



General Assembly

Distr.: General
17 March 2016

Original: English

**United Nations Commission
on International Trade Law**
Forty-ninth session
New York, 27 June-15 July 2016

Draft Model Law on Secured Transactions

Note by the Secretariat

Addendum

Contents

	<i>Page</i>
Chapter VIII. Conflict of laws	3
A. General rules	3
Article 82. Law applicable to the mutual rights and obligations of the grantor and the secured creditor	3
Article 83. Law applicable to a security right in a tangible asset	3
Article 84. Law applicable to a security right in an intangible asset	3
Article 85. Law applicable to a security right in a receivable relating to immovable property	3
Article 86. Law applicable to the enforcement of a security right	4
Article 87. Law applicable to a security right in proceeds of an encumbered asset	4
Article 88. Meaning of “location” of the grantor	4
Article 89. Relevant time for determining location	5
Article 90. Exclusion of <i>renvoi</i>	5
Article 91. Overriding mandatory rules and public policy (<i>ordre public</i>)	5
Article 92. Impact of commencement of insolvency proceedings on the law applicable to a security right	6



B.	Asset-specific rules	6
	Article 93. Law applicable to the rights and obligations between third-party obligors and secured creditors	6
	Article 94. Law applicable to a security right in a right to payment of funds credited to a bank account	6
	Article 95. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration	7
	Article 96. Law applicable to a security right in intellectual property	7
	Article 97. Law applicable to a security right in non-intermediated securities	7
	Article 98. Law applicable in the case of a multi-unit State	8
Chapter IX.	Transition	9
	Article 99. Amendment and repeal of other laws	9
	Article 100. General applicability of this Law	9
	Article 101. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law	9
	Article 102. Applicability of prior law to the creation of a prior security right	9
	Article 103. Transitional rules for determining the third-party effectiveness of a prior security right	9
	Article 104. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law	10
	Article 105. Entry into force of this Law	11

Chapter VIII. Conflict of laws¹

A. General rules

Article 82. Law applicable to the mutual rights and obligations of the grantor and the secured creditor

The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, the law governing the security agreement.

Article 83. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 and article 97, the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset is the law of the State in which the asset is located.

2. The law applicable to the priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located.

3. The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.

4. A security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a State other than the State in which it is located at that time may be created and made effective against third parties under:

(a) The law of the State of the location of the asset at the time of the putative creation of the security right; or

(b) The law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a short period of time to be specified by the enacting State] after the time of the putative creation of the security right.

Article 84. Law applicable to a security right in an intangible asset

Except as provided in articles 85 and 94-97, the law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.

Article 85. Law applicable to a security right in a receivable relating to immovable property

Notwithstanding article 84, in the case of a security right in a receivable that arises from the sale or lease of, or is secured by, immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which

¹ Depending on its legal tradition and drafting conventions, the enacting State may incorporate the provisions of this chapter in its secured transactions law (at the beginning or at the end of it) or in a separate law (civil code or other law).

rights in the relevant immovable may be registered is the law of the State under whose authority the immovable property registry is maintained.

[Note to the Commission: The Commission may wish to note that it may not be easy for a secured creditor with a security right in receivables to find out that they are secured by a mortgage and thus that a law other than the law of the grantor's location will apply to the priority competition with a mortgagee. The Commission may, therefore, wish to consider whether the rule in article 85 should be limited to receivables arising from the sale or lease of immovable property.]

Article 86. Law applicable to the enforcement of a security right

The law applicable to issues relating to the enforcement of a security right in:

(a) A tangible asset is the law of the State in which [enforcement takes place] [the encumbered asset is located at the time of commencement of enforcement], except as provided in article 97; and

(b) An intangible asset is the law applicable to the priority of the security right, except as provided in articles 94, 96 and 97.

[Note to the Commission: The Commission may wish to consider the options within square brackets in subparagraph (a) added pursuant to a decision of the Working Group (see A/CN.9/865, para. 90). In this connection, the Commission may wish to note that recommendation 218, subparagraph a, on which subparagraph (a) is based, refers to the place of enforcement (lex fori), as it would result to: (a) the law governing enforcement remedies coinciding with the law generally applicable to procedural issues; (b) the law governing remedies coinciding in many instances with the place in which the encumbered asset is located; and (c) the enforcement requirements being the same for enforcement by both domestic and foreign creditors (see Secured Transactions Guide, chap. X, para. 66).]

Article 87. Law applicable to a security right in proceeds of an encumbered asset

1. The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.

2. The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an original encumbered asset of the same kind as the proceeds.

Article 88. Meaning of “location” of the grantor

For the purposes of the provisions of this chapter, the grantor is located:

(a) In the State in which it has its place of business;

(b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and

(c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Article 89. Relevant time for determining location

1. Except as provided in paragraph 2, references to the location of the encumbered asset or of the grantor in the provisions of this chapter refer:

(a) For creation issues, to the location at the time of the putative creation of the security right; and

(b) For third-party effectiveness and priority issues, to the location at the time the issue arises.

2. If the right of a secured creditor in an encumbered asset is created and made effective against third parties and the rights of all competing claimants are established before a change in the location of the asset or the grantor, references in the provisions of this chapter to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change.

Article 90. Exclusion of *renvoi*

A reference in the provisions of this chapter to “the law” of a State as the law applicable to an issue refers to the law in force in that State other than its rules of private international law.

Article 91. Overriding mandatory rules and public policy (*ordre public*)

1. The provisions of this chapter do not prevent a court from applying overriding mandatory provisions of the law of the forum that apply irrespective of the law applicable under the provisions of this chapter.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.

3. A court may only exclude the application of a provision of the law applicable under the provisions of this chapter if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

4. The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State other than the State the law of which would be applicable under the provisions of this chapter.

5. This article does not prevent an arbitral tribunal from applying or taking into account public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law applicable under the provisions of this chapter, if the arbitral tribunal is required or entitled to do so.

6. This article does not permit a court to displace the provisions of this chapter dealing with the law applicable to the third-party effectiveness and priority of a security right.

Article 92. Impact of commencement of insolvency proceedings on the law applicable to a security right

The commencement of insolvency proceedings in respect of the grantor does not displace the law applicable to a security right under the provisions of this chapter.

B. Asset-specific rules

Article 93. Law applicable to the rights and obligations between third-party obligors and secured creditors

The law governing the rights and obligations between a debtor of a receivable, an obligor under a negotiable instrument or an issuer of a negotiable document and the grantor of a security right in these types of asset is the law applicable to:

- (a) The rights and obligations between the secured creditor and the debtor, obligor or issuer;
- (b) The conditions under which the security right may be invoked against the debtor, obligor or issuer, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor, obligor or issuer; and
- (c) Whether the obligations of the debtor, obligor or issuer have been discharged.

Article 94. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 95, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor, is

Option A²

The law of the State in which the depositary institution maintaining the account has its place of business.

2. If the depositary institution has places of business in more than one State, the law applicable is the law of the State in which the office maintaining the account is located.

Option B

The law of the State expressly stated in the account agreement as the State whose law governs the account agreement or, if the account agreement expressly provides that the law of another State is applicable to all such issues, the law of that other State.

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary institution has, at the time of the conclusion of the account agreement, an

² A State may adopt option A or B of this article.

office in that State that is engaged in the regular activity of maintaining bank accounts.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the default rules based on article 5 of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary to be inserted here by the enacting State].

Article 95. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

If the law of the State in which the grantor is located recognizes registration of a notice as a method for achieving effectiveness against third parties of a security right in a negotiable instrument, negotiable document, right to payment of funds credited to a bank account or certificated non-intermediated security, the law of that State also is the law applicable to the third-party effectiveness of the security right in that asset by registration.

Article 96. Law applicable to a security right in intellectual property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.

2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.

3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Article 97. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:

(a) The law applicable to the creation, effectiveness against third parties and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and

(b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which [enforcement takes place] [the securities are located at the time of commencement of enforcement].

[2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.]

[2. The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities.]

3. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in uncertificated non-intermediated securities, as

well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option C

1. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in non-intermediated equity securities, as well as to its effectiveness against the issuer, is the law under which the issuer is constituted.

2. The law applicable to the creation, the effectiveness against third parties, the priority and the enforcement of a security right in non-intermediated debt securities, as well as to its effectiveness against the issuer, is the law governing the securities.

[Note to the Commission: The Commission may wish to note that articles 93 and 94 refer to the rights and obligations between a third-party obligor and a secured creditor, while article 97 refers to the effectiveness of a security right in non-intermediated securities against the issuer. In this connection, the Commission may wish to consider whether these articles should be revised to use the same wording, and, if so, which wording should be used. In addition, the Commission may wish to consider whether the rights and obligations of a depositary bank and the effectiveness of a security right in non-intermediated securities against the issuer should be addressed in article 93 (to have the rights and obligations of all third-party obligors addressed in one and the same article) or in articles 94 and 97 (to have all bank account- and securities-related issues addressed in one article).]

Article 98. Law applicable in the case of a multi-unit State

1. Any reference in the provisions of this chapter to the law of a State that has two or more territorial units refers to the law in force in the relevant territorial unit.

2. The relevant territorial unit referred to in paragraph 1 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If the applicable law is the law in force in a territorial unit, the internal conflict-of-laws provisions in force in the territorial unit determine whether the substantive law provisions of the State or of a particular territorial unit of the State apply.

[Note to the Commission: The Commission may wish to consider a simplified version of this article that could read along the following lines: "If the law applicable to an issue is the law of a State that comprises one or more territorial units each of which has its own rules of law in respect of that issue: (a) any reference in the provisions of this chapter to the law of a State means the law in force in the relevant territorial unit; and (b) the internal conflict-of-laws rules of the

State, or in the absence of such rules, the law in force in that territorial unit determine the relevant territorial unit whose substantive law is to apply.”]

Chapter IX. Transition

Article 99. Amendment and repeal of other laws

1. [The laws to be specified by the enacting State] are repealed.
2. [The laws to be specified by the enacting State] are amended as follows [the text of the relevant amendments to be specified by the enacting State].

Article 100. General applicability of this Law

1. For the purposes of the provisions of this chapter:
 - (a) “Prior law” means [the law applicable under the conflict-of-laws rules of the enacting State] that applied to prior security rights immediately before the entry into force of this Law; and
 - (b) “Prior security right” means a right created by an agreement entered into before the entry into force of this Law that is a security right within the meaning of this Law and to which this Law would have applied if it had been in force when the right was created.
2. Except as otherwise provided in this chapter, this Law applies to all security rights, including prior security rights within its scope.

Article 101. Applicability of prior law to matters that are the subject of proceedings commenced before the entry into force of this Law

1. Subject to paragraph 2, prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Law.
2. If any step has been taken to enforce a prior security right before the entry into force of this Law, enforcement may continue under prior law or may proceed under this Law.

Article 102. Applicability of prior law to the creation of a prior security right

1. Prior law determines whether a prior security right was created.
2. A prior security right remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Law.

Article 103. Transitional rules for determining the third-party effectiveness of a prior security right

1. A prior security right that was effective against third parties under prior law at the time this Law entered into force continues to be effective against third parties under this Law until the earlier of:
 - (a) The time it would have ceased to be effective against third parties under prior law; and

(b) The expiration of [a period of time to be specified by the enacting State] after the entry into force of this Law.

2. If the third-party effectiveness requirements of this Law are satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right continues to be effective against third parties under this Law from the time when it was made effective against third parties under prior law.

3. If the third-party effectiveness requirements of this Law are not satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the prior security right is effective against third parties only from the time it is made effective against third parties under this Law.

4. A written agreement between a grantor and a secured creditor creating a prior security right is sufficient to constitute authorization by the grantor for the registration of a notice covering the assets described in that agreement under this Law.

Article 104. Application of prior law to the priority of a prior security right as against the rights of competing claimants arising under prior law

1. The time to be used for determining the priority of a prior security right is the time it became effective against third parties under prior law or, in the case of advance registration, became the subject of a registered notice under prior law.

2. The priority of a prior security right as against the rights of a competing claimant is determined by prior law if:

(a) The security right and the rights of all competing claimants arose before the entry into force of this Law; and

(b) The priority status of none of these rights has changed since the entry into force of this Law.

3. For the purposes of subparagraph 2(b), the priority status of a prior security right has changed only if:

(a) It was effective against third parties when this Law entered into force but ceased to be effective against third parties as provided in article 103, paragraph 3; or

(b) It was not effective against third parties under prior law when this Law entered into force, and only became effective against third parties under this Law.

[Note to the Commission: The Commission may wish to consider the content, the placement and the necessity of retaining paragraph 1, as (a) it may be inconsistent with article 103, paragraph 2; (b) its wording may be unclear; and (c) article 103 already addresses comprehensively the transitional rules for determining the time of third-party effectiveness of prior security rights for the purposes of applying the priority provisions of this Law. To address these concerns and as its content relates to article 103, paragraph 2, paragraph 1 could be placed at the end of article 103 and be revised to read along the following lines: "If a prior security right referred to in paragraph 2 was made effective against third parties by registration under prior law, the time of registration under prior law is the time to

be used for the purposes of applying the priority rules of this Law that refer to the time of registration of a security right.”]

Article 105. Entry into force of this Law

This Law enters into force [on the date or according to mechanism to be specified by the enacting State].
