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DOI: https://doi.org/10.34625/issn.2183-2705(35)2024.ic-27

Secção I
Investigação Científica*

* Os artigos presentes nesta secção foram sujeitos a processo de revisão segundo o método *blind peer review* / The articles in this section have undergone a blind peer review process.

UNIDROIT Factoring Model Law: Critiques and Possible Effects

Lei do Modelo de Factoring UNIDROIT: Críticas e Possíveis Efeitos

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ABSTRACT: Factoring fulfills an important function globally in financing and accessing credit for businesses, companies and entrepreneurs of all sizes, especially small and medium-sized businesses. The UNIDROIT Factoring Model Law was prepared within a three-year period as a result of the work initiated by UNIDROIT upon the recommendation of the World Bank due to reasons such as the inadequacy of the existing international legislation for countries to create a functional factoring legislation and the need to create global rules and legislation specific to factoring. The UNIDROIT Factoring Model Law for which the Guide to Enactment has not yet been prepared, contains some challenging rules. During the preparation of the UNIDROIT Factoring Model Law, other relevant legal regulations were also used and compliance with them was observed. In this study, the UNIDROIT Factoring Model Law, which is a very new legislation, has been criticized under basic section headings and its weaknesses and strengths have been examined. While doing this, an answer is sought to the question of whether the UNIDROIT Factoring Model Law could meet the expectations. Additionally, its possible effects are discussed. It has been concluded that the UNIDROIT Factoring Model Law contains provisions that may cause problems and confusion in practice especially under the headings of the scope of receivables subject to transfer, notification and registration system, priority rights, but in general it should be welcomed as an exemplary law. It is too early to answer the question of whether the UNIDROIT Factoring Model Law will be successful internationally, that is, to what extent it will be adopted by countries. The Guide to Enactment to be prepared in this process will also be effective.
KEYWORDS: Factoring; UNIDROIT; Factoring Model Law; Model Law on Secured Transactions; Receivable.

RESUMO: O factoring cumpre uma função importante a nível mundial no financiamento e acesso ao crédito para negócios, empresas e empreendedores de todas as dimensões, especialmente pequenas e médias empresas. A Lei Modelo de Factoring do UNIDROIT foi preparada dentro de um período de três anos como resultado do trabalho iniciado pelo UNIDROIT por recomendação do Banco Mundial devido a razões como a inadequação da legislação internacional existente para os países criarem uma legislação de factoring funcional e a necessidade de criar regras globais e legislação específica para o factoring. A Lei Modelo de Factoring do UNIDROIT, para a qual o Guia de Promulgação ainda não foi preparado, contém algumas regras desafiadoras. Durante a elaboração da Lei Modelo de Factoring UNIDROIT, também foram utilizadas outras normas legais relevantes e observado o seu cumprimento. Neste estudo, a Lei Modelo de Factoring UNIDROIT, que é uma legislação muito nova, foi criticada nos títulos das secções básicas e os seus pontos fracos e fortes foram examinados. Ao fazer isso,

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busca-se uma resposta à questão de saber se a Lei Modelo de Factoring UNIDROIT poderia atender às expectativas. Além disso, são discutidos seus possíveis efeitos. Concluiu-se que a Lei Modelo de Factoring UNIDROIT contém disposições que podem causar problemas e confusão na prática, especialmente no que diz respeito ao âmbito dos valores a receber sujeitos a transferência, sistema de notificação e registo, direitos de prioridade, mas em geral deve ser acolhida como uma lei exemplar. É muito cedo para responder à questão de saber se a Lei Modelo de Factoring UNIDROIT terá sucesso internacionalmente, ou seja, até que ponto será adoptada pelos países. O Guia de Implementação a ser preparado neste processo também será eficaz.
PALAVRAS-CHAVE: Factoring; UNIDROIT; Lei Modelo de Factoring; Lei Modelo de Operações com Garantia; Recebíveis.

1. Introduction

Factoring, with an annual global volume exceeding 3 trillion euros, is a leading type of financing used around the world. Europe accounts for the majority of world factoring volume, but new markets such as the Middle East, Africa and South America provide the most growth in factoring volume[1].

Although the UNIDROIT International Factoring Convention dated 1988 is an important regulatory text in international factoring, in the global factoring volume international factoring has only a share of 20%[2]. In other words, a significant portion of the world's factoring volume consists of domestic factoring transactions. However, the project of preparing a model law that could guide states within the scope of establishing or improving domestic factoring legislation was not on the agenda of any intergovernmental organization until the issue was included in the UNIDROIT 2020-2022 Work Program[3].

During the preparation of the UNIDROIT Factoring Model Law (hereinafter, MLF), the United Nations Convention on the Assignment of Receivables in international Trade of 2001 (hereinafter, Receivables Convention) and UNCITRAL Model Law on Secured Transactions of 2016 (hereinafter, MLST) were used, and it can even be said that MLF was prepared as a complement to these texts[4]. However, the Receivables Convention differs from the MLF in that it is an international agreement and regulates the transfer

[1]FCI, Industry Statistics https://fci.nl/en/industry-statistics?language-content-entity=en accessed 31 October 2023. Also see Leora Klapper, 'The role of factoring for financing small and medium enterprises.' (2006) 30(11) *Journal of Banking & Finance* 3112.
[2] ibid.
[3]UNIDROIT,'AnnotatedDraftAgenda'(June2020)https://www.unidroit.org/english/documents/2020/study58a/wg01/s-58a-wg-01-02-e. pdf accessed 1 November 2023.
[4]UNIDROIT, https://www.unidroit.org/instruments/factoring/model-law-on-factoring/ factoring-model-law-overview/ accessed 31 October 2023.

of all kinds of receivables between parties located in different countries. When MLST is compared with MLF, it can be said that there is a close harmony between MLST and MLF in terms of language, terminology and purposes. However, MLF only regulates the area of receivables, in contrast MLST contains comprehensive provisions for security interests in different assets. Thus, MLF appears as a much shorter and simpler legislation compared to MLST. Moreover, prior legislation such as FCI Model Law on Factoring 2013, Afreximbank Model Law on Factoring 2016 and those published by some non-governmental organizations were also used[5]. These texts were prepared by taking the previous UNIDROIT and UNCITRAL legislations as models.

Currently, UNIDROIT's efforts to introduce and implement MLF are continuing. In this context, a four-stage plan has been developed; to position MLF as a basic tool that facilitates trade financing and access to credit and economic development, to raise awareness about MLF, to support the adaptation of MLF to country legislation, and to ensure wide accessibility of MLF[6]. The main question to be answered in this text is to what extent MLF can achieve these goals.

2. Critiques of UNIDROIT Factoring Model Law

A wide variety of critiques and suggestions were made regarding the MLF draft during the preparation process, which lasted approximately three years[7]. As a result of these critiques and suggestions, the final text published by UNIDROIT emerged[8]. However, likewise the other human-made legal texts, it cannot be said that the final MLF text is free from criticism or does not have any shortcomings or weaknesses. This issue will be examined below within the limits of an article.

[5] ibid.
[6]UNIDROIT https://www.unidroit.org/instruments/factoring/model-law-on-factoring/model-law-on-factoring-implementation/ accessed 31 October 2023.
[7]UNIDROIT, 'Model Law on Factoring Consultation -Comments Summary Table' (November 2022) https://www.unidroit.org/wp-content/uploads/2022/11/Study-LVIII-A-W.G.6-Doc.-4-Summary-table-of-comments-on-draft-MLF.pdf accessed 26 November 2023.
[8]UNIDROIT, 'Item No. 4 on the agenda: Adoption of Draft UNIDROIT Instruments' (April 2023)https://www.unidroit.org/wp-content/uploads/2023/04/CD-102-5-Model-Law-on-Factoring.pdf accessed 26 November 2023.

2.1. Scope and General Issues

Regarding the scope of the MLF, the first issue that needs to be discussed is which areas the MLF should regulate. In the final text prepared by UNIDROIT, the scope of application of MLF was limited to the transfer of receivables (MLF Article 1 (1). What the receivable consists of is defined in MLF Article 2 (g). However, when MLF Article 1 (1) is analyzed alone, it is seen that the wording is insufficient to define the scope of MLF as there is no mentioning about the type of transfer[9]. Under MLF, the transfer of receivables includes both outright transfers and security transfers (MLF Articles 2 (j-i) and 2 (j-ii). Although it has been commented against this critique that a revision of the text may confuse the scope article with the definition, we cannot agree with this comment[10]. In its current form, the scope article does not contain sufficient clarity about the scope of the MLF. On the other hand, revision of Article 1 (1) accordingly will make the MLF more compatible with the MLST in terms of scope[11]. Therefore, it should be considered as reasonable to mention the security transfer of the receivable in the scope article.

The draft text of the MLF, which was submitted to public opinion in 2022, included Article 1 (4) stating that the MLF has no effect on the rights and obligations arising from negotiable instruments[12]. However, this clause was later removed from the final text[13]. In our opinion, this choice was quite appropriate. Under MLF Article 2 (1-e) proceeds of a receivable are listed as money, negotiable instruments and funds credited to a deposit account with an authorized deposit-taking institution. Should the said wording be remained an uncertainty

[9]For critiques on this subject see Issues Paper in UNIDROIT, 'Model Law on Factoring Consultation Submissions' (November 2022), 90 https://www.unidroit.org/wp content/uploads/2023/02/Study-LVIII-AW.G.6-Doc.-5-rev.-MLF-online-consultation submissions.pdf, accessed 26 November 2023.

[10]For the comment see UNIDROIT, 'Summary Report of the Forth Session' (February 2022), 21 paragraph 102 https://www.unidroit.org/wp-content/uploads/2022/04/Study LVIII-AW.G.4-Doc.-6-Report.pdf accessed 28 November 2023.

[11] See UNCITRAL Model Law on Secured Transactions 2016, article 2 (kk).

[12]UNIDROIT, 'Draft Model Law on Factoring' (November 2022) https://www.unidroit.org/wp-content/uploads/2022/11/Study-LVIII-AW.G.6-Doc.-3-Draft-Model-Law-on-Factoring.pdf , accessed 28 November 2023.

[13]UNIDROIT, 'Model Law on Factoring' (2023) https://www.unidroit.org/wp-content/uploads/2023/10/UNIDROIT-Model-Law-on-Factoring-En-PDF-version.pdf , accessed 28 November 2023.

would be created in terms of the other proceeds of a receivable by referring only the negotiable instrument in the scope article[14].

The definitions article of the MLF is also capable of giving rise to various discussions. In this context, the definition of receivable in paragraph g of Article 2 is remarkable. According to this definition, receivables arising from the sale or rental of a real estate are excluded from the scope of MLF. The reason for this choice is that the MLF is not designed to resolve disputes that may arise from real estate law, which may vary from country to country[15]. This explanation may be justified at first glance. However, when the response given by UNIDROIT against the critiques and suggestions made to the MLF draft regarding the definition of receivables is examined in detail, it is seen that such explanation does not fully reflect the current situation[16]. In the comment made by the UNIDROIT Secretariat, it is mentioned that a country that will implement MLF may prefer a wider scope of application[17]. Thus, it is accepted by the UNIDROIT Secretariat that the definition of receivables in the MLF may also include transactions that may arise from the sale and rental of real estate. In this case, it would be more appropriate to restate the definition of receivables alternatively, including receivables arising from the sale and rental of real estate, and leave the choice to the preference of the countries.

Another issue needs to be discussed in terms of the definition of receivables is why receivables arising from various financial services and transactions are not included. In fact, this issue has been evaluated in detail during the preparatory work[18]. However, in our opinion, the conclusion reached as a result of these evaluations was not appropriate. Although the definition of receivables in MLF article 2 (g) gives the impression that financial receivables are not included in the scope of receivables, such a conclusion cannot be reached clearly from the text. Moreover, when the documents including the discussions

[14]For the evaluations of the working group on this subject, see UNIDROIT, 'Summary Report of the Sixth Session' (March 2023), 6 paragraph 10 https://www.unidroit.org/wp-content/uploads/2023/04/Study-LVIII-AW.G.6-Doc.-7-Report.pdf , accessed 29 November 2023.
[15] UNIDROIT, (n. 7) 12, 14, comment number 29, 38. UNIDROIT, (n. 9) 7, 83.
[16] UNIDROIT, (n. 7) 12 comment number 29.
[17]"A State would not be precluded from implementing the MLF with a narrower or broader scope of application, but in the latter case it ought to be aware of potential conflicts that might need to be resolved.", UNIDROIT, (n. 7) 12, comment number 29.
[18]UNIDROIT, 'Issues Paper' (November 2021) 7-9 paragraph 20, 21, 22 https://www.unidroit.org/wp-content/uploads/2021/11/Study-LVIII-AW.G.4-Doc.-2-Issues-paper.pdf accessed 10 December 2023.

held during the preparatory work are reviewed, it can be said that the drafters did not have any intention that the MLF would not be applied to financial receivables without exception. As a matter of fact, in the working group minutes, it was stated that receivables arising from stock market transactions should be considered within the scope of the definition of receivables, and bank deposits could also be considered as proceeds of a receivable[19]. Depending on these facts it can be argued that the finalized definition of receivables in the MLF text contains some ambiguities[20].

The last issue that requires consideration regarding the definitions article is the proposal to include the definition of "writing" among the definitions and to include electronic communication to the definition of "writing" [21]. In Article 5 (2), which states the validity conditions of the transfer agreement, being in writing is clearly considered as a condition of validity. It is stated by the UNIDROIT Secretariat that this issue will be addressed in the Guide to Enactment[22]. However, in order to provide sufficient clarity, the methods conforming the writing requirement should have been regulated in the MLF. The current version of the MLF will bring about questions in the context of electronic contracts.

2.2. Effectiveness of the Transfer of Receivables Between the Parties

Parallel to the analyses in the paragraph hereinabove regarding Article 5 (2), the form of the signature is to be further discussed. The critiques and suggestions received by UNIDROIT on this issue are about addition of an electronic signature provision to MLF[23]. We are in the opinion that an electronic

[19] ibid, paragraph 22.
[20] Issues Paper in UNIDROIT, (n. 9) 91.
[21] Comments of FCI Legal Committee in UNIDROIT, (n. 9) 71. For the validity conditions of the factoring agreement, see Ivanka Spasic, Milorad Bejatovic and Marijana Dukić-Mijatović, 'Factoring - Instrument Of Financing In Business Practice – Some Important Legal Aspects.' (2012) 25 *Economic-Research Ekonomska Istraživanja* 157; Tamara Milenkovic-Kerkovic and Ksenija Dencic-Mihajlov, 'Factoring in the Changing Environment: Legal and Financial Aspects.' (2012) 44 *Procedia Social and Behavioral Science* 433; Muslim Shohib, 'Legal Protection for Parties in Transferring Receivables from Factoring Transactions (Factoring).' (2022) 37(1) *Yuridika* 156; John Glinavos, 'An introduction to international factoring & projects finance.' (2002) 11 https://mpra.ub.uni-muenchen.de/854/ accessed 16 December 2023.
[22] UNIDROIT, (n. 7) 18 comment no 54.
[23]Comments of Global Supply Chain Finance Forum in UNIDROIT, (n. 9) 56; Comments of Embassy of Poland in Italy in UNIDROIT, (n. 9) 94; Comments of FCI Legal Committee in UNIDROIT (n. 9) 72.

signature provision should be included in the MLF. However, the current text of MLF creates uncertainty in this respect[24].

Perhaps the most notable article of the MLF is Article 8, which states that contractual provisions prohibiting the transfer of receivables are invalid. According to the first paragraph of the article consisting of two paragraphs, agreements between the transferor and the debtor that limit the authority to transfer the receivable does not affect the validity of the transfer of the receivable. In parallel with the first paragraph, the second paragraph regulates that the transferor and the transferee cannot be held responsible for breach of an agreement referred under paragraph one. Furthermore, any third party who is not a party to the agreement referred in paragraph one cannot be held responsible even if it has the knowledge of that agreement. In addition, the debtor cannot avoid fulfilling his obligation by citing the transfer limitation.

MLF adopted a different approach to the transfer of receivables than the previous international legislation[25]. The main difference that should be emphasized is that in the MLF, the transferor cannot be held liable against the debtor in any way on the sole ground of breaching the transfer limitation. In the previous international legislation, it is accepted that the person who transfers the receivable in violation of an agreement is responsible to the debtor.

The reason for this difference is that there have been demands from the factoring sector and the purpose of preparing the model law is to facilitate and support the factoring activity in order to increase access to finance in the countries that will implement the model law[26]. In addition, sector representatives stated that granting the debtor the right to file a lawsuit against the transferor of the receivable would be incompatible with the purposes of establishing the MLF. According to those who argue in favor of the anti-assignment clauses, granting such a right to sue will create serious uncertainty and risk for those who will transfer their receivables in many jurisdictions, and will ultimately have a

[24]Regarding the use of electronic signature in factoring transactions, see Nasibeh Mohammadzadeh, Sadegh Dorry Nogoorani, and José Luis Muñoz-Tapia, 'Invoice factoring registration based on a public blockchain.' (2021) *IEEE access* 924221 ff.; Leora Klapper, 'The role of factoring for financing small oath medium enterprises.' (2006) 30(11) *Journal of banking & finance* 3111; Ronald L. Rivest, Adi Shamir and Leonardo Adleman, 'A method for obtaining digital signatures and public-key cryptosystems.' (1978) 21(2) *Communications of the ACM* 120 ff.
[25]See Receivables Convention article 9, MLST article 13, UNIDROIT Convention on International Factoring 1988 article 6.
[26]UNIDROIT, (n. 14) 12 paragraph 40.

hindering effect on factoring transactions[27]. It can be argued that such a sharp general anti-assignment regulation may cause problems when different types of receivables and different legal regimes are considered. As a response to this argument, it can be said that the scope of the receivables subject to MLF is limited. Secondly, in most of the cases in practice, where the agreement limiting the transfer of a receivable is breached, the debtor does not suffer losses[28]. This issue has also been discussed in English law, and after discussions, restriction on transfer of receivables has been lifted in the legislation for certain types of contracts[29]. Moreover, the fact that the transfer of receivables depending on immovable properties which may create controversy in various legal systems, is excluded in the MLF, and this may prevent the critiques against the MLF's anti-assignment approach to a large extent.

As a result of the strong support for an anti-assignment clause, which was shaped during the preparation of the model law, Article 8 is included in Article 3 among the articles that cannot be changed or removed by the will of the parties.

Article 7 (1) of the MLF dictates that the benefit of any personal and property right securing a receivable will be transferred to the transferee with the transfer of the receivable, and if a new transaction is required for this transfer under the governing law, this transaction must be carried out by the transferor. Article 7 (2) stipulates that the provisions of the agreement between the transferor and the debtor or another person that limit the transferee's acquisition of the rights securing the receivable are not applicable. In addition, Article 7 (2) is listed in Article 3 among the articles that cannot be changed or removed by the parties' will. However, it can be said that the content of Article 7 may cause some question marks and contradictions. First of all, while Article 8 is deemed as an article that parties cannot change or remove under Article 3 (1), it creates a contradiction that Article 7 (1) is not deemed as a provision of this nature. Secondly, another contradiction is created by listing Article 7 (2) in Article 3 as a provision that the parties cannot change or remove, but not including Article

[27]UNIDROIT, Summary Report of the First Session (August 2020) 20-23 paragraph 147-163 https://www.unidroit.org/english/documents/2020/study58a/wg01/s-58a-wg-01-04-rev01-e.pdf accessed 26 December 2023.
[28]Paul MacMahon. "Rethinking Assignability." (2020) 79(2) *The Cambridge Law Journal* 314.
[29]The Business Contract Terms (Assignment of Receivables) Regulations 2018, No. 1254.

7 (1). Although it is stated in Article 7 (1) that the transfer of guarantees will be performed together with the transfer of the receivable, the parties can make this provision inoperative if they wish. In case if Article 7 (1) is not rendered inoperative by the parties, then Article 7 (2) will automatically function and the contractual provisions limiting the transferee's acquisition of security rights will be deemed invalid. There arise the questions that why does Article 7 (1) is not listed in Article 3 (1) and why applicability of Article 7 (2) is left to the decision of the parties on the applicability of Article 7 (1).

2.3. Effectiveness of the Transfer of Receivables Against Third Parties and the Registry

Under MLF for the effectiveness of the transfer of receivables against third parties, notification of the transfer and its registration in the registry are deemed as mandatory (MLF Article 9)[30]. Though MLST includes the notification and registry system, the difference of MLF in this regard is that MLF requires both the notification and registration of the notice in the registry. The registration of notifications system is already implemented in some countries in factoring transactions but many other countries are unfamiliar with this system[31].

The policy reflected in Article 9 of MLF should be welcomed. Although there are different systems in this regard, the registration of the notices comes to the fore with its advantages in terms of transparency and security[32]. Therefore, it would not be appropriate to criticize the overall system choice[33]. On the other hand, there are issues that can be criticized in the context of the provisions regulating the registry. Among these provisions which are provided under Annex A of MLF, Article 3 attracts attention. Pursuant to Article 3 of Annexe A, registration of a single notice is deemed sufficient for multiple transfers. This article creates a contradiction when compared to Article 9. It is understood under Article 9 that a notice and its registration is required for each

[30] See MLF Chapter III, MLF Chapter IV, MLF Annex A.

[31] For an evaluation on a country basis, see Inessa Love, Maria Soledad Martínez Peria and Sandeep Singh, 'Collateral Registries for Movable Assets Does Their Introduction Spur Firms' Access to Bank Finance?' (2013) *Policies Research working Paper* accessed 8 December2024https://documents1.worldbank.org/curated/en/731881468314344960/pdf/WPS6477.pdf; Alejandro Alvarez de la Campa, 'IFC's Secured Transactions and Collateral Registries Program "Results Framework: Methods and Findings" https://www.ebrd.com/downloads/legal/secured/campa2m.pdf accessed 8 December 2024.

[32] Benito Arruñada, 'Registries' (2014) 1(2) *Man and the Economy* 209 ff.

[33] Regarding critiques of the registry system, see UNIDROIT, (n. 27) 28 paragraph 205-206.

receivable transfer to be effective against third parties. In response to these critiques, it was stated by the Working Group that Article 3 of Annexe A refers to the transfers between the same parties and these transfers can be made through registration of a single notice. The Working Group also decided to provide further explanation in the Guide to Enactment[34]. This approach of the Working Group cannot be approved. The provisions in a model law such as MLF must be clear, definite and free of ambiguity.

Another article that needs to be discussed among the articles regarding the registry is Article 4 of Annex A. In accordance to this article, the notice of transfer can be registered in the registry before the transfer of the receivable or the execution of the transfer agreement. In the discussions at the Working Group it is stated that the purpose of this article is to ensure the transfer of future receivables[35]. Nevertheless, this regulation may cause problems in practice. First of all, it is to be said that future receivables are being subject to factoring in many legal systems[36]. However, allowing prior registration of a notice of transfer of a future receivable will open the door to various abuses or disputes. The legal action that is to be performed in such a case must be a commitment to transfer[37]. We consider that in such cases, the data that should be registered in the registry is to be the commitment to transfer the receivable. Accordingly, after such a receivable comes into existence and the existing receivable is transferred through the transfer agreement or in the case that these cannot be realized, the articles on registration of an amendment or cancellation notice should be applied.

2.4. Priority Rights Arising from the Transfer of Receivables

The MLF regulates priority rights in the transfer of receivables under the system of registration of notices. However, neither the provisions regulating priority rights in receivable transfers nor the provisions regulating registry and registration in the registry are included in Article 3. In other words, the parties

[34]UNIDROIT, (n. 14) 28 paragraph 147.
[35]UNIDROIT, (n. 14) 28 paragraph 149.
[36]Bai Fangyao, 'On the Rules for Determining Pure Future Claims in Factoring Contracts' (2023) 4(3) *Modern Law Research* 7 ff.
[37]For detailed explanations on this issue see Orkun Akseli, Turkish Law and UNCITRAL's Work on the Assignment of Receivables with a Special Reference to the Assignment of Future Receivables' (2007) 1(1) *Law and Financial Markets Review* 45 ff.

can exclude the system of registry of notices. Moreover, any country that will adopt MLF may exclude the rules regarding the registry system. It should be stated that in such cases, the priority system of the MLF will be dysfunctional. Although the aim of the MLF is the acceptance of the model law in its entirety by the countries, there is risk especially for the countries which belong to a legal system distant from the approach of establishing a security registry[38].

It should also be acknowledged that the priority system based on registration may not operate effectively and successfully in some other cases. Examples of these include international factoring transactions and factoring transactions effecting property registered in different registries. It will not be difficult to predict the operational difficulties that may arise from different legislations and physical conditions in the context of international factoring transactions[39]. Although establishment of single central security registries by the countries is among the targets of MLF, in jurisdictions where such registries are not established, it is likely to encounter problems in determining priority, especially with regards to proceeds and security transfers which may require extra transactions in different registries[40].

2.5. Rights and Obligations of the Parties

In terms of problematic articles regarding this section, Article 23 should be addressed first. Under Article 23, regardless of whether the debtor is notified or not, in cases where the payment is made to the transferor, the transferee is entitled to be paid that amount by the transferor (paragraph b of Article 23), and in cases where the payment is made to a third party over whom the transferee has priority, the transferee is entitled to be paid that amount by the third party (paragraph c of Article 23). In contrast, under MLF Article 9 it is provisioned that, the validity of the transfer of receivable against a third party depends on the notification of transfer and its registration in the registry. In addition, Article 2 of Annex A provides that, the validity of such a registration depends on the written approval of the transferor. Thus, the text of the first paragraph of Article 23, stating that “whether the debtor is notified or not”, and especially the text of

[38]For the critiques made from the perspective of the laws of countries that are not familiar with the registry system, see UNIDROIT, (n. 7) 16 comment no 46, 56 comment no 180.
[39]On this subject, see also UNIDROIT, (n. 34) 28 paragraph 205.
[40]See also Spyridon V Bazinas, 'The desirability and feasibility of another uniform law on factoring' July/August (2020) *Butterworths Journal of International Banking and Financial Law* 467 ff.

paragraph c afterwards, seem incompatible with other articles and are likely to cause incorrect and/or contradictory interpretations[41].

Another problematic article appears to be Article 26 (7). This article regulates the debtor's right and obligation to control the transferee's authority in case it receives a notice therefrom. This obligation may cause problems in practice, since the debtor is faced with a difficult control duty and its situation is made unjustly more difficult than before. Alternatively, it might have been provisioned that the debtor would receive a notice from the first transferor, who is the debtor's main addressee, confirming the authorities of the subsequent transferees[42].

The last article under this section that needs to be emphasized is Article 29 (2-b). The meaning of the parts of its text including "the receivable is not fully earned by performance" and "in the context of that contract, a reasonable transferee would consent to the modification" are ambiguous and may lead to inconsistent and contradictory interpretations and practices affecting both the debtor and the transferee. Although it is explained by the UNIDROIT Secretariat that Article 29 (2-b) is compatible with Article 66(2)(b) of the MLST and Article 20(2)(b) of the Receivables Convention, this article should have been provisioned in a clearer way avoiding any such ambiguities[43].

2.6. Collection and Execution

There are a few problematic articles regarding this section that can be emphasized. In this context, Article 33 (2) attracts attention thus various questions may arise when this article is considered. Article 33 (2) states that the transferee can exercise its collection right before the default occurs if the transferor approves. First, the question that comes into mind is, isn't it actually the debtor who will default? Secondly how can the transferee have the right to collect with the approval of the transferee before the default occurs? Another question is, what the debtor's situation will be in case of collection of the debt

[41]On this subject, see also comments of Cairo University, Portuguese Association for Leasing, Factoring and Renting, FCI Legal Committee, The University of Sydney Law School, Unicredit Bank in UNIDROIT, (n. 9) 40, 58, 74, 93, 63.
[42]For critiques see comments of Portuguese Association for Leasing, Factoring and Renting in UNIDROIT, (n. 9) 58.
[43]For the UNIDROIT Secretariat statement, see UNIDROIT, (n. 7) 45, comment 148. For critiques see comment by ICC China in UNIDROIT, (n. 9) 12.

before default[44]. Although it has been clarified by the UNIDROIT Secretariat that this article is compatible with the MLST and that the reference is made to the default of the person under obligation other than the debtor, it should be emphasized that Article 33 (2) is not clear enough and may cause contradictory interpretations[45].

Another article reflecting weaknesses is Article 35 (1-b). According to this article, in case the transferee collects or sells the transferred receivable, the surplus shall be paid to the subordinate competing claimant who has notified the transferee of its claim, without prejudice to Article 35 (1-c). In contrast, under Article 35 (1-c), regardless of whether there is a legal dispute as to the entitlement or priority of any competing claimant in accordance with the rules of MLF, the transferee has the right to pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution in accordance with Article 35. Essentially, Article 35 (1-c) appears as a precautionary provision against the uncertainties that may arise from the implementation of Article 35 (1-b). However, some questions arise when these provisions are considered together. The first is how can the transferee determine precisely and without error that the subordinate competing claimant has the right of priority[46]? The answer to this question remains open. Even though in cases where some evidence is presented to the transferee, will it be possible to reach an error-free conclusion in every case? Another question is what will be the transferee's liability against the subordinate competing claimant having priority over the notifying subordinate competing claimant when it pays the surplus to the notifying one? There is also no clarity in the article on this issue.

2.7. Conflict of Laws

There is less issue that can be criticized under the heading of conflict of laws. Among those Article 44 needs to be examined in terms of its consequences. According to this article, courts may not apply the law authorized by the articles of conflict of laws of the MLF depending on mandatory provisions and/or public policy of the forum. At first glance, this article seems compatible

[44] See the comments of FCI Legal Committee and the Embassy of the Republic of Cyprus to Italy in UNIDROIT (n. 9) 74, 86.
[45]Secretariat response to comments 151, 152 in UNIDROIT, (n. 7) 47.
[46]Roy Goode, (n. 7) 49, comment no 163.

with other similar international legislation and reasonable in terms of legal grounds. However, as a consequence the provisions of the MLF will not be applicable including those excluded from party autonomy such as effectiveness and priority of a transfer of a receivable. Such a result means that the MLF will be completely dysfunctional. It can be commented that whether an alternative regulation could be considered that would gradually disable the MLF provisions in such cases.

3. Possible Effects of the UNIDROIT Factoring Model Law

In accordance to the four-part strategy regarding the implementation of the MLF, UNIDROIT will work for the international recognition of MLF as a tool that represents the best practice in the field of receivables financing, introduce MLF to organizations such as governments and NGOs through wide-ranging meetings, carry out efforts with partner organizations such as ADB, UNCITRAL and ILI to have MLF accepted by countries as a basis for reform projects in the field of finance and factoring law and make MLF broadly accessible[47].

As to the progress made by UNIDROIT in the context of recognition of the MLF, it has been declared by UNIDROIT that the MLF has been recognized as one of the three key pillars of the "Financial Inclusion in Trade Roadmap" (April 2023) prepared by the World Trade Board. Besides, the MLF has been recognized as an international standard in the field of receivables financing in the EBRD's New Finance Support Report (May 2023) [48].

Regarding the strategy announced by UNIDROIT for the recognition of the MLF, it can be said that this strategy seems reasonable for the promotion and implementation of an international model law such as MLF. However, at this stage the important issue is to evaluate the MLF's capacity to achieve the targeted goals rather than the content of the announced strategy.

As announced by UNIDROIT, within the period of 2023-2025 the preparation work for Guide to Enactment will be carried out[49]. This Guide to

[47]UNIDROIT, https://www.unidroit.org/instruments/factoring/model-law-on-factoring/model-law-on-factoring-implementation/ accessed 04 January 2023.
[48]World Trade Board, 'Financial Inclusion in Trade Roadmap' https://worldtradesymposium.com/sites/wts/files/file/2023-03/financial-inclusion-in-trade-roadmap-2023.pdf ; EBRD, 'New Finance Support' https://www.ebrd.com/what-we-do/sectors/legal-reform/access-to-finance.html accessed 04 January 2023.
[49]UNIDROIT, (n. 8).

Enactment will also be a factor that plays a role in the international adoption of the MLF.

Considering the few arguments for and against the MLF's possible influence in the international arena so far, it is too early to make judgments about the success or failure of the MLF[50]. On the other hand, the MLF as a soft-law instrument, does not impose any obligation that it must be adopted as a whole by the countries. In this respect, even the adaptation of only certain articles or sections of the MLF can be a criterion to measure its performance[51].

4. Conclusion

MLF is the result of a valuable work carried out within 2020-2023 with the participation of experts and industry representatives. Factoring occupies an important place in the global financial system and the MLF is a reference legislation in this field to be adopted especially by developing countries. In addition, it was an advantage for the MLF that its draft was opened to public opinion before the final text was accepted. However, despite all these facts, there are also problematic provisions in the MLF that may be subject to criticism.

In this context, it can be stated that the articles regulating the application of the MLF to receivables arising from immovable properties and financial receivables fall short. At least they could have been provisioned to include many more alternatives.

The most impressive regulation of the MLF is the article stating that contractual provisions regarding the prohibition of transfer of receivables are deemed ineffective. This rule is a reform that should be welcomed positively for the development of financial markets. Parallel to this rule, it is provisioned that the contractual provisions that prevent the transfer of the rights securing or supporting payment of a receivable are deemed ineffective. However, the fact that this rule is not among the articles that the parties cannot exclude by agreement has created a contradiction.

[50]Spyridon V Bazinas (n. 40) 47 ff.; William Brydie -Watson, 'The desirability and feasibility of another uniform law on factoring' August/September (2023) *Butterworths Journal of International Banking and Financial Law* 556 ff.
[51]William Brydie -Watson (n. 51) 560.

The articles on the validity of receivable transfers against third parties are compatible with previous legislation such as the MLST provided that especially the articles regulating operational matters and priority rights may cause problems in practice.

In the context of the articles regulating the rights and obligations of the parties, in particular those imposing on the transferee to notify the debtor and the debtor to control whether the transferee is authorized, may create potential problems.

As to the collection right, the transferee can exercise it before the occurrence of default if the transferor approves. This may cause contradictory interpretations and implementation problems. Similar arguments can be raised about the provision providing that where the subordinate competing claimant notified the transferee of its claim before the transferee collects or sells the receivable, the transferee must pay the surplus to that claimant.

The MLF may completely or partially be excluded by the judicial authorities, based on mandatory legal rules and public policy in the context of conflict of laws rules.

Although most of the critiques mentioned hereinabove can be eliminated during the preparation of the Guide to Enactment, it is too early to make a definitive judgment.

Finally, notwithstanding that the targets determined by UNIDROIT for the global acceptance and adoption of the MLF are significant, time will be decisive on its success.

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Data de submissão do artigo: 12/03/2024

Data de aprovação do artigo: 27/06/2024

Edição e propriedade:

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