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Draft Model Law on Secured Transactions

Note by the Secretariat

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Preamble

The purpose of this Law is:

- (a) To promote low-cost credit by enhancing the availability of secured credit;
- (b) To allow grantors to use the full value inherent in their assets to support credit;
- (c) To enable secured creditors to obtain security rights in a simple and efficient manner;
- (d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
- (e) To validate non-possessory security rights in all types of asset;
- (f) To enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry;
- (g) To establish clear and predictable priority rules;
- (h) To facilitate efficient enforcement of a creditor's rights;
- (i) To allow parties maximum flexibility to negotiate the terms of their security agreement;
- (j) To balance the interests of all affected persons; and
- (k) To harmonize secured transactions laws, including conflict-of-laws rules relating to secured transactions.

[Note to the Working Group: The Working Group may wish to consider whether the commentary to the draft Model Law should, in line with the mandate given to the Working Group by the Commission (see A/67/17, para. 105) clarify that the draft Model Law is intended to be a simple, short and concise model law to assist States in enacting the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the "Secured Transactions Guide"), consistent with and without replacing the Secured Transactions Guide.]

Chapter I. General provisions

Article 1. Scope of application

Option A

1. Subject to paragraph 3 of this article, this Law applies to all rights in movable assets created by agreement that secure payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, the type of the movable asset, the status of the grantor or secured creditor or the nature of the secured obligation, including:

- (a) Security rights in all types of movable asset, tangible or intangible, present or future, including inventory, equipment and other tangible assets, contractual and non-contractual receivables, and contractual non-monetary claims;

(b) Security rights created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection legislation;

(c) Security rights securing all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way; and

(d) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.

2. This Law also applies to:

(a) Security rights in proceeds of encumbered assets; and

(b) Subject to the exception provided in article 100, to outright transfers of receivables despite the fact that such transfers do not secure the payment or other performance of an obligation.

3. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to:

(a) Rights to payment of funds credited to a bank account;

(b) Rights to receive the proceeds under an independent undertaking;

(c) Negotiable instruments and negotiable documents;

(d) Aircraft, railway rolling stock, space objects, ships as well as other categories of mobile equipment in so far as such asset is covered by a national law or an international agreement to which the State enacting legislation based on these articles (herein referred to as “the State” or “this State”) is a party and the matters covered by this Law are addressed in that national law or international agreement;

(e) Intellectual property;

(f) Securities;

(g) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;

(h) Payment rights arising under or from foreign exchange transactions;

(i) With the exception of articles 11, 15, 27, 32, 55, 98, 99, 109 and 120, immovable property;

(j) Proceeds of an excluded type of asset even if the proceeds are of a type of asset to which this Law applies, but only to the extent that other law applies; and

(k) [Other exception(s) to be added by the enacting State].

Option B

1. This Law applies to security rights in goods, inventory, equipment and receivables.

2. The security rights to which this Law applies may:
 - (a) Be created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection legislation; and
 - (b) Secure all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way.
3. This Law also applies to:
 - (a) Security rights in proceeds of encumbered assets;
 - (b) Subject to the exception provided in article 100, to outright transfers of receivables despite the fact that such transfers do not secure the payment or other performance of an obligation; and
 - (c) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.

[Note to the Working Group: The Working Group may wish to note that option A is based on recommendation 2 of the Secured Transactions Guide, appropriately revised to exclude certain types of asset that are subject to asset-specific recommendations in line with the decision of the Commission to “prepare a simple, short and concise model law on secured transactions based on the general recommendations of the Secured Transactions Guide” (see A/67/17, para. 105). However, receivables are included pursuant to the decision of the Commission that the draft Model Law should be “consistent with all the texts prepared by UNCITRAL on secured transactions” (A/67/17, para. 105), including the United Nations Convention on the Assignment of Receivables in International Trade (the “United Nations Assignment Convention”). In view of the interdependence of receivables with goods, equipment and inventory, excluding receivables would result in the application of different laws where, for example, inventory was sold and converted to receivables that were in turn used to buy new inventory. This approach would tend to have a negative impact on the availability and the cost of credit. In this connection, the Working Group may wish to note that, while the Convention applies only to contractual receivables, in line with the recommendations of the Secured Transactions Guide, the draft Model Law applies to non-contractual receivables as well.]

In addition, the Working Group may wish to note that, to ensure that the draft Model Law is not inconsistent with the functional, integrated and comprehensive approach to secured transactions recommended in the Secured Transactions Guide (see chapter I, paras. 101-112). The commentary should explain that: (a) the draft Model Law is an economic way to implement the recommendations of the Secured Transactions Guide on core commercial assets (goods, equipment, inventory and receivables), without replacing the Secured Transactions Guide; and (b) States are encouraged to follow the functional, integrated and comprehensive approach and thus implement all the recommendations of the Secured Transactions Guide, including the asset specific, at least to the extent that they do not have any rules or modern rules on security rights in these types of asset.

Moreover, the Working Group may wish to note that option B is intended to reflect the same policy embodied in option A in a more economic way, that is, by referring directly to goods, equipment, inventory and receivables. This approach would make paragraph 3 and the relevant definitions of the terms included therein unnecessary.

If the Working Group decides to retain option A, it may wish to consider whether subparagraph 3 (j) is appropriate. For example, if intellectual property is sold for cash and the cash proceeds are used by the seller to buy inventory, the inventory would be proceeds of the intellectual property. Contrary to what subparagraph 3 (j) provides, the Working Group may wish to consider that the draft Model Law should apply to the inventory even if other law would cover the inventory (at least, in the case where the other law was insufficient, that is, for example, did not require registration of a notice in the general security rights registry). In addition, as a practical matter, subparagraph 3 (j) would require a secured creditor extending credit to a debtor against a security right in an encumbered asset to conduct an investigation into whether the encumbered asset is proceeds of assets that would not be subject to the draft Model Law. Such a rule would tend to increase the cost or reduce the availability of credit.]

Article 2. Definitions

For the purposes of this Law:

(a) “Acquisition secured creditor” means a secured creditor that has an acquisition security right. In the context of the unitary approach, the term includes a retention-of-title seller or financial lessor;

(b) “Acquisition security right” means a security right in goods, equipment or inventory that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the asset;

(c) “Assignee” means a person to which an assignment of a receivable is made;

(d) “Assignment” means the creation of a security right in a receivable that secures the payment or other performance of an obligation, including an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(e) “Assignor” means a person that makes an assignment of a receivable;

(f) “Attachment to a movable asset” means a tangible asset that is physically attached to another tangible asset but has not lost its separate identity;

(g) “Attachment to immovable property” means a tangible asset that is so physically attached to immovable property that, despite the fact that it has not lost its separate identity, it is treated as immovable property under the law of the State where the immovable property is located;

[Note to the Working Group: The Working Group may wish to note that the term “bank account” (and other types of asset not addressed in the draft Model law) and terms such as “insolvency court”, “insolvency estate” and “insolvency proceedings” have been deleted as they would normally be defined in other law of the enacting State, and not in its secured transactions law.]

(h) “Competing claimant” means a creditor of a grantor that is competing with another creditor of the grantor having a security right in an encumbered asset of the grantor and includes:

- (i) Another creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);
- (ii) The seller or financial lessor of the same encumbered asset that has retained title to it;
- (iii) Another creditor of the grantor that has a right in the same encumbered asset;
- (iv) The insolvency representative in the insolvency proceedings in respect of the grantor; or
- (v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset;

(i) “Consumer goods” means goods that a grantor uses or intends to use for personal, family or household purposes;

(j) “Debtor” means a person that owes performance of a secured obligation and includes a secondary obligor such as a guarantor of a secured obligation. The debtor may or may not be the person that creates the security right;

(k) “Debtor of the receivable” means a person liable for payment of a receivable and includes a guarantor or other person secondarily liable for payment of the receivable;

(l) “Encumbered asset” means a tangible or intangible asset that is subject to a security right. The term also includes a receivable that has been the subject of an outright transfer;

(m) “Equipment” means a tangible asset used by a person in the operation of its business;

(n) “Financial lease right” means a lessor’s right in a tangible asset (other than a negotiable instrument or negotiable document) that is the object of a lease agreement under which, at the end of the lease:

- (i) The lessee automatically becomes the owner of the asset that is the object of the lease;
- (ii) The lessee may acquire ownership of the asset by paying no more than a nominal price; or
- (iii) The asset has no more than a nominal residual value.

The term includes a hire-purchase agreement, even if not nominally referred to as a lease, provided that it meets the requirements of subparagraph (i), (ii) or (iii);

(o) “Grantor” means a person that creates a security right to secure either its own obligation or that of another person, including a retention-of-title buyer, financial lessee or an assignor in an outright transfer of a receivable;

(p) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) “Intangible asset” means all forms of movable assets other than tangible assets and includes incorporeal rights, receivables and rights to the performance of obligations other than receivables;

(r) “Inventory” means tangible assets held for sale or lease in the ordinary course of a grantor’s business, as well as raw and semi-processed materials (work-in-process);

(s) “Knowledge” means actual rather than constructive knowledge;

(t) “Mass or product” means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) “Notice” means a communication in writing;

[Note to the Working Group: The Working Group may wish to note that the commentary will refer to article 4 for the electronic equivalent of “writing” and “signed writing” and also to the term “notice” in the draft Registry Guide.]

(v) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivable and the assignee;

(w) “Original contract” means, in the context of a receivable created by contract, the contract between the assignor and the debtor of the receivable from which the receivable arises;

(x) “Possession” means the actual possession only of a tangible asset by a person or an agent or employee of that person, or by an independent person that acknowledges holding it for that person. It does not include non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession;

(y) “Priority” means the right of a person to derive the economic benefit of its security right in preference to a competing claimant;

(z) “Proceeds” means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset;

(aa) “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(bb) “Retention-of-title right” means a seller’s right in goods, equipment or inventory pursuant to an arrangement with the buyer by which ownership of the asset is not transferred (or is not transferred irrevocably) from the seller to the buyer until the unpaid portion of the purchase price is paid;

(cc) “Secured creditor” means a creditor that has a security right, including an assignee in an outright transfer of a receivable;

(dd) “Secured obligation” means an obligation secured by a security right;

(ee) “Secured transaction” means a transaction that creates a security right, including for convenience of reference an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(ff) “Security agreement” means an agreement, in whatever form or terminology, between a grantor and a creditor that creates a security right, including for convenience of reference an agreement for the outright transfer of a receivable, without re-characterizing it as a security agreement;

(gg) “Security right” means a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, including for convenience of reference the right of the assignee in an outright transfer of a receivable, without re-characterizing it as a security right and, [if the enacting State follows a unitary approach to acquisition financing, acquisition security rights and non-acquisition security rights] [but not a retention-of-title or financial lease right if the enacting State follows a non-unitary approach to acquisition financing]; and

(hh) “Tangible asset” means every form of corporeal movable asset, such as goods, inventory and equipment.

[Note to the Working Group: The Working Group may wish to note that the references to the unitary and non-unitary approach to secured transactions in the definitions contained in subparagraphs (a), (b), h (ii), (n), (o), (bb) have been deleted as it does not fit in a model law. The Working Group may wish to consider whether the unitary and the non-unitary approaches should be referred to within square brackets as is done in subparagraph (gg).]

Article 3. Party autonomy

1. Except as otherwise provided in articles 6, 7, 66, 79, 80, 103-132, 134-146, the secured creditor and the grantor or the debtor may derogate from or vary by agreement its provisions relating to their respective rights and obligations.
2. Such an agreement does not affect the rights of any person that is not a party to the agreement.

Article 4. Electronic communications

1. Where this Law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.

2. Where this Law requires that a communication or a contract should be signed by a person, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:

(a) A method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic communication; and

(b) The method used is either:

(i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or

(ii) Proven in fact to have fulfilled the functions described in subparagraph 2 (a) of this article, by itself or together with further evidence.

[Note to the Working Group: The Working Group may wish to note that, with respect to the substance of article 4, the commentary will refer to article 9, paragraphs 2 and 3, of the United Nations Convention on the Use of Electronic Communications in International Contracts.]
