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

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SUMMARY REPORT

OF THE FIRST SESSION

(Hybrid, 8 – 10 April 2024)

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1. The first session of the Working Group to prepare a Guide to Enactment ("the Guide") for the UNIDROIT Model Law on Factoring (MLF) took place in hybrid format between 8 and 10 April 2024. The Working Group was attended by 36 participants, comprised of ten Working Group Members; five observers from international, regional and intergovernmental organisations; thirteen observers from industry associations, government and academia; and nine members of the UNIDROIT Secretariat (the list of participants is available in Annexe II).

Item 1: Opening of the session by the Chair

2. *The Chair* of the Working Group and Member *Ad Honorem* of the UNIDROIT Governing Council, Mr Henry Gabriel ("Chair"), welcomed all participants to the first session. *The Chair declared the session open.*

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

3. *The Working Group* adopted the draft Agenda (Study LVIII B – W.G.1 – Doc. 1, available in Annexe I of this report).

Item 3: Implementation update on the UNIDROIT Model Law on Factoring (Study LVIII B – W.G.1 – Doc. 5)

4. Under *the Chair's* suggestion, the Working Group commenced with a discussion regarding the implementation of the UNIDROIT Model Law on Factoring (Study LVIII B – W.G.1 – Doc. 5) before beginning a review of the proposed structure of the Guide to Enactment (Study LVIII B – W.G.1 – Doc. 2) and then moving to review the Model Law on Factoring Guide to Enactment Section Summaries (Study LVIII B – W.G.1 – Doc. 3), with reference to the Summary of Matters Referred for Consideration by the Model Law on Factoring Working Group (Study LVIII B – W.G.1 – Doc. 4). *The Working Group agreed to this approach.*

5. *The Secretariat* provided an implementation update on the MLF. It was explained that the most notable successes had been the inclusion of the MLF in broader international instruments and guides. The MLF had been included in the Financial Inclusion in Trade Roadmap by the World Trade Board,[1] the New Finance Support Report by the European Bank for Reconstruction and Development (EBRD),[2] and the Factoring Regulation Knowledge Guide by the International Finance Corporation (IFC).[3] The MLF had also been presented at major international events. An unofficial Chinese translation had already been launched, an Arabic translation was also underway, and Japanese and Spanish translations were to follow. It was further explained that UNIDROIT continued to work with Factor Chain International (FCI) and the African Export-Import Bank (AFREXIMBANK) to find a solution towards promoting the MLF in Africa.

6. The Secretariat noted that the proposed future implementation activities provided at the end of Doc. 5 would be submitted to the Governing Council for approval in May 2024. The Secretariat concluded that the successful implementation of the MLF needed to be a joint enterprise by interested stakeholders and noted that any proposals or initiatives from the Working Group regarding additional promotion activities would be gratefully received by the Secretariat.

7. *The Working Group noted the update on the implementation of the MLF.*

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[1] https://worldtradesymposium.com/sites/wts/files/file/2023-03/financial-inclusion-in-trade-roadmap-2023.pdf.

[2] https://ebrd-restructuring.com/storage/uploads/r_p_documents/15148%20EBRD%20(New%20finance%20report%202023)%20ARTWORK_digital_HR.pdf.

[3] https://www.ifc.org/content/dam/ifc/doc/2024/knowledge-guide-on-factoring-regulation-and-supervision-ifc-2024.pdf.

Item 4: Overview of the purpose, structure, content and negotiation of the MLF Guide to Enactment (Study LVIII B – W.G.1 – Doc. 2)

8. The Secretariat introduced the proposed structure of the Guide, as set out in Study LVIII B – W.G.1 – Doc. 2.

9. *The Chair and an observer* queried who would be the intended audience of the Guide. *The Working Group affirmed that the Guide's intended audience was government officials in States considering implementation of the MLF, including officials from the Central Bank, Finance Ministry, Treasury, Justice Ministry, or the Legislative Drafting Department (as set out in Doc. 2, paragraph 6).*

10. *An expert* queried the level of detail required in the Guide, and warned that if too much detail was provided, the Guide could turn into a very extensive document that could resemble a reference textbook rather than a Guide to Enactment. *Another expert* agreed, noting that it was important for the content of the Guide to be curated for its intended audience. *The Working Group decided that there was no need at the outset to predefine the level of detail to be included in the Guide, although it was important to ensure the Guide's content was properly tailored to the instrument's intended audience.*

11. *The Working Group approved the general structure of the Guide, as set out in Doc. 2, noting that certain subsections might need to be moved around.*

Item 5: Consideration of Guide to Enactment section summaries (Study LVIII B – W.G.1 – Doc. 3)

12. *The Secretariat* introduced Study LVIII B – W.G.1 – Doc. 3, noting that each section had been prepared by one of the primary drafters, in consultation with the review team for that particular section. The Working Group commenced with a review of the Guide's section summaries, as contained in Doc. 3.

PART I – PURPOSE AND OVERVIEW

13. *The Secretariat* provided an overview of Part I. It was explained that Part I (1) was designed to introduce the Guide and its purpose. Part I (2) was intended to provide a simple and practical explanation of factoring and receivables finance and the typical related business practices. Part I (3) was intended to provide a "sales pitch" for the MLF that summarised why the instrument was important, the problems it was designed to address and the economic benefits that would arise from its adoption. Part I (3) was also intended to set out the core legal principles underpinning the MLF. Part I (4) was intended to provide a simplified legal overview of the operation of the MLF on a chapter-by-chapter basis, and Part I (5) was intended to explain the relationship between the MLF and other international instruments, such as the Factoring Convention, the Assignment of Receivables Convention and the Model Law on Secured Transactions.

14. Different views were expressed on whether Sections 4 and 5 should be separated from Part I, as they were more technical in nature than the preceding sections. *The Working Group decided to retain the current structure of Part I, for later review once a first draft had been prepared.*

Part I, Section 1: Introduction to the MLF Guide to Enactment

15. No comments were made on Part I(1).

Part I, Section 2: Factoring and receivables finance

16. *Several experts and observers* noted the importance of clearly setting out the types of business practices and financing methods that would be supported by the MLF, with an emphasis on the fact that the MLF flexibly supported a variety of transactions, such as reverse factoring and non-notification factoring.

Part I, Section 3, Subsection 3: Benefits and Core Principles of the MLF

17. The Working Group discussed how Part I(3) should deal with (i) risks arising from a weak legal framework, (ii) benefits of implementing the MLF, and (iii) the Core Principles of the MLF. In relation to structure, it was suggested that it might be more logical to discuss the benefits of the MLF after introducing its core principles. *The Working Group decided to reconsider the structure of Part I(3) once a full draft had been prepared.*

18. In relation to risks arising from existing legal frameworks, the Working Group noted that there were two different situations: (i) legal systems where there was already robust receivables finance activity even though the legal framework was significantly different from the core concepts of the MLF (such as Spain or Germany), and (ii) legal systems where there was little to no factoring activity, partially due to the existing legal framework. It was suggested that Part I(3) should discuss how the MLF could be useful in both situations, in relation to (i) addressing risks in States where factoring was already functioning, and (ii) providing a comprehensive new framework to facilitate new financing transactions in States where factoring was non-existent.

19. In relation to the Core Principles, the Working Group made a distinction between the MLF's Policy Objectives (such as facilitation of receivables finance, transparency and predictability for commercial transactions, fair and balanced rules for parties, etc.) and Core Concepts (such as simple requirements for a transfer; registration of a public notice for third-party effectiveness; rules dealing with proceeds; application to outright transfers and security transfers; enforcement rules that also address insolvency, etc.). *The Working Group decided that the Guide should outline and explain both the MLF's broad Policy Objectives and its Core Concepts in Part 1(3).*

20. The Working Group discussed what the MLF's Policy Objectives and Core Concepts should be. It was suggested that "non-interference" should be deleted as a Policy Objective, and that "flexibility/adaptability" in application to different financing arrangements should be added as a Policy Objective. *The Chair* asked the Secretariat to take note of the various suggestions and prepare a revised list and description of the MLF's Policy Objectives and Core Concepts for discussion at the second session.

21. *Several experts* cautioned that it was important to ensure that the identification and explanation of the Core Concepts not create an implication that the other articles in the MLF were not important and could be easily deviated from. The experts stressed that the MLF was already a fairly refined instrument and implementing States should not be encouraged to delete further articles during implementation.

22. *An observer* suggested that while there was value in identifying Core Concepts, it was a certainty that some States would implement the MLF without complying with the Core Concepts. It was explained that this was particularly likely in relation to not including both outright transfers and security transfers in the same legal framework. The observer concluded that the section would have to be drafted sensitively in order to emphasise the importance of the Core Concepts, without deterring a State from disregarding the entire MLF if it did not agree with every Core Concept.

Part I, Section 4: Overview of the MLF

23. *The drafter* introduced Part I(4), noting that the section had been drafted in its entirety, as it would not have made sense to prepare a summary of a summary section. It was explained that the section was designed to provide a high-level summary that was approximately two pages long, and it was up to the Working Group to discuss whether the right level of detail had been provided. *The Working Group agreed that* Part *1(4) should provide an overview of the most important rules, but their justification and explanation should be detailed in Part 4.*

24. As a general matter, *an expert* suggested that the use of cross-references in the Guide could be distracting, and that footnotes or endnotes would be preferable. *The Working Group adopted this suggestion*.

25. In relation to subsection 2, *the Working Group decided that the subsection should explicitly provide that (i) security transfers were covered in the MLF, (ii) negotiable instruments were not included in the definition of "receivable", and (iii) the MLF does not override consumer protection laws. The Working Group further decided there was no need to explicitly state that payment obligations arising from credit card transactions were within the definition of "receivable" in subsection 2, and the fact that the MLF addressed private law aspects of the transfer of receivables and not regulatory matters could be made elsewhere.*

26. In relation to subsection 3, *the Chair* suggested that the last paragraph (regarding limitations on transfers) be removed. *Another expert* suggested that it should be modified, rather than deleted.

27. In relation to subsection 4, *the drafter* noted some minor errors that would be rectified. *An expert* suggested that subsection 4 should clarify that a notice of a transfer was registered in the registry, rather than the transfer agreement itself.

28. In relation to subsection 5, *the Working Group decided that it should be explained why the registry rules were contained in the MLF Annexe rather than in Part IV. An expert* suggested that subsection 5 did not need to address the periods of registration or time of effectiveness, amending or cancelling notices or legal issues associated with authorisation. The expert also suggested deleting the last paragraph regarding the integrity of the record and removal of a notice. The expert suggested that the subsection should instead highlight the automated nature of the registry system. *Another expert* supported these proposals. *A third expert* suggested that subsection 5 should clarify that it referred to notices of registration, rather than notices of transfer. *The Working Group agreed to delete the final sentence regarding fees and registrar liability limits.*

29. *An expert* identified an issue associated with the content of a description of receivables to reasonably allow for their identification. The Working Group discussed at length what constituted a sufficient description of a receivable. *The Working Group agreed that the matter needed to be carefully addressed in Part IV, so as not to suggest there was a problem with the MLF in relation to the identified issue and instead explain the intended approach.*

30. In relation to subsection 6, *the Working Group agreed to shorten the fourth sentence and delete the fifth bracketed sentence.*

31. In relation to subsection 7, *the Working Group agreed that the subsection should be restructured into three separate sub-parts dealing with (i) rules governing rights between the transferor and the transferee, (ii) the rights of the debtor, and (iii) how dealings between the debtor and the transferor affect the transferee. The Working Group further decided to delete "under the party autonomy principle" from the first sentence, and the bracketed text from the second sentence, but decided to retain "the transferor must then pay the proceeds to the transferee" in fourth sentence, and further explain the matter in the article-by-article section.*

32. In relation to subsection 8, *the Working Group agreed to change "debtor" to "transferor" in the fourth line of the second paragraph.*

33. In relation to subsections 9 and 10, *the Working Group decided to include one or two additional sentences explaining the main scenarios that these Sections address (for Chapter VIII, the two important contexts were international transfers and international receivables, whereas for Chapter IX it was the treatment of transactions that began under the prior law and continued after the new law entered into force).*

Part I, Section 5: Coordination of the Model Law on Factoring with other international instruments

34. *The Working Group agreed that the Guide needed to contain some explanation on the relationship between the MLF and the Factoring Convention, the Assignment Convention and the Model Law on Secured Transactions. Several experts* suggested that the Guide should explain that the MLF and the earlier instruments were both based on the same Policy Objectives and Core Concepts, but that the MLF was a more modern instrument that was appropriately adapted for domestic legal reforms regarding receivables financing. *Another expert* suggested that the Guide should carefully explain how the MLF was intended to act as a stepping stone to broader secured transactions reform based on the Model Law on Secured Transactions.

35. *One expert* suggested this section should also reference other relevant instruments, such as Article 8 of the UNIDROIT Principles of International Commercial Contracts, and regional standards such as those produced by the OAS. *Another expert* noted that it might be important for the Guide to explain and differentiate from the *Afreximbank Model Law on Factoring,* which was still being broadly promoted across Africa. No decision was reached on these matters.

36. At a later point in discussions, *an expert* suggested that in relation to Part II(2) subsection 4, the Guide should not advocate for the implementation of the Receivables Convention, as doing so might send mixed messages to enacting States. *The Working Group reaffirmed that Part I(5) should emphasise the complementarity in the Policy Objectives and Core Concepts of the MLF and earlier international instruments, without going into substantive details.*

37. *An expert* suggested relocating Section 5 to Part III as those topics appeared to be similar to those in Part I.

PART II – IMPLEMENTAITON OF THE MODEL LAW ON FACTORING

Part II, Section 1: Implementation of the Model Law on Factoring within the existing legal framework

38. *The drafter* introduced the section, noting that there was significant overlap between Parts II and III, and that the Working Group might need to consider whether the parts should be combined or reordered. The drafter explained that the purpose of Part II(1) was to set out how the MLF should be implemented alongside the existing secured transactions law. It was noted that the relevant subgroup had cautioned against trying to classify States as having unreformed, partially reformed or comprehensively reformed secured transactions frameworks, as it would be politically sensitive and difficult to agree upon. The drafter concluded by explaining that Part II(1) subsection 3 dealt with forms of implementation, which was somewhat simpler but would require coordination, as Part III, subsection 4 set out some challenges in implementation and subsection 5 provided an explanation of the transitional provisions, which did not appear to fit very well in Part II.

39. *The Chair* suggested that it would be beneficial if Part II(1) made reference to the Core Concepts set out in Part I in assisting States to assess how complementary the MLF would be with

their existing secured transactions framework, and where the State might be in the "waterfall" of different situations set out in subsection 2. *The Working Group adopted the suggestion.*

40. *Several experts* queried why a State with a comprehensive secured transactions law might want to introduce a separate receivables finance law. *Other experts and observers* provided several examples where such a situation might arise. By way of example, it was explained that in the United Arab Emirates, a secured transactions law had been implemented that applied to both security transfers and outright transfers and provided a registration system, however the UAE subsequently enacted a factoring law to supplement the secured transactions law and include regulatory provisions. It was noted that in another West Asian country secured transactions rules were contained in the civil code, however the authorities did not want to amend the civil code, so they were considering enacting a separate receivables finance law instead. Yet another example provided was China, where the civil code had been amended in 2020 and was unlikely to be amended again in the near future, so judicial interpretation and guiding cases from the Supreme Court were the most likely route to the implementation of the MLF. A final example given was that common law systems where many of the rules might be reflected in case law might also benefit from enacting a separate law with regulatory provisions to increase legal certainty.

41. *The Chair* noted that the Guide might need to contain a paragraph explaining that while it was primarily aimed at legislators, it might also be useful in relation to judicial interpretation, which in some legal systems could be almost akin to legislative reform.

42. *Multiple experts* raised further concerns regarding whether the Guide should suggest that States which had implemented a comprehensive secured transactions law should consider implementing a separate receivables finance law. *The Working Group agreed that the Guide should avoid using the term "comprehensive". The Working Group further agreed that States which had implemented a secured transactions law that was consistent with the Policy Objectives and Core Concepts of the MLF should not be encouraged in the Guide to enact a separate receivables finance law.*

43. *The drafter* noted that subsection 2 provided an explanation of what should be enacted alongside the existing law, and subsection 3 provided an explanation of where the new provisions should be enacted. The drafter suggested that these elements, while interrelated, should be kept separate in the Guide.

Part II, Section 2: Implementation of the Model Law on Factoring in different legal systems

44. *The drafter* introduced the section, explaining that it covered (i) how the MLF would be implemented and related terminological and conceptual issues, (ii) how the implementation of the MLF could be affected by the legal tradition of the implementing State (common law, civil law, Sharia law), and (iii) the value of international harmonisation of receivables finance law. The drafter concurred with earlier comments that Parts II(1), II(2) and III(1) would need to be reorganised.

45. *The Secretariat* explained that Part II(1) was intended to explain to States that had already implemented a secured transactions law that they might still need the MLF. Part II(2) was intended to explain to States that regardless of their legal tradition (common law, civil law, mixed, or Sharia law), the MLF could still be implemented. Part III(1) was intended to explain the interaction between the broader law in the enacting State and the MLF, and how the MLF would affect the private law rules in relation to the transactions within its scope.

46. *An observer* noted that the explanation regarding the importance of "post-enactment acculturation" was important and should be retained. *The Chair* agreed, noting that the matter should be included in the Guide in a different part, and that the Working Group might consider identifying a more user-friendly term than "post-enactment acculturation".

47. *An expert* noted that the part emphasising the importance of harmonised conflict of law rules should be retained in the article-by-article section, because the international harmonisation effect of the global implementation of the MLF would be undermined if enacting States adopted different conflict of laws rules.

PART III – COORDINATION OF THE MODEL LAW ON FACTORING WITH GENERAL LAW, REGULATION AND OTHER MATTERS

Part III, Section 1: Coordination of the MLF with domestic law

48. *The Chair* queried whether the Guide should reproduce the text of the MLF itself in relevant sections, or whether it could be assumed that users would read the two documents together. *An expert* argued that it could be assumed that readers would concurrently reference the MLF while reading the Guide and suggested there was no need for repetition in the Guide. *Another expert* supported some restatement of critical definitions such as "receivable" and "transfer" within the Guide for precision, though not for more routine references. *Another expert* agreed, emphasising the importance of user-friendliness, and suggested that the digital format of the document would allow for lengthier content and efficient search functions. The expert advocated for including necessary definitions within the Guide so that readers would not have to toggle between documents. *The drafter* suggested avoiding detailed definitions repeatedly within the text and instead opting for the use of digital tools such as hyperlinks for definitions and referencing within the Guide. *The drafter* highlighted the importance of defining terms specifically when discussing exceptions, such as Subsection 1.3 on "Transfers falling outside MLF". *The Working Group agreed and endorsed the use of hyperlinks and the annexation of the MLF to the Guide to enhance usability.*

49. In relation to the use of the term "a contract giving rise to the receivable" throughout the Guide, *the drafter* proposed using an alternative term for clarity. *The Working Group decided to adopt "underlying contract" as the term instead of "a contract giving rise to the receivable".*

50. With reference to Subsection 1.3, *an expert* emphasised the importance of carefully explaining how the Guide's terminology could be adapted by an implementing State, especially when linking the MLF with general domestic laws related to assignments. The expert advocated for ensuring that the MLF did not complicate existing legal frameworks unnecessarily and maintained functional similarities where possible. *Another expert* warned against adapting the MLF's terminology to fit existing national laws without considering the potential misalignment of legal principles, and suggested that what might be terminologically acceptable in one legal system might carry different implications in another. *Yet another expert* suggested that the Guide could encourage States to examine and potentially revisit their existing law of assignment rather than merely adapting the MLF to fit the existing law, in order to ensure coherence and consistency in implementation. *The Chair* agreed that the Guide should carefully explain the potential problems with adapting the MLF's language to fit the local context. *An expert* suggested that detailed implementation examples should be inserted in Part II(1) subsection 3, rather than in the current section. *The Working Group adopted the suggestion*.

51. With reference to Subsection 1.4, *an expert* raised concerns about properly defining guarantees in legal texts to ensure they not be excluded by States implementing the MLF. *The drafter* acknowledged the complexity of including guarantors in the definition of "debtors", noting that the designation depended on specific laws and suggesting placement of these definitions in the text for clarity. *Another expert* suggested that the Guide should explain that enacting States might wish to include a broader a definition of debtor that included guarantors if obligated to pay under a guarantee, and emphasised the need for clarity in the enacting law, noting that varying interpretations existed across jurisdictions. *The Chair* discussed the implications of the Guide, explicitly stating that the MLF definition of debtor should apply equally to guarantors. The Chair advised that the Guide should adopt a cautious approach, allowing local law to determine the issue, while *another expert* argued against broadly defining guarantors as debtors to preserve the traditional role of guarantees. *The*

drafter suggested a review of prior discussions to ensure that the Guide's discussion of guarantees did not contradict common practices or the intended coverage of guarantors by the MLF. *The Chair* suggested that the content be incorporated into both this section and the definitions section in Part IV initially, to allow for subsequent refinement during the review process. *The Working Group adopted this suggestion*.

52. With reference to Subsection 1.4, *the Chair* queried whether the list of legal areas interacting with the MLF was complete. *An expert* recommended adding immovable property law to the list, highlighting its significant interaction with the MLF and stressing the importance of acknowledging this relationship in the Guide. *The Chair* concurred on the addition, emphasising the need to briefly mention the implications of property law to ensure readers were aware of its relevance. Nonetheless, *another expert* cautioned against trying to explain the interaction in depth due to the variability of property law across jurisdictions. *Another expert* agreed, expressing the same caution in relation to privacy law, suggesting a similar approach of acknowledgment without detailed exploration. *A third expert* supported the inclusion of procedural laws in the list of interacting laws and further suggested considering how the MLF's interaction with other specific areas like public deposit funds and the general law of assignment, highlighting the need for clarity in how these laws intersected. *The Working Group decided to add property law and procedural laws to the list of areas of general law that might interact with the MLF.*

53. With further reference to Subsection 1.4, *an expert* raised a concern about the concept of set-off as a defence under Japanese law, which differed from other jurisdictions. She sought clarification on whether set-off should be considered a separate defence or categorised under a broader definition. *Another expert* suggested that the Guide could potentially include a broader range of examples to accommodate different jurisdictions' interpretations. However, *the drafter* cautioned against diving too deeply into the specifics of defences, suggesting that the Guide should maintain a general approach without becoming too entangled in the nuances that varied by jurisdiction. The drafter suggested that, to the extent necessary, detailed interactions could be explained in the article-by-article section. *The Chair* confirmed that the Guide would not refer to specific countries.

54. *The drafter* queried whether Article 16 (transfers competing with claims arising by operation of other law) applied inside insolvency, outside insolvency, or both. It was explained that the Working Group had adopted various views during the negotiation of the MLF and that it would be useful for the Guide to clarify the matter. *One expert* urged caution in addressing the matter in the Guide, noting that some States (for example, Canada) would distinguish the treatment of preferential claims in insolvency depending on whether the transfer was a security transfer or an outright transfer. *The Chair* suggested that Article 16 was intended to apply to both claims arising inside and outside of insolvency, and suggested that any detailed guidance on Article 16 could be addressed in the article-by-article section.

55. With reference to Subsection 1.5, in relation to situations where the MLF needed to be coordinated with secured transactions (or similar) law, *the drafter* questioned whether it was more beneficial for the Guide to include a list of cross-references to areas of specific interaction or to address these matters directly in the article-by-article section. She noted a slight preference for integrating such details into the individual article discussions. *The Secretariat* suggested that it could be helpful to briefly mention in the general section that certain articles might raise specific issues, directing readers to the detailed discussions in the article-by-article section for more information. *The Working Group agreed to this approach.*

Part III, Section 2: The Model Law on Factoring and the digital economy

56. *The drafter* introduced Part III Section 2, noting that there were sections on (i) digital platforms, (ii) digital currencies, (iii) domestic electronic commerce laws, and (iv) digital assets.

57. As a general matter, *the Secretariat* noted that because this Section dealt with technological matters that could change rapidly, there was a heightened risk that this section, while important, could quickly become obsolete. Noting the importance of explaining how the MLF would interact with new technological developments and the importance of ensuring that the Guide would not become outdated, it was suggested that the Section on digital economy could provide limited general guidance that was unlikely to become obsolete, and instead a "Digital Economy Supplement" could be developed alongside the Guide that could be updated more flexibly (every few years, as necessary) to address technological innovations and broader changes to the digital economy. *The Chair and several experts* supported the proposal, and suggested that much of the detail currently in Part III Section 2 could be moved to the Digital Economy Supplement. *The Working Group agreed that Part III Section 2 should provide a general, minimalist explanation of the relationship between the MLF and the digital economy, and that the detailed analysis should instead be included in a Digital Economy Supplement to be issued alongside the Guide and updated as necessary.*

58. In relation to Subsection 2 on digital platforms, *one expert* emphasised the importance of addressing the interaction between the registry under the MLF, and digital platforms where receivables could be bought and sold. It was explained that such platforms had been developed around the world, and their development was often supported by international financial institutions. The platforms could be public (government-owned) or private. It was noted that in most legal systems, the transfer of a receivable using a platform did not produce third-party effectiveness. As such, where countries had implemented a registry that required registration of a transfer for third-party effectiveness (as required under the MLF), users of platforms were not legally protected in relation to third-party effectiveness and priority. It was noted that there were technical solutions (such as "Application Programming Interfaces" (APIs) that could link the registry and a platform) that might ameliorate the issue, but this interaction between the MLF and platforms required careful explanation. Other issues requiring additional consideration were identified, including (i) whether the details required to use a platform would satisfy the transferor identification requirements in Clause 8 of the MLF Registry Rules, (ii) whether the Guide/Supplement should positively advocate for a link between receivables platforms and the transfer registry, and (iii) whether the registration requirement in the MLF might hinder receivables finance and deter countries from implementing the Model Law. The Working Group also discussed the range of different parties that might buy receivables on such platforms (which in some countries would include major banks and international financial institutions but also individual persons with limited expertise), and whether it would be overly burdensome for purchasers of a package of different receivables on a platform to register them in the transfer registry. *One expert* cautioned that the Guide was intended for legislators and government agencies rather than users of receivables platforms, and that any guidance on this matter should keep in mind the Guide's intended audience. *The Working Group decided that the Digital Economy Supplement should provide detailed guidance on the relationship between the MLF and receivables platforms, with explanation of the legal risks that could be created if they were not properly coordinated.*

59. In relation to Subsection 3 (digital currency), *the Working Group agreed that there should be a short explanation in this section regarding the meaning of "monetary sum", which could include a digital currency if that was what the general law of the enacting State provided.* It was noted that the same point should be made in relation to the definition of "receivable" in the article-by-article section.

60. In relation to Subsection 4 (domestic electronic commerce laws), *the drafter* suggested that the current section could explain that the MLF was intended to cover electronic writing and signatures,

and that this explanation could then be cross-referenced throughout the article-by-article section, in order to avoid unnecessary repetition. *The Working Group agreed with this approach.*

61. *One observer* stressed the need for the Guide to explain that there was nothing inherently incompatible between the MLF and a digital assets platform or e-invoicing structure, in order to avoid disincentivising States from enacting the MLF. *Several experts agreed*, noting that the Guide itself should simply explain that receivables linked to digital assets would still require registration, even if tokenised.

62. *Another observer* queried whether this section should include a description of deep tier financing, to which *an expert* responded that it would be preferable to address the matter in the earlier section on business practices.

63. In relation to Subsection 2.5, the Working Group discussed the extent to which the Guide should address matters related to digital assets and the tokenisation of receivables, and whether detailed explanations should instead be included in the Digital Economy Supplement. *The drafter* noted that it was important for the Guide to explain the link with the UNIDROIT Principles on Digital Assets and Private Law, which provided that perfection of an interest in a digital asset was through "control". *One observer* stressed the need for the Guide to explain that there was nothing inherently incompatible between the MLF and a digital assets platform or e-invoicing structure, in order to avoid disincentivising States from enacting the MLF. *Several experts agreed*, noting that the Guide itself should simply explain that receivables linked to digital assets would still require registration, even if tokenised*. Another expert* emphasised the importance of addressing digital invoices and assets to reflect contemporary practices in various jurisdictions and ensure the relevance of the MLF. *The Working Group agreed that the Guide should include a minimalist explanation of the potential treatment of digital assets under the MLF, and that more detailed guidance be provided in the Supplement (including the three situations in which digital assets could be linked to contractual rights to payments, with examples as set out in Doc. 3, page 42).*

Part III, Section 3: The Model Law on Factoring and Regulatory Matters

64. *The Secretariat* noted that a full version of Part III Section 3 would be provided for the Working Group's consideration at its second session. It was further explained that the Section could be relatively brief, with significant cross-references to the recently published IFC Knowledge Guide on Factoring Regulation. *An expert* added that an issues paper from the MLF Working Group had already elaborated on various regulatory issues to be included in the Guide. The expert mentioned the importance of these regulatory issues, especially for non-bank financial institutions that required licensing to engage in factoring. The expert pointed out that the primary audience for these discussions included regulatory authorities and central banks, and emphasised the need for regulatory frameworks to be considered alongside private law rules.

Part III, Section 4: Other Matters

65. *The Working Group deferred discussion of this Section until its second session.*

PART IV – ARTICLE-BY-ARTICLE COMMENTARY

Part IV, Introduction: General instructions on reading the MLF

66. With reference to the name of the MLF, *the drafter* raised two points: (i) whether there was the need to define "factoring" within the Guide, given its broad application to various receivable financing transactions, and (ii) the potential for using "factoring" as a generic term throughout the document to simplify references to those transactions. *An expert* suggested referencing the letter from FCI to support why the MLF had been named as such and indicated that this designation followed industry recommendations. *Another expert* agreed with using "factoring" throughout the document

and noted that even though the MLF covered more than traditional factoring, it provided a useful and logical shorthand for the broader range of transactions covered. *The Chair* supported explaining the choice to title the instrument "Model Law on Factoring" early in the Guide, in order to clarify that its scope covered more than traditional factoring, and he agreed that using "factoring" consistently as a term could help maintain clarity and consistency. *The Working Group adopted these suggestions*.

67. As a general matter, *the drafter* queried whether Part IV should repeatedly state that "the enacting State is advised to ensure the relationship between the MLF and [relevant domestic law] is made clear in the implementing legislation", or whether this issue could instead be addressed clearly in Part II or III, in order to avoid unnecessary repetition. *The Working Group agreed, that as a general rule, there was no need to repeat the need for clarity between the MLF and relevant domestic law throughout Part IV, unless specifically necessary.*

68. As another general matter, *the drafter* clarified that the naming of the parties in the practical examples provided in Part IV would be harmonised so the same names of parties were used consistently (e.g. Party X and Party Y).

69. As a third general matter, *the Working Group agreed that Part IV of the Guide did not need to provide cross-references to corresponding provisions of the MLST.*

Part IV, Chapter I – Scope and General Provisions

Article 1 – Scope of application

70. Consumers: *The drafter* discussed how the MLF applied to consumers and queried whether the Guide should explicitly refer to natural persons in its explanation, recalling discussions from the Working Group aimed at clarifying the application to consumers without unnecessarily broadening the scope. *Several experts* suggested that the Guide should avoid using the term "consumer" to avoid ambiguity, and instead use the term in the MLF itself: "personal, family, or household purposes". *The Chair* preferred a minimalistic approach in the Guide, to avoid the potential confusion that could arise from trying to address every possible ambiguity, which suggested that sometimes less detailed guidance might be more effective. *The drafter* proposed retaining detailed examples to reflect the diversity of factoring practices across jurisdictions, as discussed in the Working Group. She suggested adding clarification to ensure that the MLF accommodate various scenarios, including peer-to-peer lending, and emphasised the need to mention that certain factoring activities might be regulated or require licensing. *Other experts* noted the merit in including examples that dealt with the most likely situations that would arise (receivables arising from the sale of goods to consumers).

71. Regulation: *An observer* highlighted the importance of acknowledging that factoring activities might require specific licensing, affecting how transactions were conducted, and suggested this section should explain that regulation may limit the types of parties that could be part of a factoring transaction. *The Chair* agreed that mentioning regulation was helpful for clarity, without the need to include detailed explanations. *The Working Group adopted this suggestion.*

72. Policy-based statutory restrictions on transfers: *The drafter* explained the intention behind the use of the words "policy-based" to denote specific prohibitions under the law, such as restrictions on transferring wages or payment rights arising from contracts related to national security. *An expert* supported the examples provided but recommended using "restrict" instead of "prohibit" to more accurately reflect the legal nuances in government contracts and other restricted transactions. *Another expert* provided a Canadian example, corroborating the previous expert's point by mentioning laws that restricted or prohibited the assignment of receivables in government contracts. *The Working Group agreed that the Guide should: (i) set out examples of policy-based restrictions while also noting the importance of maintaining narrow, policy-based exceptions, and (ii) use the term "restrict" instead of "prohibit".*

Article 2(a) – Competing Claimant

73. *The drafter* emphasised the need to clearly define "competing claimant" and attempted to explain scenarios of competition using examples, distinguishing between actual and potential competition among claimants. *An expert* expressed concern regarding the distinction between actual and potential competition among claimants, and instead suggested that the Guide could explain that at a relevant time there might be sufficient money to satisfy both claimants so the competition between them would be negated. *Another expert* noted that the term "competing claimant" in the MLF was not used in a context where the identified matter would become an actual problem. *Several experts* noted that the more significant competition would be in relation to where a receivable was transferred to one party, and then a security transfer over the same receivable was made in favour of another party. It was noted that this was a matter that should instead be explored in the provisions governing power to dispose, and that a cross-reference here would be sufficient. *The Working Group decided to simplify the example provided, and to cross-reference and explain the term "power to dispose" in the relevant article-by-article section.*

Article 2(b) - Debtor

74. In relation to the explanation of how the term "debtor" would apply in relation to future receivables, *one expert* noted that there were few instances in the MLF where such a reading would be possible, and suggested that the explanation in this section could explain the limited circumstances under which ambiguity could arise, and connect potential examples to those instances.

75. *The Working Group agreed that it was unnecessary for the Guide to explain that "debtor" meant "debtor of the receivable".*

Article 2(c) - Default

76. *An expert* pointed out that the definition of "default" might need to be explained expansively in the Guide to align fully with Article 2(c) of the MLF, which included both the failure to perform secured obligations and any other events constituting default as agreed upon in security agreements.

Article 2(d) - Future receivable

77. *The drafter* emphasised the complexity of defining "future receivables", noting that future receivables could arise in relation to (i) receivables that had not yet arisen at the time of the transfer agreement, and (ii) the receivable had arisen but had not yet been acquired by the transferor. The drafter proposed adding explanations and examples in the Guide to clarify at which point a receivable should be considered present versus future. *An observer representing industry* noted that a receivable did not "arise" until the underlying contract had been concluded, and that the timing of the goods or services being delivered were irrelevant. The observer suggested that this should be the only example of future receivable given, to avoid confusion or ambiguity. *The drafter* suggested correcting the last sentence of the second paragraph to: "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." *The Working Group adopted this suggestion. The Working Group also agreed to inclusion of the second example provided on page 49 of Doc. 3 in relation to import and export factors.*

78. *An expert* proposed briefly cross-referencing the priority rule to clarify that priority was determined from the date of registration and not from the time of acquiring future receivables. *The drafter* agreed and suggested also mentioning that debtors could be notified and registrations could be made in relation to transfers of future receivables, noting that these matters were addressed later in the document. *The Working Group adopted this suggestion.*

79. *An observer representing industry* noted that in the recent significant fraud case of Greensill Capital, loans were made against expectations of future receivables, which did not subsequently materialise, causing billions of dollars in losses. The observer concluded that the expected "future receivables" in the Greensill case would not fall within the scope of the definition of "future receivable" in the MLF. *The Working Group agreed to remove the discussion of the relationship between future receivables and fraud.*

80. *An expert* queried whether the Guide's explanation of the definition of "future receivable", should address whether a mere promise could give rise to future receivables that could be transferred. She noted that in civil law jurisdictions like Japan, a promise to transfer a receivable could not have third-party effectiveness unless the receivable actually arose. She requested clarity on whether promises without underlying contracts could be considered transferable future receivables. *The drafter* responded to this query with reference to the point at which a future receivable became present, suggesting that, under English law, the conclusion of the underlying contract would create an existing (not future) receivable. It was noted that a promise (rather than a contract) could give rise to a future receivable, but that the receivable would not be transferred until it had arisen. *An expert* noted the importance of being able to register transfers of such receivables for securing priority, regardless of their current or future status.

81. *An observer* addressed the issue of whether such promises should have third-party effectiveness. She suggested that a unilateral promise have third-party effectiveness under domestic law if it met the criteria of a contract, thus giving rise to future receivables. She emphasised that not all civil expectations were protected by law, and the key consideration was whether the promise and future receivables could be realised, thereby warranting legal protection. *The drafter* emphasised the importance of clearly explaining early on that notices could be registered for both present and future receivables, with priority dating from the registration date. She reiterated that future receivables were transferred when they arose, aligning with the established principles in the Guide.

82. *An observer* expressed confusion over the definitions of future receivables and the clause on advance registration, questioning if a transfer agreement had to be in place to register a notice in relation to future receivables. *The drafter* clarified that a notice in relation to future receivables could be covered by a transfer agreement and could be registered before they existed or before the transfer agreement was finalised. *The observer* acknowledged the explanation but noted that this outcome might not be immediately clear to government lawyers reading the document. *The drafter* suggested improving the explanation within the definitions and registration provisions, to clarify that parties could register notices for future receivables even before entering into a transfer agreement. *The Chair* suggested that the concept of registering future receivables should be reiterated throughout the document to emphasise its significance and potential conflict with existing legal traditions. *An expert* highlighted the need for clear examples illustrating the timing of registration, signing transfer agreements, and the arising of receivables to clarify their legal consequences. *The drafter* agreed, noting the importance of explaining when a future receivable became a present receivable and proposing detailed examples to illustrate this process, particularly in contexts like manufacturing businesses. *The Working Group decided to provide comprehensive examples and explanations to ensure readers understood this fundamental concept.*

Article 2(e) - Judgment creditor

83. *The drafter* highlighted the issue of defining "judgment creditor", noting that definitions could vary between jurisdictions. She suggested that while it was important to ensure consistency with Article 17 which specifically addressed judgment creditors, it might be more effective to provide detailed examples and address this topic within the commentary on Article 17. *The Working Group agreed with the proposal.*

Article 2(f) - Proceeds

84. *The drafter* initiated a discussion on the definition of "proceeds", focusing on why the MLF limited proceeds to cash and the need to explain this limitation. The drafter noted the importance of clarifying that non-cash proceeds, including returned goods, were excluded, and mentioned that proceeds included interest. *An expert* emphasised the need to explain that receivables could not be considered proceeds of proceeds, providing examples to illustrate the concept. *Another expert* raised concerns about the interaction between proceeds and refinanced receivables and questioned whether a refinanced receivable should be considered proceeds. He suggested clarifying this point in the Guide. The expert agreed that returned goods did not qualify as proceeds and supported simplifying the explanation. *The Chair* suggested explicitly stating the narrow definition of proceeds to prevent confusion, particularly in jurisdictions with broader definitions. *An expert* agreed that returned goods should not be discussed under proceeds, noting their separate treatment in the Receivables Convention.[4] *An expert* suggested that letters of credit need not be included in the discussion of proceeds as it was explained under the commentary related to Article 7, and advocated instead for a brief mention in the commentary on Article 2(f). *Multiple observers* discussed the terminology related to letters of credit and agreed that the Guide should refer to payments under letters of credit rather than claims to avoid confusion. *The Working Group decided that the Guide should clearly explain the meaning of proceeds and make reference to Article 6 (Proceeds) in this discussion, include interest, and briefly address the exclusion of letters of credit and returned goods, while ensuring consistent terminology and providing clear examples for complex concepts. The Working Group also decided that there was no need to refer to the Receivables Convention in the discussion of this Article.*

Article 2(g) - Receivable

85. *The drafter* introduced the structure of Article 2(g) and highlighted that a "receivable" might not be confined to a single category within Article 2(g) but could simultaneously belong to multiple categories (for example, the receivable arise from the same activity that could be categorised as both the " supply of a good" and "the provision of data").

86. With reference to the fourth paragraph on Doc. 3, page 54, a*n expert* raised concerns about the explanations of "money" and "monetary sum", highlighting the need to distinguish between physical money transfers and obligations denominated in money. The expert stressed that the Guide should not inadvertently exclude transactions where no actual money changed hands but were measured in monetary units. *The Working Group adopted the suggestion.*

87. Receivables related to the supply or lease of goods or services*: The Secretariat* suggested that there was no need to define goods and services, as doing so would likely raise more problems that it would solve. *The Working Group adopted this suggestion. An expert* proposed providing examples in the Guide to explain what constituted the supply or lease of goods or services. The expert expressed concern that without clear examples, the term "supply of goods" might be misunderstood to include a broader definition. *The Working Group agreed to include examples of goods and services.*

88. Receivables associated with real estate: *The Secretariat* noted that receivables arising from the sale or lease of real estate were not included within the definition of "receivable". However, it was emphasised that there might be some limitations on this exclusion, particularly in cases such as Airbnb rentals. *The Chair* noted that this aspect of law (i.e. the relationship between real estate, services and leases) was quite complex. It was suggested that as the matter was somewhat ambiguous, the Guide should not go into great detail. *Another expert* mentioned the distinction in Japanese law between buildings and land as separate immovable assets and noted that stating the MLF did not apply to receivables associated with real estate might be misinterpreted as excluding construction contracts for buildings, which were considered service contracts, and should be included.

[4] United Nations Convention on the Assignment of Receivables in International Trade (New York, 2001).

The Working Group noted that there was no need to attempt to find a resolution in this complicated area and considered it unnecessary to discuss the matter of real estate in the Guide.

89. Financial receivables: The Working Group discussed the treatment of financial receivables at length. It was suggested that the Guide should explain that the MLF did not apply to certain financial arrangements that were often colloquially or formally referred to as financial services arrangements. It was further suggested that the Guide should refer to the types of financial receivables specifically excluded from the scope of the Receivables Convention (e.g. including netting agreements, foreign exchange transactions, interbank payments) as examples of the types of financial receivables outside the scope of the MLF, but that these examples did not constitute a definitive list. It was also suggested that the Guide should explain that these types of financial receivables were generally regulated by their own specialised law, which was why it was not necessary to include them within the scope of the MLF. *The Working Group agreed that the Guide should not suggest that States needed to explicitly list such exclusions in their implementing legislation. The Working Group decided that there was no need to refer to the Receivables Convention in explaining this matter.*

90. *Several experts* noted that there would be some ambiguous cases in relation to the exclusion of "financial receivables", including (i) receivables arising from financial advisors' services, and (ii) receivables arising from the payment of insurance premiums. *An expert* noted that the insurance contract was not a service contract so it should not be covered. *Another expert* noted that in Australia the factoring of insurance premiums was very common. *Another expert* noted that in Canada insurance companies financed premiums or receivables by borrowing against them rather than selling them and that such practice would not be covered by the MLF. *Several experts suggested that* receivables from regulated financial services, loans, and insurance premiums would not fall within the meaning of "service" in the definition of receivables. *The drafter* raised the issue of aligning aspects of other laws with the MLF, particularly concerning interactions with insurance law. *The Working Group concluded that the Guide did not need to provide guidance on these matters.*

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

92. Data protection laws: *An expert* queried the relationship between data protection or privacy laws which prevented or prohibited the transfer of receivables, and the definition of "receivable". *Another expert* responded that a restriction on the transfer of certain receivables (such as receivables related to transactions or services that breached privacy or data protections laws) would be addressed by Article 1, rather than the definition of "receivable" in Article 2(g).

93. Refinancing receivables: The Working Group recalled that the underlying policy objective of this rule was to ensure that a party with a right in a receivable that was refinanced should not lose its right under the MLF on the basis that the replacement payment obligation might not satisfy the definition of "receivable" (because it might not arise from a contractual right to payment related to the provision of goods or services). The Working Group further recalled that while drafting this rule in the MLF had been challenging, the underlying policy objective was clear, *and it decided that the Guide should explain that policy objective*. *One expert* clarified that the rule would clearly apply to the renegotiation of payment terms (e.g. paying $1000 a month for six months instead of $1200 a month for five months).

94. *The drafter and several experts* raised queries about the exact operation of the rule, particularly in relation to (i) whether the replacement financing agreement needed to be between the original transferor and transferee, (ii) whether it applied to novations and new payment obligations, and (iii) whether the new receivable arising from the replacement payment obligation would need to be separately registered as a different transfer. *One expert* suggested that the rule did not necessarily need to be limited to the original transferor and transferee, providing an example of a car bought on credit from a dealer, where the right to payment was transferred to a dealer financier. If the debtor was having trouble paying and the debtor and dealer financier decided to renegotiate the payment terms, such a transaction should be covered. *Several experts* expressed concerns regarding the possible application of the rule to new payment obligations (through novations), on the basis that such an approach would be conceptually similar to negotiable instruments and independent payment obligations, which had been excluded from the definition of "receivable".

95. *The Working Group decided that the Guide did not need to provide detailed guidance in relation to the refinancing of receivables and should instead focus on explaining the rule's underlying policy rationale. The Working Group decided to give the matter further consideration at its second session.*

Article 2(h) - Registry

96. *The drafter* noted that the enacting State would need to specify in the definition of "registry" the authority responsible for the establishment of the registry.

Article 2(i) – Security transfer

97. *The drafter* noted that subsection (i) of the definition of "security transfer" optionally provided the opportunity for States to list transactions that would be considered as security transfers, whereas subsection (ii) was a mandatory rule that would effectively serve as a catch-all for functional equivalents. The drafter queried whether, in States (such as England) where listing charges and mortgages in subsection (i) would capture all possible security transfers, the Guide should note that States could consider not including subsection (ii), even though it was not in square brackets.

98. *An observer* emphasised focusing on the essential purpose of the transfer, which was to ensure consistent priority rules. He suggested that individual States could determine which security rights to include or exclude, and believed that it was unrealistic to anticipate addressing all the diverse concepts in potential enacting States, as the implementation would require further work by each State.

99. *An expert* suggested framing the definition of "security transfer" as accommodating both formal and functional approaches to security rights. Subsection (i) would provide comfort to States by allowing them to list their formal devices. However, subsection (ii) was intended to be suitable for all States, encompassing various security rights such as charges, mortgages, and assignments in security. The balance between the two paragraphs depended on the State's underlying assignment law. *The Working Group noted that the Guide should explain that the basic rule was that a State should have the functional rule in subsection (ii), and could also additionally list relevant security devices in subsection (i).*

Article 2(j) - Transfer

100. *The drafter* noted that the summary provided (i) policy rationales for the MLF applying to both outright transfers and security transfers, (ii) clarification that the MLF applied to transfers made for other purposes, including transfers of receivables related to the sale of a business, and (iii)clarification that in some circumstances "transfer" referred to a process, and in other circumstances it referred to the rights of a transferee. The drafter requested confirmation that the

summary was correct and further feedback on the extent to which the Guide should address issues of recharacterisation, particularly in relation to recourse and non-recourse factoring.

101. Policy rationales: The Working Group was broadly supportive of the four policy rationales which explained why the MLF applied to both outright and security transfers. It was suggested that the fourth rationale (industry support) should not be a rationale in itself, but rather that the industry support related to the three other policy rationales.

102. Transfers related to the sale of a business: *Several experts* agreed that the Guide should explain why the MLF should apply broadly to transfers of receivables, including those related to the sale of a business. *One expert* suggested that the broad application of the MLF to transfers (i) was necessary for the integrity of the law in providing priority rules that captured all transfers of relevant receivables, and (ii) would provide a legal framework for the transfer of receivables in the course of the sale of business, which in some countries might not currently exist.

103. Characterisation and recourse vs non-recourse factoring: The Working Group discussed the matter at length. In general, the Working Group agreed that the Guide should clarify that the MLF's definition of transfer was deliberately broad enough to cover both outright and security transfers, regardless of how they were characterised under domestic law. The Working Group further agreed that transfers with recourse would generally be characterised as security transfers in most legal systems and transfers without recourse would generally be characterised as outright transfers. Views differed as to the level of detail the Guide should provide in relation to the recourse versus non-recourse issue, and whether the definition of "transfer" was the appropriate place to provide such analysis. *The Working Group decided that the Guide should provide limited explanation on the characterisation of recourse and non-recourse transfers, as well as some examples, without getting into unnecessary detail. The Working Group also agreed that the Guide should briefly clarify that recharacterisation of a transfer might become necessary in the context of enforcement.*

Article 2(k) - Transfer agreement

104. *The Working Group agreed that this section should note that (i) agreements between the debtor and transferee in a reverse factoring situation would not be a transfer agreement, and (ii) a transfer agreement could provide for multiple transferees.*

105. The Working Group discussed whether the Guide should include the sentence "apart from the requirements set out in Art. 5, domestic contract law governs the question of whether a transfer agreement is an enforceable contract". Different views were raised. *The Working Group decided that the Guide should clarify that most aspects of a transfer agreement would be governed by "other domestic law", beyond the minimum requirements in Article 5. The Working Group decided that the point should be put in square brackets and reformulated for further discussion at the second session.*

106. *The Working Group decided that the relationship between transfer agreements and parties interacting on a digital receivables trading platform should be explained in the Digital Economy Supplement, and not in the Guide itself.*

Article 2(l) – Transferee

107. *The drafter* noted that the term "transferee" encompassed two key aspects. Firstly, it referred to the individual or entity to whom a receivable was transferred or in whose favour it was transferred, which also encompassed security transfers. Secondly, whether "transferee" included an agent of a transferee was determined by domestic agency law. *The Working Group agreed to remove the second paragraph of this section*.

Article 2(m) – Transferor

108. *The Working Group agreed to retain the paragraph related to transferors of future receivables and remove the paragraph on domestic agency law*.

Article 3 – Party autonomy

109. *The drafter* noted that it was challenging to provide clear examples that illustrated how party autonomy should work under the MLF, and invited participants with actual transactional experience to suggest useful examples. *The Working Group decided that the section should begin with an explanation and examples of where party autonomy was permissible under the MLF (Article 3(2)), then explain the restrictions on party autonomy.*

110. *Several experts* suggested that the example related to Article 18 should be removed, and instead party autonomy examples based on the modification of the rules in Articles 22 and 29 could be inserted.

Article 4 – General standards of conduct

111. *The drafter* expressed uncertainty regarding two points. Firstly, it was noted that it was difficult to define what constituted selling a receivable in a commercially reasonable manner. Second, it was explained that it had been difficult to identify useful examples, noting that the example in the document related to Article 34 was based on security transfers, which was not the main focus in the MLF.

112. *One expert* noted the UNIDROIT Working Group on Best Practices for Effective Enforcement was facing similar challenges and had defined "good faith" as a subjective test and "commercial reasonableness" as an objective test. *The Working Group agreed that this section of the Guide should be aligned with the associated work being undertaken by the UNIDROIT Working Group on Best Practices for Effective Enforcement.*

113. *Several experts* suggested possible examples of commercial reasonableness. *One expert* suggested that it would be commercially reasonable to sell a receivable on a well-established and easily accessible platform, whereas it might not be commercially reasonable to attempt selling it on an unfamiliar or less reputable platform. *Another expert* suggested that it would not be commercially reasonable to conclude a transfer agreement for present and future receivables that was completely disproportionate to the actual value of the receivables.

114. *The Working Group noted that further work was required to develop clear examples of good faith and commercial reasonableness under Article 4, and to further discuss the matter at the second session.*

Part IV, Chapter II – Transfer of a receivable

Article 5 – Requirements for the transfer of a receivable

115. In relation to Article 5(1), the Working Group discussed the explanation in Doc. 3, page 64, regarding the transferor having rights in the receivable or the power to transfer it. *Several experts* noted that the general level of explanation and content was appropriate, although the language would need to be refined. *An expert* expressed discomfort with the Guide stating that the only exception to the requirement for a transferor having the power to transfer a receivable under Article 5 was the priority rule in Article 13. *The drafter* noted that Article 13 did not apply in all priority contexts, for example in relation to judgment creditors. *Another expert* noted that in a general secured transactions context there might be exceptions, but in a receivables context it would be difficult to imagine a situation where Article 13 would not apply. *The Working Group decided that the expression*

"nemo dat quod non habet" should be replaced by a plain English term. The Working Group decided to further consider the matter at its second session.

116. In relation to Article 5(2), *the experts* discussed the writing requirement. *The Secretariat* suggested that while it might be unnecessary for the Guide to provide a detailed policy justification for Article 5(2), it might be useful if the Guide explained that Article 5(2) was intended to simplify legal requirements in most States, although the writing requirement might add a new requirement in some States. *The Working Group decided that there was no need to include a detailed explanation of the meaning of "writing", and instead the Guide should note that Article 5(2) provided minimum requirements.*

117. *An expert* suggested that for Article 5(2)(c), where receivables needed to be described in a way allowing for their identification, it was sufficient for identification purposes if the transfer agreement stated that they were all receivables assigned or transferred under its provision. This requirement was distinguished from collateral descriptions in filings, highlighting the difference between informing searchers and the parties involved. It was proposed that this matter be addressed in the Guide.

118. In relation to Article 5(3), *another expert* suggested including a sentence or two advising enacting States not to adopt a rule mandating specific descriptions of receivables. It was emphasised that such requirements were often suggested but were ultimately impractical and unnecessary.

119. In relation to Article 5(3) and (4), *the Working Group reaffirmed that the paragraphs provided examples if what could be transferred by a transferor but should not be read restrictively to limit what could be transferred.*

120. In relation to Article 5(4), *an expert* summarised the Working Group's understanding that paragraph 4(a) distinguished between "part of a receivable" as selling individual items from a stream of payment obligations, and "an undivided interest in a receivable" as selling a portion (e.g. half) of the entire pool.

Article 6 – Proceeds

121. *The drafter* introduced the treatment of proceeds in Article 6, noting that the summary in Doc. 3, page 66 explained that because proceeds were money or a negotiable instrument, the applicable priority rule in relation to proceeds would be "other domestic law" rather than Article 13 of the MLF.

122. *Several experts* emphasised that Article 6 dealt with "identifiable proceeds". *The Working Group agreed that the Guide should provide that where proceeds became comingled or were not readily identifiable, other domestic law would govern identifiability. The Working Group further decided to avoid using the word "tracing", which could cause confusion for users of the Guide.*

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

123. *The drafter* clarified that Article 7(1) distinguished between "secured" and "supported", and explained how it worked in two situations: when the benefit transferred without a new act and when a new act would be necessary. The drafter addressed comments from the Secretariat's spreadsheet regarding letters of credit and sought guidance on providing a more detailed explanation for Article 7.

124. Letters of credit: The Working Group undertook a lengthy discussion regarding the treatment of letters of credit under Article 7(1). *Some experts* suggested that it was important to state in the Guide that the MLF did not intend to overrule domestic law regulating letters of credit, in order to ensure that stakeholders in the letters of credit industry would not form a negative perception of the MLF. *Other experts* noted that the treatment of letters of credit was a complex matter that it might

be preferable not to address. *An expert* suggested including an example regarding letters of credit, where the transferor requested the issuing bank to transfer the letter of credit or bank guarantee to the beneficiary, who became the transferee of the receivable. It was noted that such an example would also demonstrate that the MLF did not override law domestic law on letters of credit. *Another expert* pointed out that traditionally documentary letters of credit were not transferable unless explicitly stated otherwise, which aligned with ICC rules. However, Article 7(2) might render assignment clauses ineffective, potentially conflicting with the ICC rules. He questioned whether this unintended consequence should be addressed and sought input on how to proceed. *A third expert* suggested explaining that the provision respected letter of credit law and practice by clarifying that what was transferred under Article 7 was not the letter of credit itself but rather the right to draw under the letter of credit. *A fourth expert* suggested that Article 7 might not address the assignment of proceeds because beneficiaries of letters of credit could assign proceeds without requiring a new act of transfer. It was suggested that the explanatory text for Article 7 should only cover the transfer of the right to draw under a letter of credit, which would respect the domestic law regulating letters of credit. *The Chair summarised that given the complexity of the matter, it would be preferable for the Guide not to address letters of credit.*

125. *An observer representing industry* noted that receivables backed by credit insurance were more common than receivables backed by letters of credit, and suggested that the Guide should address credit insurance. *The drafter* noted that summary in Doc. 3, page 69 provided credit insurance as an example. *The Working Group agreed with the proposal.*

126. Regarding Article 7(2), it was noted that there was significant overlap between Article 8. *The Working Group agreed that the Guide should include an explanation of the relationship between Articles 7(2) and 8.*

Article 8 – Contractual limitations on the transfer of a receivable

127. *The drafter* provided a detailed overview of Article 8. It was reaffirmed that Article 8 did not override any public-policy prohibitions on transfers (for example, transfers prohibited due to sanctions, national security, or proscribed groups). It was suggested that it would be useful for the Guide to set out the kinds of losses that parties could allege for breach of an anti-assignment clause, such as loss of a business relationship or mental distress. *The Working Group agreed that the Guide should set out the policy rationale for Article 8 and should not include any arguments against a State implementing Article 8.*

128. *Several experts* noted that overriding an anti-assignment clause might impose additional costs on the debtor, such as triggering additional overseas withholding taxes if the transferee was in a third country, or higher bank fees. The Working Group discussed at length whether Article 24 would protect a debtor from such costs. *Several experts* cautioned that Article 24 should not be read to allow debtors to enforce anti-assignment clauses by arguing that the override would impose additional costs on them. *One expert* suggested that the correct reading was that Article 8 clarified that the transferor could not be prevented from transferring the receivable. Once the transfer had been made, Article 24 provided that the transferee would only be entitled to receive what the transferor would have been allowed to receive, and the debtor could not be left worse off in relation to external costs (internal operational costs for the debtor would not be taken into account). *The Working Group agreed that this matter should be addressed in the Guide.*

Part IV, Chapter III – Effectiveness against third parties of a transfer of a receivable

Article 9 – Registration

129. *The drafter* noted that it was important to set out the distinction between registration and notification, highlighting that they were separate processes. It was explained that notifying the debtor required following specific rules, distinct from registration. The drafter addressed scenarios

where notification to the debtor might not occur despite registration and clarified that registration of a notice was not incompatible with a non-notification factoring agreement, as registration was not equivalent to notification. The drafter sought feedback on the clarity and completeness of the explanations.

130. *One expert* suggested a slight drafting change in relation to the first paragraph on page 73 of Doc. 3, noting that it would be preferable not to use the language "if it is effective between the transferor and transferee", as the MLF did not use such language. *Another expert* suggested that in relation to non-notification factoring and the language in paragraph 2 on page 74, the Guide should focus on explaining the operation of the MLF rather than the possible contractual terms of non-notification factoring agreements.

131. *The Chair suggested that the Working Group defer discussion of Article 9 until after the commentary on the Registry Annexe had been drafted.*

Article 10 – Proceeds

132. *The Working Group decided to remove the text contained in square brackets on page 74.*

Technical error in the Model Law on Factoring's transition rules

133. The Working Group identified a technical error in Articles 11 and 52 of the MLF.[5] *After a lengthy discussion, the Working Group concluded that it would be preferable to amend the MLF to address the technical error, rather than attempt to explain it in the Guide to Enactment*. The matter was referred to the Secretariat for further action.

Item 4: Organisation of future work

134. *The Secretariat* noted that a first draft of the Guide would be prepared intersessionally and provided to the Working Group for consideration at its second session. It was further noted that the small subgroups would continue to provide feedback on the different sections intersessionally.

135. *The Secretariat confirmed that the second meeting of the Working Group would take place on 16-19 December 2024.*

Item 5: Any other business

136. No other business was raised.

Item 6: Closing of the session

137. *The Chair* thanked all participants for their contributions to what had been a friendly, constructive and productive first session. *The Chair declared the session closed.*

[5] Further information is available in : https://www.unidroit.org/wp-content/uploads/2024/04/C.D.-103-9.1-bis-Proposed-amendment-to-the-MLF.pdf.

ANNEXE I

AGENDA

1. Opening of the session by the Chair

2. Adoption of the agenda and organisation of the session

3. Implementation update on the UNIDROIT Model Law on Factoring (Study LVIII B – W.G.1 – Doc. 5)

4. Overview of the purpose, structure, content and negotiation of the MLF Guide to Enactment (Study LVIII B – W.G.1 – Doc. 2)

5. Consideration of Guide to Enactment section summaries (Study LVIII B – W.G.1 – Doc. 3)

6. Organisation of future work

7. Any other business

8. Closing of the session

ANNEXE II

LIST OF PARTICIPANTS

CHAIR

Mr Henry GABRIEL *in-person*	Professor of Law Elon University United States of America *UNIDROIT Governing Council Member Ad Honorem*

MEMBERS

Mr Giuliano CASTELLANO *remotely*	Associate Professor Asian Institute of International Finance Law (AIIFL) Hong Kong
Mr Neil COHEN *in-person*	Jeffrey D Forchelli Professor of Law, Brooklyn Law School United States of America
Mr Michel DESCHAMPS *in-person*	Université de Montréal McCarthy Tetrault Canada
Mr Marek DUBOVEC *in-person*	Director of Law Reform Programs International Law Institute United States of America
Mr Alejandro GARRO *remotely*	Adjunct Professor of Law Colombia Law School United States of America
Ms Louise GULLIFER *in-person*	Rouse Ball Professor of English Law University of Cambridge United Kingdom
Ms Megumi HARA *in-person*	Professor of Law Chuo University Japan
Ms Catherine WALSH *in-person*	Professor of Law McGill University Canada
Mr Bruce WHITTAKER *in-person*	Senior Fellow University of Melbourne Australia

INSTITUTIONAL OBSERVERS

INTERGOVERNMENTAL ORGANISATIONS

AFRICAN EXPORT - IMPORT BANK (AFREXIMBANK) *remotely*	Mr Enga KAMENI Lawyer Legal Department Egypt
EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT (EBRD) *in-person*	Mr Milot AHMA Acting Counsel Legal Transition Team Financial Law Unit United Kingdom
remotely	Mr Liubov SKORYK Associate Legal Transition Programme / Office of General Counsel United Kingdom
EXPORT-IMPORT BANK OF THE UNITED STATES (EXIM) *in-person*	Ms IfeanyiChukwu EGBUNIWE Senior Counsel for Trade Finance, Insurance, and Small Business Export-Import Bank United States of America
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) *Remotely*	Mr Jae Sung LEE Senior Legal Officer UNCITRAL Secretariat Secretary of Working Group III International Trade Law Division, Office of Legal Affairs Austria
remotely	Ms Monica CANAFOGLIA Legal Officer International Trade Law Division (UNCITRAL Secretariat) United Nations Office of Legal Affairs Austria

INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

INTERNATIONAL LAW INSTITUTE (ILI) *remotely*	Mr Bob TROJAN Senior Advisor United States of America
SHANGHAI INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION (SHIAC) *remotely*	Ms YANG Guang Deputy Secretary-General Peoples' Republic of China

PRIVATE SECTOR REPRESENTATIVES

APEC FINANCIAL INFRASTRUCTURE DEVELOPMENT NETWORK *in-person*	Mr Christopher J. WOLHERT Business Leader Commercial Distribution Finance Asia Wells Fargo Bank Hong Kong
FACTOR CHAIN INTERNATIONAL (FCI) *remotely*	Mr Ulrich BRINK FCI Legal Committee Germany
remotely	Mr Saibo JIN FCI Legal Committee People's Republic of China
INTERNATIONAL CHAMBER OF COMMERCE (ICC) *remotely*	Ms XU Jun Deputy General Manager Global Transaction Banking Department Bank of China People's Republic of China
SECURED FINANCE NETWORK (SFN) *remotely*	Mr Richard KOHN Co-General Counsel United States of America

INDIVIDUAL OBSERVERS

Mr Orkun AKSELI *in-person*	Professor of Commercial Law The University of Manchester Law School United Kingdom
Mr Ole BÖGER *remotely*	District Court Judge Hanseatic Court of Appeal Bremen, Germany
Ms Sofia Meiling HUANG *in-person*	Professor of Roman Law and Comparative law Zhongnan University of Economics and Law Executive Director of Sino-Italian Institute People's Republic of China
Ms Elham MABROUK *remotely*	Lecturer Cairo University Egypt

UNIDROIT SECRETARIAT

Mr Ignacio TIRADO *in-person*	Secretary-General
Mr William BRYDIE-WATSON *in-person*	Senior Legal Officer
Ms Philine WEHLING *remotely*	Legal Officer
Mr Ian LI *remotely*	Legal Officer
Ms Jeannette TRAMHEL *in-person*	UNIDROIT/MAECI Chair Holder
Ms Serena MIRABELLO *in-person*	UNIDROIT Scholar
Ms Daijun GU *in-person*	UNIDROIT Intern
Ms Lauren JONES *remotely*	UNIDROIT Intern
Mr Andrew WOHLERT *in-person*	UNIDROIT Intern