a transfer has or will taken place). [see commentary on registry?]. The information required in a registered notice is quite limited, and receivables can be described generically (Clause 7 Annexe A). For these reasons, registration of a notice relating to a transfer is not the same as notification of the debtor or that transfer (art 25) and for the rules in arts 25 – 29 to apply, a notification has to be sent to the debtor in accordance with those rules. (WG 2:106-107)	
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		<ul style="list-style-type: none"> - Moreover, a transfer can be 'effective' against a debtor (in the sense that the debtor is discharged only by paying the transferee or someone whom the transferee instructs the debtor to pay, Art 26) by notification of the debtor. It is possible for a transfer to be effective against a debtor in this way without a notice in respect of that transfer having been registered (in which case it would not be effective against 'third parties'). In this sense, then, the term 'third parties' in Art 9 does not include the debtor (WG6:182, SS84) - Conversely, it is possible for a transfer to be effective against third parties if a notice in respect of it has been registered even if the debtor has not been notified of the transfer. Indeed, 'non-notification' [factoring][receivables financing] is quite common in some States. In that situation, the transfer agreement is likely to include a term limiting the notification of the debtor of the transfer by the transferee to certain specific circumstances (see also Art 22(2)). However, as mentioned above, registration of a notice is not notification and should not result in a transferee breaching such a term in a non-notification [factoring][receivables financing] agreement. (WG 6:51) 	
3.	Article 10 Proceeds	<ul style="list-style-type: none"> - Art 10 operates in tandem with art 6, which provides that a transferee of a receivable obtains rights in the proceeds of that receivable. Under Art 10, the third party effectiveness of the transfer also applies to the transferred receivable's proceeds. There is no need (or ability under the registry rules) to register a notice in relation to proceeds or for the notice registered in relation to the transfer of the receivables to mention proceeds. [If, however, a receivable is the proceeds of a receivable or proceeds of proceeds, a notice would be required for third party effectiveness] 	[note that the question of priority in relation to proceeds is dealt with in the commentary to art 14]
4.	Article 11 Continuity in third-party effectiveness	<ul style="list-style-type: none"> - Art 11 provides detailed rules for inclusion by an enacting State A for the situation where a transferor locates from State B to State A. Under Art 37, the law applicable to the third party effectiveness of a 	

	<p>upon the relocation of the transferor to this State</p>	<p>transfer of a receivable is the law of State in which the transferor is located.</p> <ul style="list-style-type: none"> - Art 11 relates to a transfer that was made effective against third parties under the law of State B (in this example, on Day 1) before the transferor relocated to State A (in this example, on Day 30). That transfer remains effective against third parties if a notice in respect of it is registered in the MLF registry of State A before the earlier of two dates. - First, the time when third-party effectiveness would have lapsed under the law of State B (let us assume Day 60) - Second, a period of time after the relocation of the transferor. The enacting State (State A) must specify that period when implementing Art 11 of the MLF (let us assume 15 days, ie Day 45) - The transfer therefore remains effective against third parties if the transferor registers a notice in State A’s MLF registry before Day 45. Let us assume it does so on Day 40. - Art 11(2) concerns the time from which third party effectiveness dates if the transfer remains effective against third parties by the operation of Art 11(1). That time is the time when third-party effectiveness was achieved in State B (Day 1). - [It is very important that third-party effectiveness dates from that point, since the date of third-party effectiveness determines priority**] 	<p>[**this is in square brackets as I think this is actually not correct. In the scenario posited, the law of State A (ie the location of the transferor) will determine priority</p>
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			<p>under Art 37. That law is the MLF at the time the issue arises (Art 42(1)(b)). However, priority under the MLF depends on the date of registration of a notice (presumably) in the MLF registry (Art 13). In my example, that is day 40, whereas Art 11(2) provides for TPE on Day 1.</p> <p>One way of partly dealing with this (which is what I suggest we do) is to say in the GtE that 'registration of notices' in Art 13 includes registration of a notice in a notice-based register in any State. This, at least, covers the situation where State B has a notice-based registry. I have included text in the commentary to Art 13 to this effect.</p> <p>However, it might be the case that TPE is obtained in State B by some other means (e.g. notification of the debtor) so that Art 13 doesn't apply. This does appear to be a gap, which we need commentary to deal with. I have discussed it with Neil and he agrees that there is some sort of gap here.</p>
CHAPTER IV - SECTION 5			
CHAPTER IV – THE REGISTRY SYSTEM			
Drafter: Secretariat		Subgroup: Entire WG	
Subsection	Subject	Content	Notes/Issues for Working Group
1.	Art 12 The Registry	- This section should simply restate that the MLF contains a comprehensive set of rules for the establishment of a registry in Annexe A.	Should we reference the fact that the MLST contains its Registry Rules directly in the body of the

			<p>instrument, rather than in a separate Annexe? It's probably unnecessary.</p> <p>It is suggested that we don't deal with issues related to competing registries here.</p>
<p>CHAPTER IV - SECTION 6</p> <p>CHAPTER V – PRIORITY OF A TRANSFER</p>			
<p>Drafter: Louise Gullifer</p>		<p>Subgroup: Bruce Whittaker, Megumi Hara</p>	
Subsection	Subject	Content	Notes/Issues for Working Group
1.	Introduction	<ul style="list-style-type: none"> - This chapter deals with priority issues in relation to transfers. The word 'transfer' is used throughout the chapter, but it is to be recalled that in chapter V 'transfer' usually means 'rights of a transferee arising from a transfer' since it is the rights that are competing rather than the process of transfer. (WG5:8) 	
2.	Art 13 Competing transfers	<ul style="list-style-type: none"> - There is only one priority rule applicable to competing transfers of receivables under the MLF: the 'first to register' rule established in Art 13. Any other priority rules in relation to competing transfers that previously existed in the law of an enacting State will need to be repealed. For transitional provisions, see Art 52. (WG5:10, SS85). - The effect of the rule in Art 13 is that when there are competing transfers, the first in respect of which a notice is registered, has priority over the second in respect of which a notice is registered. The second to be registered, in turn, has priority over the third and so on. 	<p>[do we need to say anything about the deletion of the double debtor section (Art 30 MLST) on the basis that it does not apply in practice in the factoring context? WG5:11]</p>

		<ul style="list-style-type: none"> - Since a notice can be registered in respect of a transfer before that transfer actually takes place (clause 4 Annex A), the rule in Art 13 can operate as an exception to the nemo dat rule where the order of registration is different to the order of the transfers. For example, if X (the owner of a receivable) transferred the receivable [outright] to Y on Day 1 but did not register a notice in relation to the transfer until Day 20, and, in the meantime, X transferred the receivable [outright] to Z on Day 5 and Z registered a notice on Day 10, Z would have priority over Y because Z's transfer was the first in respect of which a notice was registered. However, when X made the transfer to Z, X had no rights in the receivable (and so had nothing to transfer to Z). The effect of Art 13 is that Z receives more rights than X had to give. This means that, at the time of the transfer to Z, X had the power to transfer the receivable (see Art 5(1)). - Further, it is possible for a registered notice to cover transfers of future receivables (Art 13(2)). Art 13(2) covers both types of future receivables discussed in [commentary to Art 2(d)]. - When a receivable included in an otherwise effective transfer agreement is a future receivable because it has not yet arisen, its transfer takes place when it arises. However, the priority of transfers will depend on the date of the registration of relevant notices rather than the date the actual transfer of the future receivable takes place. (WG6:48, SS78) For example, X enters into a transfer agreement on Day 1 with Y in respect of a receivable that had not yet arisen, but did not register a notice in relation to the transfer until Day 20. In the meantime, X enters into a transfer agreement on Day 5 with Z in respect of the same future receivable and Z registers a notice on Day 10. The future receivable actually arises on Day 30, at which time both transfers take place. Here, Z would 	<p>[I used this example in IV(2) as well]</p>
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		<p>have priority over Y because Z’s transfer was the first in respect of which a notice was registered.</p> <ul style="list-style-type: none"> - When a receivable included in an otherwise effective transfer agreement is a future receivable because it has not yet been acquired by the transferor, its transfer takes place when the transferor acquires it (Art 5(5)). However, the priority of transfers will depend on the date of the registration of relevant notices rather than the date the actual transfer of the future receivable takes place. For example, X enters into a transfer agreement on Day 1 with Y in respect of a receivable that X has not yet acquired, but X did not register a notice in relation to the transfer until Day 20. In the meantime, X enters into a transfer agreement on Day 5 with Z in respect of the same future receivable and Z registers a notice on Day 10. X acquires the future receivable on Day 30, at which time both transfers take place. Here, Z would have priority over Y because Z’s transfer was the first in respect of which a notice was registered. - Where the competing transfers are both security transfers, the priority rules determines the order in which the transferor recover, on enforcement, from the proceeds of the enforcement. How much each transferor recovers will depend on the amount of the proceeds of the enforcement and the amount of the secured obligations. For the distribution of proceeds of enforcement, see Art 35. - Art 13(3) makes it clear that the priority of security transfers applies in relation to all secured obligations whenever they arise, even if they arise after the notice relating to the transfer is registered. - Art 13 only applies to competing ‘transfers’, that is, transfers made in accordance with the MLF or made effective against third parties under the MLF (Art 11). Another person could have rights in a 	<p>[is this right?]</p>
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		<p>receivable through a means other than transfer. One example is a judgment creditor (this is covered in Art 17). Another example is where a receivable is 'proceeds' under an applicable secured transactions law under which a security right in, for example, goods automatically extends to their proceeds. An enacting State whose secured transactions law has this effect will need to coordinate that law with the MLF (WG 1: 216-217)</p> <ul style="list-style-type: none"> - ['notice' in Art 13 means notice in any notice filing system when applying the priority rule to a transfer made in another State where the transferor located to the enacting State (Art 11)*] 	<p>[*This section is to deal (partially) with the point raised in relation to Art 11. More will be needed, but this is to meet the first (and easier) problem]</p>
3.	<ul style="list-style-type: none"> - Art 14 Proceeds 	<ul style="list-style-type: none"> - Art 14 provides that the priority of a transfer extends to the proceeds of the transferred receivable. This means that where there would have been competing transfers of a receivable, had the receivable not been paid, the priority of the competing claims to the proceeds depend on the order of registration of notices in respect of the transfers of the receivable. - However, the right of X, a transferee, who has a right in proceeds because a receivable has been transferred to it (Art 6) and who has registered a notice in respect of the transfer (Art 9) may still be in competition with the rights of other people which arise by other means. In that situation, the rights of those people will not have been made effective against third parties by registration in the MLF registry, but by registration in another registry or another method such as control). Therefore, priority will not be determined by the rule in Art 13 (WG5:13, WG6:44, SS 86). 	<p>[According to WG5:13 Art 14 was going to be amended to 'priority under this law' but that doesn't seem to have happened]</p>

		<ul style="list-style-type: none"> - [An example of the situation mentioned in the previous paragraph is where the right of X in funds in Y’s bank account (as proceeds of a receivable transferred to X) is in competition with a secured creditor Z who has a security right in the funds in Y’s bank account. Z has registered its security right in the State’s collateral registry. Other law will apply to the priority between X’s right and Z’s right. Under some secured transaction laws, the right of a person who has control of the bank account will have priority over the right of a person who has made its right effective against third parties by other means. X might then want to take control of the bank account by means of a control agreement as well as registering a notice in respect of the transfer to it.*] - Although ‘proceeds’ are not specifically mentioned in Art 15, the right of a transferee in proceeds remains effective against third parties and keeps its previous priority if the transferor enters insolvency proceedings. This follows from Art 14, and the reasoning in Art 15 applies mutatis mutandis to proceeds [WG6:52,SS 88] 	<p>[*This is my attempt to reflect the discussion in WG5:24 about control (when the specific provision about control of bank accounts was deleted from the MLF). I’m not sure it is needed or whether I have got it right, but I thought I would include it for discussion.</p>
<p>4.</p>	<p>Art 15 Impact of the transferor’s insolvency on the priority of a transfer</p>	<ul style="list-style-type: none"> - Art 15 confirms that the pre-insolvency third party effectiveness and priority of a transfer remains after insolvency proceedings have commenced in relation to the transferor. This is a critical provision, as it is the protection of the transferee in the transferor’s insolvency that makes [factoring][receivables financing] attractive to financiers. Outside insolvency a financier could rely on its personal rights, but within insolvency rights with third party effect are crucial. - Explain meaning of ‘insolvency proceedings’ as a wide concept to include some restructuring proceedings (WG6:55 SS90). [DAPL included a wide definition, but we might want to leave it up to domestic law to define?] - There is one exception to the retention of priority under Art 15, which is where another claim has priority under the applicable 	<p>[we could change the wording but it seems to me that this point is important. It could, go course, go elsewhere]</p>

		insolvency law. What law is the applicable insolvency will depend on conflict of laws rules and may not be the law of the enacting State (WG5:16, SS89)	
5.	Art 16 Transfers competing with claims arising by operation of other law	<ul style="list-style-type: none"> - Art 16 enables a State to enumerate any claims which, as a matter of policy, it decides should have priority over a transfer. Such priority would usually only apply to security transfers. The priority could be both within and outside the insolvency of the transferor, or only within insolvency. - While Art 16 gives an enacting State the opportunity of enumerating any such claims, and providing for a limit on the priority of each claim or type of claim, enacting States are encouraged either to miss it out altogether (hence the fact that it is in square brackets) or to limit the number and extent of listed claims severely, in order not to have a chilling effect on access to finance [WG5:17] 	<p>[It is very unclear to me whether Art 16 is meant to apply (a) only within insolvency (b) only outside insolvency or (c) both within and outside insolvency. Art 36 of the MLST which is the equivalent appears to follow (c). However, WG5:17 seems to say that it only applies outside insolvency ie (b). WG 6:56 seems to assume that it applies within insolvency (perhaps (a) or perhaps (c)). I have assumed (c) for now]</p> <p>[CW: Although art. 16 implies otherwise, I am wondering if it is realistic to expect States to incorporate a list of insolvency law preferential claims and to specify the maximum amount of each preference in the MLF. Would these not generally be instead set out in the insolvency law as they would also usually apply to other pre-filing rights in property that otherwise would have priority (e.g. security rights generally? In addition, in States with a federal structure, legislative authority for insolvency law and for factoring and assignment law may be vested at different levels. Should the GtE acknowledge this and perhaps suggest that States might alternatively use the occasion of the enactment of the MLF to make consequential amendments to its insolvency law preferences to</p>

			<p>ensure that they specify a maximum amount for each preference to enable transferees to assess and predict their risk should the transferor become subject to insolvency proceedings.</p>
<p>6.</p>	<p>Art 17 Transfers competing with rights of judgment creditors</p>	<ul style="list-style-type: none"> - Art 17 deals with a category of persons whose could have a claim competing with that of a transferee but who themselves are not transferees. A judgment creditor is a person X who has a court order [for the payment of money] against another person Y and who, under the applicable law, can take steps to obtain a right in an asset of Y. Such a right enables the judgment creditor (often, via an officer of the State) to obtain the value in that asset and use it in satisfaction of the court order. Different States use different terms for such a person, and so an enacting State is given the opportunity of defining the term 'judgment creditor' in the MLF according to its own terminology (Art 2(e). (WG6:58. SS 91) - Art 17 applies where the enacting State permits a judgment creditor to obtain a right in a receivable. [eg garnishee order?]. An enacting State must specify in Art 17(1) the steps that must be taken for the judgment creditor to obtain a right in the receivable. If those steps are already set out in another piece of legislation, the enacting State can instead include in Art 17(1) a reference to the relevant other statutory provisions. - The priority rule in Art 17(1) is that the right of the judgment creditor has priority over the right of the transferee if the judgment creditor took the steps specified before a notice relating to the transfer was registered. 	<p>[I have set out a possible explanation of what a judgment creditor is, but this should be coordinated with the UNIDROIT Project on Best Practices in Effective Enforcement]</p>

		<ul style="list-style-type: none"> - The rule in Art 17(2) only applies to security transfers, that is, a right securing a payment obligation (usually) owed by the transferor. (WG5:18). Under this rule, if the right of a security transferee would have priority over the right of a judgment creditor, the priority of the security transfer is limited to a certain amount of credit extended to the transferor by the transferee. [explain the amounts] 	
7.	Art 18 Subordination	<ul style="list-style-type: none"> - Art 18 confirms the position that would, largely, apply under Art 3 in any event. (WG5:20) - Art 18(1) permits a person to modify or subordinate its priority. A person X can agree to rank lower than another claimant Y (subordination) or pari passu with another claimant Z (modification). (WG6:60). In this situation, under Art 18(1), there is no need for Y or Z to be a party to the agreement, which is an extension of the position under Art 3). Since subordination or modification usually occurs in the context of security transfers, the agreement is often made with the person who owes the secured obligation rather than with the benefitted creditor, although secured creditors often also make subordination agreements among themselves. - A subordination agreement cannot affect a non-party competing claimant except the person benefitted (Art 18(2)). - In the context of [factoring][receivables financing] a release was often used instead of a subordination. Hence, a factor may obtain a release from a secured creditor from the latter's rights in relation to certain receivables to be transferred to the factor. (WG 5:20, 6:60) 	
8.	Art 19	<ul style="list-style-type: none"> - Art 19 makes it clear that, unlike priority rules in some domestic laws, the priority rules in relation to transfer of receivables under 	

	<p>Irrelevance of knowledge of another transfer</p>	<p>the MLF are not affected by the fact that a transferee knows of another transfer.</p> <ul style="list-style-type: none"> - This rule makes the position more certain and avoids difficult questions of proof of knowledge. 	
<p>CHAPTER IV - SECTION 6</p>			
<p>CHAPTER VI – RIGHTS AND OBLIGATIONS OF THE TRANSFEROR, TRANSFEREE, AND THE DEBTOR</p>			
<p>Drafter: Louise Gullifer</p>		<p>Subgroup: Bruce Whittaker, Michel Deschamps</p>	
Subsection	Subject	Content	Notes/Issues for Working Group
<p>1.</p>	<p>Introduction</p>	<ul style="list-style-type: none"> - This chapter is divided into two sections. - The first relates to the rights and obligations between the transferor and the transferee. The relationship between a transferor and transferee is largely governed by the agreement between them, but the MLF provides for certain rights and obligations which will exist unless varied by the parties’ agreement under the party autonomy principle. - The second provides various rules governing the protection of the debtor when a transfer takes place, which reflect the balancing of interests between that of the debtor (that its position vis a vis the receivable does not change) and the transferee (that it has an unrestricted right to the receivable and its proceeds). The balance is carefully constructed so that, while consent of the debtor to a transfer is not required for an effective transfer, the debtor’s position only changes once it has been given relevant information about the transfer and who it needs to pay to obtain a discharge of the receivable. 	

		<ul style="list-style-type: none"> - There are two terms used in this chapter which are worth explaining at the outset. The first is 'notification of a transfer'. This is a document (paper or electronic) which is sent to a debtor to notify it of a transfer. As mentioned in the commentary to Art 13, it is possible to have a transfer that is made effective against third parties (by registration of a notice) in relation to which no notification has been sent to the debtor. Non-notification [factoring][receivables financing] is a well-known business practice. (WG2:107) However, in other very common types of [factoring][receivables financing] the debtor will be notified, and certain important consequences flow from the receipt by a debtor of the notification of a transfer, which are set out in this chapter. - The second term is 'payment instruction'. This is a document which is sent to the debtor to instruct it whom to pay, and sometimes where, to pay (that is, the address or account to which payment is to be made (Art 24(2)). It changes these matters from the terms set out in relation to payment in the trade contract giving rise to the receivable (see Art 24 below). It is not a notification of transfer, and the person the debtor is instructed to pay need not be the transferor or the transferee. It can be sent together with a notification of transfer or separately (WG4:44) - The rules on the legal effect of notifications of transfer and payment instructions apply irrespective of whether or not a notice in respect of the transfer has been registered in the registry. - In the context of this chapter it is important to remember that there are two ways in which a receivable can be the object of multiple transfers. (WG4:83,SS97) The first is where a transferor X transfers a receivable more than once to different transferees ('transfers by the same transferor'). Here, X transfers the receivable to Y and then transfers the same receivable to Z. In this situation, the 	<p>[I thought this was a good place for an explanation of these terms (WG4:82, SS 97), as otherwise it would come in the commentary to art 22 (the first time they are used) which is not necessarily the best place since 21- 23 might not be read by people who are really interested in debtor protection and how the debtor discharge rules work. But, of course, this material or something like it could go into the commentary to Art 22]</p>
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		<p>transfers to Y and Z are usually competing transfers, and the relevant priority rule is that set out in Art 13. The second is where there is a chain of transfers from transferee to transfer. Here, X transfers a receivable to Y and Y transfers the same receivable to Z (ref to discussion of import/expert factoring). In this situation the transfers are not competing since only one transferee is entitled to the receivable at any one time (WG2:104, WG 4:82, SS104)</p> <p>- [need to 'showcase' present day practices and formalities (WG2:109, SS100)]</p>	
<p>2.</p>	<p>Art 20 Rights and obligations of the transferor and the transferee</p>	<p>- Art 20 makes it clear that, as a general matter, the content of the transfer agreement governs the rights and obligations between them. The applicable contract law will determine what is included within the agreement (for example, what rules and general conditions, referred to in Art 20(1)) are actually incorporated within that agreement.</p> <p>- The relationship between the transferor and the transferee is also governed by any usage to which they have agreed and any practices they have established (Art 20(2))</p> <p>- The MLF provisions in Arts 21 – 23 will bind the parties in addition to the terms of the contract, usage and practices, but the parties can, by agreement, derogate from or modify any of the rights and obligations set out in those Articles (Art 3)</p>	<p>[I assume this is right about the interaction of the general contract law and Art 20(1). That is, that Art 20(1) does not mean that any general conditions referred to in the agreement would be incorporated and binding on the parties even if they would not be under the general contract law eg because one party had not been given sufficient notice of them]</p> <p>[WG2:68 says trade usages only bind if they are well known but 20(2) seems narrower than that since actual agreement to usage seems to be required]</p>
<p>3.</p>	<p>- Article 21 Representations of the transferor</p>	<p>- Art 21 sets out various representations that the transferor, as a matter of law, makes to the transferee. These representations are often set out expressly in [factoring][receivables financing] agreements and are very important commercially in relation to the allocation of risk between a transferor and a transferee and for this type of financing to work . (WG 2:72)</p>	<p>[I am not sure how much reference there should be to financing practice, but this one seemed to me to explain why these representations are set out in the MLF]</p>

		<ul style="list-style-type: none"> - The effect of the representations will depend on the applicable law (see Art 36(1)). [It will usually be the case is that if any of the represented facts are not the case, the transferee will have a right against the transferor to terminate the agreement and/or to sue for damages and/or other contractually agreed consequences will follow.] - Art 21(1)(a). That the transferor has the right to transfer the receivable. Even if the transferor does not have the right to transfer the receivable, it will sometimes have the power to effect a valid transfer, see commentary to Art 5(1) and Art 13. - Art 21(1)(b). That the transferor has not previously transferred the receivable to another transferee. Even if the transferor has done this, sometimes the second transferee will have priority under the rule in Art 13. - Art 21(1)(c). That the debtor does not have any defences or rights of set-off. If the debtor does have defences or set-offs they can bind a transferee under certain circumstances, set out in Art 27 unless the debtor has made an agreement not to raise them under Art 28. - The representations are made at the time of the entry into the transfer agreement. Representations (a) and (c) do not just relate to existing facts but to the future. (WG 2:70, WG5:104, WG6:68). [The effect of a representation as to the future will depend on the applicable law] [Representations as to the future should be viewed as [continuing representations] [promises as to the future]] 	<p>[I thought these comments could be helpful for an enacting State to understand how the MLF fits together.]</p> <p>[I was not quite sure what the position was in relation to reps as to the future. In the common law, reps can only relate to existing fact at the time when they are made, and so they are either treated as continuing reps (very common in loan agreements) or as promises as to the future. But I suppose that varies according to the applicable law. I've referenced all the WG discussion I could find.]</p>
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<p>4.</p>	<p>Article 22 Right to notify the debtor</p>	<ul style="list-style-type: none"> - Under Art 22(1), either the transferor or the transferee (or both) are permitted to send a notification of a transfer to the debtor. The requirements for an effective notification are set out in Art 25. - A transferor is permitted to send a payment instruction to the debtor only before the debtor receives a notification. A transferor might want to send a payment instruction if no notification had been sent to change the requirements of payment from that in the contract giving rise to the receivable (WG 3:58). A transferor is prohibited from sending a payment instruction after the debtor has received a notice of transfer. This is to prevent 'double-financing' (WG4:90) by the transferor undermining the transferee's right to payment by instructing the debtor to pay elsewhere. - However, a transferee can send a payment instruction to the debtor before or after the debtor receives a notification. This is important to protect the transferee, since after notification, the debtor must (to obtain a good discharge) pay the transferee unless it receives a subsequent payment instruction, which must be from the transferee (see previous para). The requirements for an effective payment instruction are set out in Art 25. - Sometimes, particularly in non-notification financing, there will be [a term in the transfer agreement] [an agreement between the transferor and transferee] prohibiting either party notifying the debtor of the transfer, except in very specific circumstances. Under Art 22(2) a notification in breach of such an agreement, however, does not stop a notification being effective for the purposes of Art 26, that is, in relation to debtor discharge. [Does this mean that it can be ineffective in relation to defences, set-offs and modifications? Should we say this?]. The liability of the party in breach, if any, however, is retained under Art 22(2). 	
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5.	Art 23 Right to payment	<ul style="list-style-type: none"> - Art 23 deals with who, as between the transferor and transferee, has a right to the amount paid by the debtor in purported discharge of the receivable. The rules in art 23 apply whether or not notification of a transfer has been sent to a debtor. - Art 23(a). The transferee is always entitled to retain any payment made to it, even if the debtor has not (officially) been notified of the transfer. Clearly, the debtor must know of the transferee's existence and of the transfer in order to know to pay it. - Art 23(b). If the debtor pays the transferor the transferee is entitled to be paid the amount of the receivable by the transferor. This sets out the position that is intended to apply in non-notification financing (that the debtor pays the transferor who then pays the transferee) but it also covers the position where the debtor pays the 'wrong' person, since after notification the debtor should pay the transferee. If the debtor is discharged under the rules in Art 26 by making the payment, it cannot be obliged to pay another person. Thus, when the debtor pays the transferor because it has not been notified of the transfer, the debtor does not have to pay the transferee: it is the transferor who has to do that. - Art 23(c). If the debtor pays someone else, for example, another transferee, or a judgment creditor, over whom the transferee has priority on the application of the rules in Chapter V, the transferee is entitled to be paid the amount by that other person. If the debtor is discharged under the rules in Art 26 by making the payment, it cannot be obliged to pay another person. Thus, when the debtor pays a person Y because Y notified the debtor, but X has priority over Y because a notice in relation to X's transfer was registered before a notice in relation to Y's transfer, the debtor does not have to pay X. Y must pay X. Examples of this situation is where a junior factor collects payment for a senior factor (WG3:69, SS 93) or where a junior secured creditor collects on a receivable (Art 33) 	[This and the next paragraph explain the relationship between Art 23 and Art 26, WG 6:74, SS 94]
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		<p>when the distribution of the collection must be distributed according to Art 35 (WG6:77, SS 96).</p> <ul style="list-style-type: none"> - In this context, an enacting State could choose to make it clear that where payment is made to a transferee in respect of a security transfer, that transferee can only retain the amount equal to the value of its right in the receivable (mirroring art 59(2) of the MLST). However, this is made clear in Art 35 of the MLF and so is not necessary to include here. (WG6:77, SS 96). - Art 23 does not provide that a transferee is entitled to returned goods. It was decided not to include a provision to this effect in the MLF because (WG6:75-76, SS 95) - returned goods were not considered to be proceeds under the MLF, - factors rarely received returned goods, (but could if the debtor was insolvent or the goods were faulty) - the provision could be confusing especially to those from a civil law background - the omission of the provision did not restrict the rights of a transferee, since if a factor wanted such a right it could provide for it in the transfer agreement 	
6.	Art 24 Principle of debtor protection	<ul style="list-style-type: none"> - Art 24 states the basic principle that a transfer of a receivable should not affect the rights and obligations of the debtor without its consent, except to the limited extent set out in the MLF. This gives effect to the balance referred to earlier between the interests of the debtor and those of the transferee. The unaffected rights and obligations include the terms of payment in the 'trade contract', that 	

		<p>is, the contract that gives rise to the receivable. The requirement for the consent of the debtor is an example of the party autonomy principle in Art 3.</p> <ul style="list-style-type: none"> - As mentioned above, a payment instruction is sent to a debtor to instruct it to pay someone (or somewhere) other than the person or place specified in the trade contract giving rise to the receivable. However, there are some limitations on what can be changed without the consent of the debtor, which are set out in Art 24(2). - First, the currency in which the payment is to be made. [In order to obtain debtor consent to this, there would either need to be a term in the trade contract or a separate consent would need to be obtained from the debtor] (WG 6:78) - Second, if a State where payment is to be made is specified in the trade contract, that cannot be changed to a State in which the debtor is not located. 	<p>[I have been using the term 'trade contract' to mean 'contract giving rise to the receivable' as (a) it is shorter and (b) it hammers home the point that we are talking about trade receivables. But this can, of course, be changed]</p>
7.	Art 25 Notification of a transfer or a payment instruction	<ul style="list-style-type: none"> - There are minimal formalities for a notification and a payment instruction (WG2:109-115). Each must be in writing. Depending on the electronic commerce law in an enacting State, a notification or a payment instruction can be sent electronically (WG2:118) - Art 25(2) specifies information that must be included in a notification or a payment instruction, namely, reasonable identification of the receivable and of the transferee. - The receivable needs to be identified so that the debtor knows which receivable is being referred to. If only part of a receivable was being transferred, notification of transfer would need to indicate which part 	

		<p>was being transferred. (WG3:62). Although Art 25(2) (as with the rest of the Model Law) refers to a single receivable, a notification of a transfer or a payment instruction can refer to one receivable, a generic category of receivables or all receivables owed by the debtor to one [or more than one] transferor (WG3:62).</p> <ul style="list-style-type: none"> - The transferee needs to be identified as, in the case of a notification, the debtor will be discharged only if it pays the transferee (in the absence of a subsequent payment instruction) (Art 26(2)). - There is no requirement that the transferor be identified. There are several reasons for this. First, it is not industry practice (although in some situations it could be good business practice) (WG3:57, 4:80). Second, in a chain of transfers (see below) it could confuse the debtor if intermediate transferors were identified (WG3:57, 59). Third, if the debtor needed that information, it could ask for it under Art 26(7) (WG4:80). - [Art 25(2) also gives guidance about the language of a notification or payment instruction] - Art 25(3) specifically provides that a notification of a transfer or a payment instruction can relate to receivables arising after notification. This means that either document can relate to future receivables of the first type discussed in [commentary to Art 2(d)]. In the example given [that paragraph] Z could send a notification of a transfer to Y relating to all the present and future receivables owed by Y to X. The provisions of Art 26 relating to discharge, however, would not apply to any particular receivable until it arose and became payable*. It is common practice in [factoring][receivables financing] for notifications to include present and future receivables. (WG3:53) 	<p>[*I am assuming that a receivable arises when the obligation to pay arises even if it is not yet due (because credit is extended) because otherwise most receivables that are transferred would be future receivables. We should clarify this somewhere]</p> <p>[These two paragraphs are drafted to meet the point in WG3:53-54, SS 101]</p>
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		<ul style="list-style-type: none">- Although there is no specific mention of the second type of future receivables (receivables which have arisen but which have not yet been acquired by the transferor), given that these, if included in a transfer agreement, are transferred when the transferor acquires rights in them, they can also be the subject of a notification of transfer or a payment instruction. In this situation, if a receivable included in a notification of transfer (or a payment instruction) has arisen and become payable, the provisions of Art 26 relating to discharge would apply. Therefore, the debtor would be discharged by payment to the notified transferee or payee (Art 26(2)). If another person had a better claim to the receivable than the transferee, that person would be entitled to be paid the amount of the payment under Art 23(c). - Art 25(4) relates to a chain of transfers as described above in [para.], an example of which is a transfer from X (the original creditor) to Y and then from Y to Z. Art 25(4) makes it clear that a notification of a transfer lower in the chain (that is, further away from the original transferor) is also a notification of all previous transfers. In this context, 'previous transfers' means all transfers of that receivable ** further up the chain, that is, nearer the original transferor (WG5:108, SS98, WG6:79, SS99). In the example given, a notification to the debtor by Z of the transfer from Y to Z would also be a notification of the transfer from X to Y. Since the debtor would get only get a discharge by paying Z under art 26(2), the debtor is not interested, and does not need to know about, the transfer from X to Y; a notification of the transfer from X to Y could even confuse the debtor. It is thus common practice in international factoring, where chains of transfers are common, for notification only to be given by the transferee at the 'bottom' of the chain as this is the transferee to whom the debtor must make payment (WG2:104).	
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<p>8.</p>	<p>Art 26 Debtor's discharge by payment</p>	<ul style="list-style-type: none"> - Art 26 is an important provision that determines when a debtor is discharged by payment. The governing principle underlying this article is that it should be clear to a debtor, both as a matter of law and fact, as to whom it should pay to obtain a discharge. Where the relevant facts are not clear to a debtor, it has the possibility to request further information. - Once a debtor has paid and been discharged by payment, whether the person to whom has been made is entitled to payment is governed by the priority rules in Chapter V (WG 2:80). Whether the person entitled to payment under the priority rule can claim payment from the person to whom payment is made may depend on art 23 in some circumstances, and in other circumstances will depend on other law. [Art 23 only deals with entitlement of a 'transferee', and not, for example, with the entitlement of a judgment creditor.] - If the debtor makes payment in a way that does not discharge it under Art 26, it may have to make another payment to obtain a discharge from the receivable. Whether the debtor can obtain the first payment back from the payee is a matter for the applicable law and not covered in the MLF. - Art 26(1) deals with the situation before the debtor has received a notification of transfer. In this situation, the debtor is discharged by paying according to the trade contract [giving rise to the receivable]. If the creditor under that trade contract has sent a payment instruction to the debtor changing the person or location to which payment is to be made (see Art 24(2)) then whether the debtor obtains a good discharge by complying with that payment instruction will depend on the terms of the trade contract and the applicable contract law.* The creditor under the trade contract will be a 'transferor' if the receivable has been transferred under a non- 	
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		<p>notification [factoring] [receivables financing] arrangement, but Art 22(1) has the effect that the transferor is able to send a payment instruction before notification of transfer has been received.</p> <ul style="list-style-type: none"> - Art 26(2) deals with the situation once a debtor has received one notification of transfer. (The situation where a debtor receives more than one notification of transfer is dealt with in Arts 26(4) and (5).) Normally, a debtor would receive only one notification of transfer where the receivable has only been transferred once, although it is possible that a second transfer has occurred but has not been notified to the debtor. A debtor who has received one notification is discharged under art 26(2) only by paying the transferee and not by paying anyone unless: <ul style="list-style-type: none"> - The notification instructs the debtor to pay someone other than the transferee, in which case the debtor is discharged by paying that other person or - The debtor receives a payment instruction after it has received the notification of transfer. That payment instruction can only be sent by the transferee (Art 22(1) and not by the transferor. - Art 26(3) deals with the situation where a debtor receives more than one payment instruction from the same transferee in relation to a single transfer. For example, Y owes X a receivable, and X transfers the receivable to Z. Z notifies Y of the transfer on day 1. Z then sends Y a payment instruction on day 3 and another payment instruction on day 5. Y is discharged in relation to that receivable by paying in accordance with the last payment instruction, that is, the one received on day 5. - Art 26(4) and Art 26(5) deal with the 2 situations discussed in [para...in the Introduction]. Art 26(4) deals with where there are 	
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		<p>transfers by the same transferor. Art 26(5) deals with the situation where there is a chain of transfers.</p> <ul style="list-style-type: none"> - Art 26(4) provides that where a debtor receives more than one notification of transfers in a situation where there are transfers by the same transferor, the debtor is discharged by paying in accordance with the first notification. For example, Y owes X a receivable. X transfers the receivable to Z, who notifies Y of the transfer to it. X then transfers the receivable to A, who also notifies Y of the transfer to it. Y is discharged by paying Z. Y may know that the transfers are by the same transferor because the notifications both name X as the transferor (although it is not mandatory to identify the transferor under Art 25(2), in practice the transferor is often identified in a notification (WG4:93, SS105)). If the transferor is not named, the debtor can ask for information under Art 26(7) (discussed below) (WG4:91) - In Art 26(4) the words 'by the same transferor' refer to the person who has made the multiple transfers, not the person(s) who send the notifications. Either the transferor or the transferee can send a notification in relation to a transfer. - Art 26(5) deals with where the debtor is notified (of a transfer) by a transferee (or more than one transfer by more than one transferee) (WG6:82, SS107) In the first case (the single transfer) the debtor is discharged by paying in accordance with the notification: this is consistent with Art 26(2). However, where there is a chain of transfers, and the debtor receives notification of more than one transfer in the chain, it is discharged by paying in accordance with the last notification. For example, X is owed a receivable by A, and transfers it to Y. Y notifies A of the transfer. Y then transfer the receivable to Z. Z notifies A of the transfer. A is discharged by 	
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		<p>paying Z. Z is, in the language of the section, a 'subsequent transferee' (6:83, SS 108).</p> <ul style="list-style-type: none"> - In a chain of transfers, the transferee in transfer 1 becomes the transferor in transfer 2. If, then, Z's notification identifies Y as the transferor in the transfer to Z, A will know that the transfers are part of a chain, and will know to pay Z. If, however, the position is unclear, A can make a request for information under Art 26(7) (discussed below) (WG4:91) - A difficult point arises where the debtor receives notification of a transfer of part of a debt or an undivided interest in the debt. Art 26(6) provides that the debtor is discharged either by paying in accordance with the notification (in which case they are discharged to the extent of the part paid) or in accordance with the rest of Art 26, ignoring Art 26(2). Thus, for example, if a debtor A is notified of a transfer to Y of half a receivable A owes to X, A can either pay half the receivable to Y or can pay the entire receivable to X according to the contract under which the receivable arose (in which case, X would have to pay Y half the amount paid under Art 23(b)). This provision is to protect a debtor from being involved in a dispute as to whether the receivable has been fully discharged.** - If a notification does not comply with Art 25, the debtor can ignore as it is not an effective notification. (WG4:93). However, even if the notification is effective the debtor might want more information, in which case it can make the request set out in Art 26(7) for 'adequate proof' that the initial transfer and any intermediate transfer has been made. Written proof from either the transferor or the transferee will be sufficient to be 'adequate' (WG5:43 SS 106) 	
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		<ul style="list-style-type: none"> - Until the debtor receives adequate proof it is discharged by paying according to Art 26 ignoring the notification triggering the request for information. - The debtor cannot, and need not, request proof of the transferee’s priority over other claimants, since it will be discharged by paying in accordance with Art 26. (WG 5:40) - The information must be given within a reasonable time of the request. What is a reasonable time is not defined in the MLF, although an enacting State could specify this (WG5:41). There is no requirement for the request for information to be made within a reasonable time, but the time for payment to be made is not extended by the request for information. The debtor is protected by making the request as soon as possible and paying in accordance with Art 26 ignoring the notification if the information is not forthcoming. - If a debtor is really unsure it can go to court to ask for a ruling who to pay. (WG2:100, SS109). [not clear to me that Art 26(8) addresses this situation] - Art 26(8) recognises that there could be other means of discharge under an enacting State’s law, such as payment to a court or to a public deposit fund (WG2:111, example of Japan) 	
<p>9.</p>	<p>Art 27 Defences and rights of set-off of the debtor</p>	<ul style="list-style-type: none"> - Art 27 deals with when a transferee take free of any right of set-off or defence that can be asserted against the transferor by the debtor. It reflects the balance, mentioned above, between protection of the debtor and the interests of the transferee. Thus, in some circumstances the transferee takes subject to defences and set-off while in other situations it does not. If the transferee does take 	

		<p>subject to a right of set-off or a defence, it may have a claim against the transferor in relation to the representation in Art 21(1)(c).</p> <ul style="list-style-type: none"> - The debtor can raise a right of set-off or defence whenever it arises if the right comes from the trade contract giving rise to the receivable or any other contract part of the same transaction (Art 27(1)). For example, if X agrees to supply goods to Y, Y can set off any claim for breach of contract arising from a defect in the goods against the receivable resulting from the supply. - The debtor can also raise any other right of set-off, but only if it arose before the debtor was notified of the transfer of the receivable (Art 27(2)). For example, X agrees to supply goods to Y (contract 1) on Day 1 and Y agrees to provide a service to X (contract 2) in an entirely separate transaction on Day 30. X transfers the receivable arising from contract 1 to Z on Day 10 and Z sends Y a notification of the transfer on the same day. Y cannot set off against Z the receivable arising from contract 2, as it arose after the notification of the transfer of the receivable arising under contract 1. The reason for this rule is that once the debtor knows of the right of the transferee in the receivable (in the example, the receivable from contract 1) it should not be permitted to rely on later set-offs that reduce or extinguish the value of that right. - A notification of a transfer can relate to future receivables (Art 25(2) see para []). Therefore, the rule in Art 27(2) applies even where the notification received by the debtor relates to a receivable that has not yet arisen. Thus, in the example above, if the notification was on Day 10 but contract 1 was not entered into until Day 15, the result would be the same. This is a scenario that is likely to happen where the debtor and the transferor are in an ongoing trading relationship, and the transferor factors all its 	
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		<p>present and future receivables under the trading relationship. (WG2:85-87 and 120-122, SS110)</p> <ul style="list-style-type: none"> - It is important that Art 27 is coordinated with an enacting State’s law on set-off and defences (see III(1)). 	
<p>10.</p>	<p>Art 28 Agreement not to raise defences or rights of set-off</p>	<ul style="list-style-type: none"> - The ability of a debtor to raise rights of set-off or defences against the transferee under Art 27 can be waived by agreement with transferor under Art 28. This provision in the MLF overrides any general domestic law on waiver (WG 2:144), but is subject to the limits set out in Art 28(2) and also any other domestic specific mandatory law (discussed below) - These types of agreements are very important in certain types of [factoring][receivables financing] such as reverse factoring. - Art 28(1) covers not only defences and rights of set-off that have arisen at the time of the agreement with the transferor, but any future defences or rights of set-off (WG 2:137, 139, 143) [example?] - Art 28(2) lists two type of defences that are not affected by an agreement under Art 28(1). However, an enacting State may have other types of defences which cannot be waived under its domestic law (WG 2:144). The MLF does not override these mandatory rules, and an enacting State should ensure that their extent is clearly set out in relation to Art 28 (WG 2:135, SS 111). - Art 28(1) provides that the agreement between the debtor and the transferor must be in writing and signed by the debtor. This signature is required to indicate the debtor’s consent to a waiver that reduces the rights the debtor otherwise has. It is not necessary for the transferor to sign the agreement. 	<p>[Do we need to explain how factoring differs from the use of negotiable instruments and post-date cheques? (WG 2:140 – 149). If so, is this the right place or should it be in I(3)?</p>

		<ul style="list-style-type: none"> - The enacting State’s law on electronic commerce or electronic equivalents to written documents should provide that the writing and signature requirements can be met by an electronic document and an electronic signature (WG2:122- 126) - The agreement between the debtor and transferor mentioned in Art 28(1) can be modified, but only by an agreement in writing signed by the debtor (see para [] for the reason for this requirement) (Art 28(3)). Whether this modification is effective against the transferee of a receivable depends on the application of Art 29(1) and (2). 	
11.	Art 29 Modification of the contract giving rise to the receivable	<ul style="list-style-type: none"> - Art 29 is concerned with when a transferee’s rights are affected by a modification of the trade contract giving rise to the receivable. [examples of modification eg A modification could, for example, affect the amount due under the receivable, or could affect the date of performance and therefore the date of payment.] - If the trade contract is modified before the debtor receives a notification of transfer, the transferee is bound by the modification (Art 29(1)). This rule protects the debtor, who agrees to the modification without knowing about the transfer. - Once the debtor has received a notification of transfer, any subsequent modification only affects the transferee’s rights in the two situations set out in Art 29(2)(a) and (b). In relation to Art 29(2)(a), it is common practice for receivables financiers to agree to minor modifications in this situation (WG2:155).* - Given that a notification can include future receivables, that is receivables that have not yet arisen, Art 29(2) can apply to future receivables.** (WG2:151-159, SS113) 	<p>[* this is an example of where it seems superfluous to set out what the MLF says. But we can do it if it is seen to be helpful]</p> <p>[**We do need to work out exactly what is meant by ‘receivables that have not yet arisen’ (for this article but also for others). Are they only</p>

		<ul style="list-style-type: none"> - Art 29(3) relates to a situation where a transferee is affected by a modification, but that that modification is in breach of a term in the contract between the transferee and the transferor whereby the transferor promised not to modify the trade contract that gave rise to the receivable. In this situation, the modification still binds the transferee, but the transferee may have a claim against the transferor. - Art 29(3) refers only to the transferee and not the transferor, since it is very unlikely that a transferor would assert rights against the transferee arising from a modification of the contract (WG6:90,SS 114) 	<p>receivables arising under contracts that have not yet been entered into, or do they include receivables under contracts (e.g. long-term contracts) where performance has not been started, or is not fully complete i.e. the receivable is not fully earned. Is the reference in Art 29(2)(b) to a present or a future receivable?</p>
12.	Art 30 Recovery of payments	<ul style="list-style-type: none"> - Art 30 refers to a situation where a receivable has been transferred, and the debtor has paid (either the transferor or the transferee), but where the transferor does not perform the trade contract in compliance with that contract. Art 30 provides that the debtor is not entitled to recover the sum paid from the transferee. - If the payment is still in the hands of the transferor, the debtor may be entitled to recover it, under the applicable law of contract or other law. Moreover, if the payment is in the hands of the transferee, the debtor may have a claim against the transferor for breach of the trade contract under the applicable contract law. 	
CHAPTER IV - SECTION 7			
CHAPTER VII – COLLECTION AND ENFORCEMENT			
Drafter: Neil Cohen		Subgroup: Michel Deschamps, Alejandro Garro	
Subsection	Subject	Content	Notes/Issues for Working Group

1.	Introduction	<ul style="list-style-type: none"> - Explain that this chapter covers collection and enforcement both in the case of outright transfers of receivables and transfers for security. - It is the purpose of this chapter to provide clear, simple, and efficient methods for the collection and enforcement of receivables, both in the case in which the transferor assigns title or full ownership rights in the receivable ("outright transfers"), as opposed those in which the transferor assigns a security interest in the receivable for the purpose of securing performance of an obligation ("security transfer"). - Explain that this chapter, which addresses the right of the transferee to collect the receivable from the debtor and enforce the receivable if necessary, must be read in conjunction with Chapter VI, which addresses the relative rights of the transferor and transferee and also the rules governing the effect of the transfer on the debtor. - Regardless of whether the receivable is assigned under an outright transfer or for the purpose of securing the performance of an obligation, the transferee has the benefit of any security interest (in movable or immovable property) or personal right, such as a guaranty, securing or supporting the payment of the receivable. - Also, both in the case of outright transfers and transfers for security, the transferee's right to collect or enforce payment of the receivable is subject to Articles 24 to 30, protecting the debtor's rights against adverse effects of the transfer. In many other respects, however, the rules applicable to outright transfers (Art. 31) are simpler than those governing security transfers (Arts. 32-35). 	Make section short and ensure it does not generate concern or confusion for implementing States.
2.	Right of a transferee under an outright transfer	<ul style="list-style-type: none"> - A transferee under an outright transfer becomes the owner of the receivable. It is entitled to collect on it when it becomes due. After collecting from the debtor, the outright transferee is entitled to keep whatever it collects, regardless of the amount it paid for the 	

		<p>receivable and does not need to account to the transferor for any amount collected in excess of the amount it paid for the receivable.</p> <ul style="list-style-type: none"> - The transferee under an outright transfer should be aware, however, that the right to collect is subject to Articles 23 to 30, protecting the rights of the debtor of the receivables. An outright transferee of a receivable is also bound to proceed in good faith and in a commercially reasonable manner (Art. 4). - Of course, the transferee under an outright transfer may transfer the receivable to a subsequent transferee rather than collecting the receivable itself. 	
<p>3.</p>	<p>Right of transferee under a security transfer</p>	<ul style="list-style-type: none"> - This is more complicated because, if the transfer is only for security of an obligation of the transferor, the transferor retains an interest in the receivable. - Thus, until default by the transferor on its obligation secured by the receivable, the right to collect the receivable is the transferor’s right unless the transferor consents. - After default, though, the transferee may collect the receivable or exercise any other right provided in the transfer agreement or provided for in the law governing the secured transaction. 	
<p>4.</p>	<p>Transferee under a security transfer may collect or sell the receivable</p>	<ul style="list-style-type: none"> - In the case of a security transfer, after default of the transferor, the transferee may collect payment of the receivable. - As an alternative to collecting the receivable, the transferee may sell or otherwise dispose of the receivable, subject to the Article 4 duties of good faith and commercial reasonableness. Before default, neither the transferor, the debtor, or any other obligor bound to perform the secured obligation may unilaterally waive this standard of conduct or any of the rights conferred under this chapter. 	

		<ul style="list-style-type: none"> - Pursuant to a policy aimed at maximizing flexibility and efficiency in the enforcement process, the transferee under a security transfer is given the choice to select the “<i>method, manner, time, place and other aspects of the sale</i>” (Art. 34 (2)). - The secured transferee’s right to sell a receivable, however, is subject to procedural safeguards. For example, the transferee must give advance written notice to the transferor and other interested parties listed in Article 34(3) of the transferee’s intention to sell the receivable. - There is no need to give notice of the planned sale of the receivable if the receivable is of a kind sold on a “<i>recognized market</i>”. In this context, a “<i>recognized market</i>” for receivables may point to an organized market in which large volumes of similar receivables are bought and sold, so that their prices are set by the market and not individually negotiated. Examples of such receivables include ... [examples to be supplied]. - Of course, in the case of an outright transfer of a receivable, the outright transferee, as owner of the receivable, may sell it without the need to provide notice to the transferor, who has no remaining interest in the receivable. 	
5.	Distribution of proceeds in the case of a security transfer	<ul style="list-style-type: none"> - In the case of a security transfer, the MLF provides rules for the application and distribution of the proceeds upon collection or disposition of the receivables: <ul style="list-style-type: none"> o Proceeds of collection or sale must be applied first to the obligation secured by the receivable (after deducting reasonable costs of collection or sale) (Art. 35 (1) (a)). o If there is a surplus remaining after that application of proceeds, the transferee must pay the surplus to any lower-ranking claimant that notified the transferee of its 	Note that MLF does not provide guidance for determination of surplus/deficiency in cases in which collection does not yield money immediately, such as (i) if the receivable is payable over a long period of time, or (ii) if the transferee reasonably accepts a promissory note or the like, payable in the future, as payment of the receivable.

		<p>claim and the amount. If a surplus remains after paying the amount of such claim of any subordinate claimant, the transferee must transfer that surplus to the transferor (Art. 35 (1) (b)).</p> <ul style="list-style-type: none"> ○ If proceeds of sale or collection are insufficient to satisfy the obligation secured by the receivable, the transferor or any other person who owes the secured obligation remains liable for the deficiency (Art. 35 (2)). <p>- As an alternative, the transferee may pay any surplus to a judicial or other authority or a “public deposit fund” the like for distribution in accordance with this chapter. This is particularly useful if there is a dispute as to which party is entitled to be paid any surplus, although the transferee may avail itself of this option whether or not there is any dispute as to who is entitled to be paid first (Art. 35 (1) (c))</p>	
<p>CHAPTER IV - SECTION 8</p> <p>CHAPTER VIII – CONFLICT OF LAWS</p>			
<p>Drafter: Neil Cohen</p>		<p>Subgroup: Catherine Walsh, Michel Deschamps, Marek Dubovec</p>	
Subsection	Subject	Content	Notes/Issues for Working Group
1.	Introduction	<ul style="list-style-type: none"> - Introduce need for conflict of laws rules. - Multiple states can be involved either in the case of an international transfer of a receivable or the case of a domestic transfer of an international receivable. Because both situations are common, the need for conflict of laws rules will be frequent. - Conflict of laws rules are needed not only for situations in which the laws of the relevant states differ but also because of the need to 	<p>Make section short and ensure it does not generate concern or confusion for implementing States.</p> <p>It might be useful to explain what a conflict of laws rule is inasmuch as many readers will not be familiar with the concept.</p>

		<p>identify the law governing effectiveness and priority of transfers and, thus, which state's registration regime is controlling.</p> <ul style="list-style-type: none"> - Note that the conflict of laws rules engage in depeçage (possible application of laws of different states to different issues). - Note that the rules in this chapter exclude renvoi. (Explain what this means.) Note that Article 46(b) is a limited exception to the exclusion of renvoi. - Note that the rules are consistent with UNCITRAL Convention and - MLST. 	
2.	Mutual Rights and Obligations of Transferor, Transferee, and Debtor	<ul style="list-style-type: none"> - Article 36, which addresses this topic, is divided into two parts: <ul style="list-style-type: none"> o Mutual rights and obligations between transferor and transferee o Mutual rights and obligations between debtor and transferee. - Explain why there are different rules for these situations, reflecting different policy judgments (party autonomy for the former inasmuch as the parties deal directly with each other; protection of the debtor against adverse effects of the transfer with respect to the latter). 	
3.	Effectiveness and Priority of Transfers	<ul style="list-style-type: none"> - Note that this topic requires reference to Articles 37, 38, 41, and 42. - Article 37 addresses two related, but distinct, issues: <ul style="list-style-type: none"> o Effectiveness of the transfer as between the parties (see Article 5(2)); o Effectiveness against third parties (see MLF Chapter III). 	Add some elaboration or examples with respect to "at the time the issue arises"?

		<ul style="list-style-type: none"> - Because Article 37 refers to the State in which the transferor is located, but transferors may have a presence in many States, Article 41 provides a rule for determining which State is the transferor’s location. - Because transferors may move from State to State, Article 42 provides a rule that determines the relevant time at which a transferor’s location is to be determined and applied. - Article 38 provides special rule for cases in which a transferred receivable is secured by a right in immovable property. Explain rule and why it is needed. 	
4.	Enforcement of Transfers	<ul style="list-style-type: none"> - Describe what is meant by “enforcement of transfer”, including: <ul style="list-style-type: none"> o Enforcement by transferee against transferor (including enforceability as well as remedies against misbehaving transferors?) Distinguish from “rights and obligations between the parties” o Enforcement of the receivable by transferee against the debtor. 	Consider whether, in the case of transfers for security, the topic should also include the law applicable to complaints by subordinate transferees that the enforcing transferee did not collect properly or distribute proceeds of collection properly, thereby violating the rights of those subordinate trustees. [Marek’s view: “I would not address this as I don’t think this is a situation that would arise frequently and would cause our main audience to scratch their heads.”]
5.	Proceeds	<ul style="list-style-type: none"> - Note that, as with the conflict of laws rules concerning transfers, two rules are provided: 	

		<ul style="list-style-type: none"> ○ Article 40(1) addresses the law applicable to right to proceeds of a transferred receivable as between the transferor and transferee; ○ Article 40(2) addresses the third-party effectiveness and priority of the transferee’s right to proceeds. <ul style="list-style-type: none"> - Note that, because the proceeds of a receivable are likely to be a different type of property than receivables (such as money, deposit accounts, etc.), Article 40(2) refers outward to “the law governing third-party effectiveness and priority of a right in an asset of the same kind as the proceeds.” - Note that this requires characterization by forum State court of the nature of the proceeds and identification of its conflict of laws rules for property of that type. - Note that Article 40 does not address situations in which a receivable that has been transferred is itself proceeds of property that is not a receivable (such as goods) and which is subject to a security interest. 	
6.	Overriding mandatory rules and public policy	<ul style="list-style-type: none"> - Explain background for these two common limitations on conflict of laws rules. - Explain distinction between overriding mandatory rules and fundamental notions of public policy. - Note and explain forum’s option to take into account overriding mandatory rules or fundamental notions of public policy of another state. 	The first three bullet points are likely already addressed in the PIL rules of an enacting state. The fourth bullet point (from Article 44(6)), however, is important for stability and predictability of results under this law.

		<ul style="list-style-type: none"> - Note, and explain reason for, decision that these concepts cannot be used to change the law applicable to third-party effectiveness and priority of a transfer. - Explain special rule for arbitration. 	
7.	Effect of insolvency proceedings	<ul style="list-style-type: none"> - Explain the importance of this rule. 	
8.	Multi-unit states	<ul style="list-style-type: none"> - Explain what is meant by a multi-unit state. - Provide an illustration of such a state with different rules in each unit. - Explain/justify rule in Article 46(a). - Explain/justify limited renvoi provided in Article 46(b). 	
CHAPTER IV - SECTION 9 CHAPTER IX – TRANSITION			
Drafter: Neil Cohen		Subgroup: Catherine Walsh, Megumi Hara, Alejandro Garro	
Subsection	Subject	Content	Notes/Issues for Working Group
1.	Introduction	<ul style="list-style-type: none"> - Introduce need for transition rules. - Transition rules in MLF address several important issues: <ul style="list-style-type: none"> o Effective date of new factoring law o Listing laws that are repealed or amended by the new factoring law o Delineating the circumstances in which former law continues to apply to some transactions ("<i>pre-effective-date transfers</i>") and disputes ("<i>pre-effective-date disputes</i>") even after the effective date of the new law. 	Make section short and ensure it does not generate concern or confusion for implementing States.

		<ul style="list-style-type: none"> - Note that there are many pre-effective-date transfers that will continue in effect after the new law comes into force, so it is important to determine when former law ceases to govern matters related to those transactions. 	
2.	Entry into force of new law	<ul style="list-style-type: none"> - Article 47 states the date on which the new factoring law enters into force. - Explain that the MLF leaves selection of the effective date to the legislator in each State. - Explain that it is preferable to set the effective date in the future rather than simultaneously (or nearly simultaneously) with enactment of the new law, since: <ul style="list-style-type: none"> o It will take time to educate constituencies about the enactment and effect of the new factoring law. o Commercial parties will need time to adjust their transactional methods to the new rules; o It will take time to design and implement the registry. - The enacting State, therefore, may set the effective date of the new law at some reasonable period after the law is enacted. However, the delay before the new factoring law goes into effect should not be too long, lest the beneficial economic effects of the new law be unnecessarily delayed. 	
3.	Amendment and repeal of other laws	<ul style="list-style-type: none"> - Legislation based on the MLF is intended to replace a law or laws that previously addressed the same issues, so the new law should repeal aspects of prior law that would be governed by a provision in MLF. 	Add some elaboration or examples with respect to “at the time the issue arises”?

		<ul style="list-style-type: none"> - In some situations, a State’s law may govern not only factoring transactions within the scope of the new law but also other sorts of transactions. In those cases, that former law should be amended so as not to apply to transactions within the scope of the new law. - In many civil law jurisdictions, a new factoring law may implicate legal provisions and transactions governed by other laws, such as those governing the assignment of rights, assignment of contracts, “pledge of credits”, etc. The enacting State may be required to amend those provisions to the extent it is needed to align their terminology with the terms introduced by the new factoring law. The location of this amendment and its formulation may depend on whether the new factoring law is enacted as a stand-alone statute or incorporated into a title, section, or chapter of a civil or commercial code. - It should be noted that even repealed or amended prior law will remain in effect after the effective date of the new law to govern situations described in Articles 50-54. 	
<p>4.</p>	<p>Applicability of new factoring law – generally</p>	<ul style="list-style-type: none"> - General principle, subject to important exceptions, is that the new factoring law applies to all transfers of receivables, both those entered into before the effective date of the new law and those entered into afterward. See Article 49(2): <ul style="list-style-type: none"> o This differs from many legal reforms that have prospective effect only. o Primary situations in which new factoring law applies to pre-effective-date transfers are those involving competing rights between a pre-effective-date transfer of a receivable and a transfer entered into after the effective date. 	<p>Address whether the topic also includes the law applicable to complaints by competing transferees that enforcing transferee did not collect properly or distribute proceeds of collection properly?</p>

		<ul style="list-style-type: none"> - The goal is to protect settled expectations yet obtain benefits of new law as soon as possible. 	
5.	Law applicable to matters that are the subject of proceedings commenced before effective date of new factoring law	<ul style="list-style-type: none"> - Article 50 (1) provides that prior law applies to a matter that is already the subject of arbitral or judicial proceedings before the effective date; this is justified by a policy of freezing the rules applicable to the settlement of a <i>dispute once the t proceedings have commenced</i>. This is an exception to the general principle set forth in Article 49(2). - Article 50(2) provides two important qualifications to the exception in Article 50(1) from the general rule in Article 49(2): <ul style="list-style-type: none"> o If steps have been taken by the transferee to enforce a pre-effective date transfer before the effective date of the new factoring law, the transferee may continue to enforce under the prior law or may proceed under the new law; o If steps have been taken by the transferee to collect a receivable before the effective date of the new factoring law, the transferee may continue to collect under the prior law or may proceed under the new law. - In keeping with a general policy of balancing the advantages of immediate application of the new law with the protection of existing rights, the transferee is given an option as to how to pursue the resolution of a pending dispute, thus continuing the enforcement or collection proceedings under prior law or commencing proceedings under the new law. 	
6.	Law applicable to whether a prior transfer is effective between the parties	<ul style="list-style-type: none"> - Prior law determines whether a pre-effective-date transfer is effective between the parties to the transfer. 	

		<ul style="list-style-type: none"> - <i>A prior transfer remains effective even if the transfer would not be effective between the parties under the new factoring law. This is justified by both a policy of stability of results from a transaction and from the fact that a transferee would likely be unable to obtain the cooperation of the transferor to take additional steps after the effective date to continue the effectiveness of a transfer that would otherwise cease to be effective under the new rules.</i> - <i>There is no parallel rule under which a pre-effective date transfer that was not effective between the parties under former law, but which satisfies the requirements for effectiveness under the new factoring law, becomes effective on the effective date of the new law. There is no policy promoting stability of results suggesting that a pre-effective-date transfer failing to meet the requirements of the prior law becomes effective on the effective date of the new law. However, under the general principle set forth in Art. 49 (2), the requirements of the new law for effectiveness of the transfer between the parties are determined by the new law.</i> 	
<p>7.</p>	<p>Law applicable to third-party effectiveness of pre-effective-date transfer</p>	<ul style="list-style-type: none"> - Article 52 provides a balance between stability of rights acquired against third parties under the prior legal regime and the benefits brought about by the adoption of the new factoring law, requiring publicly accessible registration of transfers in order to obtain third-party effectiveness. - According to Art. 52(1), third-party effectiveness obtained under the prior regime that would not suffice for third-party effectiveness under the new law continues in effect for only a short period (until the earlier of the events delineated in subparagraphs (a) and (b) of Article 52(1)). In order to obtain third-party effectiveness for a pre-effective-date transfer, the transferee must satisfy the requirements for third-party effectiveness before the expiration of the time the pre-effective-date transfer would have ceased to be effective under prior law (Art. 52 (1) (b)), or before the expiration of a short grace 	

		<p>period specified by the enacting State. After that time, a pre-effective-date transfer is effective against third parties only if the requirements of the new factoring law are satisfied.</p> <ul style="list-style-type: none"> - Because authorization for the registration of a notice is required by the new law, and a transferor who has already received payment for a receivable might refuse to provide that authorization after the effective date of the new law, Article 52(4) indicates that a written agreement for a prior transfer suffices to constitute authorization required for registration under the new law. - If the requirements to obtain third-party effectiveness under the new law are satisfied before the end of the short grace period in Art. 52 (1), the transfer is treated under the new law as having been effective against third parties continuously from the time it was made effective under the prior law. But if the requirements are satisfied only after the expiration of the grace period under Art. 52 (1), the transfer is treated as effective against third parties only from the time at which the requirements of the new law are satisfied. 	
8.	Priority	<ul style="list-style-type: none"> - The general rule of Article 49 (2) makes the priority rules of the new factoring law applicable even to pre-effective date transfers unless an exception applies. Article 53 provides an exception to this general rule. - Under Article 53(1), prior law determines priority as between a transferee and competing claimant whose rights arose before the effective date and as long as their “priority status” (as defined in Article 53(2) has not changed since the effective date of the new law. - Example: Assume that, according to the law in force in before the effective date of the new law adopting the principles of the Model 	

		<p>Law, priority as between competing transferees of the same receivable was determined according to the order in which the debtor was notified of each transfer, and that a transfer that has been the subject of such a notification is effective against third parties. Assume further that, before the enactment and effective date of the new law, Transferor transferred the same receivables to T1 and then subsequently to T2 but that T2 notified the debtors on those receivables before T1 did so, so that the claim of T2 would have priority over that of T1. Then, the new law becomes effective, and no other events (such as registration of a notice) occur that would have an effect on priority. Under this scenario, application of Article 53 results in T2’s claim having priority over that of T1. This is because that would be the case under the prior law and the priority status of neither claim has changed since the effective date. 2024 the priority status between a transferee and a competing claimant was determined according to the date the debtor was notified of the transfer.</p> <ul style="list-style-type: none"> - If Article 53(1) does not apply, the priority rules of new law are applicable, even if one or more of the competing claims relate to pre-effective date transactions - In that case, under Article 13(1), priority between competing transfers is determined by the order of registration of notices relating to those transfers. - Thus, if a pre-effective date transfer was made effective against third-parties under prior law by a method other than registration of a notice and third-party-effectiveness was achieved under the new law by registration of a notice before the expiration of the grace period set out in Article 52(1), the date used for determination of the priority of that transfer is the date of registration under the new law and not the date of third-party-effectiveness by another means under prior law.) 	<p>As noted by Louise with respect to a similar point regarding grantors who change location to an enacting state, the rule in the last bullet point highlighted in yellow seems incorrect and is inconsistent with the answer provided in the MLST, where priority is determined by the order of third-party effectiveness (in which case Article 52(2) would give effect to the date of third-party effectiveness under the prior law) not limited to third-party effectiveness achieved by registration of a notice. See MLST Guide to Enactment par. 540. This may be an error in the MLF.</p>
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9.	Rights and obligations of the debtor	<ul style="list-style-type: none"> - Under Article 54, when a receivable was created before the effective date of the new law, the effectiveness of the new law does not change the rights and obligations of the debtor. Otherwise, the rights of debtors would be changed by a law that they could not have predicted would govern their rights. - The reference to conflict-of-laws rules is needed because the law that governs the various rights and obligations of the debtor may not have been the law of the forum, particularly as a result of the party autonomy generally provided to parties to a contract under the conflict-of-laws rules of most states. 	
CHAPTER IV - SECTION 10 ANNEXE A – REGISTRY PROVISIONS			
Drafter: Bruce Whittaker		Subgroup: Catherine Walsh, Alejandro Garro, Megumi Hara	
Subsection	Subject	Content	Notes/Issues for Working Group
To be completed.			
ANNEXES			
1. MODEL LAW ON FACTORING			