United Nations A/CN.9/887

General Assembly

Distr.: General
26 May 2016
English
Original: English/French/Spanish

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

# Draft Model Law on Secured Transactions

## Compilation of comments

**Note by the Secretariat**

Contents



V.16-03099 (E) 070616 080616

# I. Introduction

1. At its twenty-eighth and twenty-ninth sessions (Vienna, 12-16 October 2015, and New York, 8-12 February 2016, respectively), Working Group VI (Security Interests) adopted a draft model law on secured transactions (the "draft Model Law") (A/CN.9/865 and A/CN.9/871) and, at its twenty-ninth session, decided to submit it to the Commission on the understanding that the Secretariat would make the text of the draft Model Law available to States for comment (A/CN.9/871, paragraph 91).

2. This note sets forth, with minimal editorial modifications, the second compilation of comments received from Governments (the first compilation is contained in document A/CN.9/886).

# II. Comments on the draft Model Law

## A. Canada

[Original: English]
Date: 16 May 2016

**Chapter I. Scope of application and general provisions**

3. Articles 1(2) and 2(k)(ii), (o)(iii), (dd)(ii), (ee), and (ii)(ii): We suggest: (a) deleting the square-bracketed text in article 1(2) and revising the remaining text as follows: "…, this Law applies to an agreement for the outright transfer of a receivable."; (b) retaining the square-bracketed text in articles 2(k)(ii), (o)(iii), (dd)(ii) and (ii)(ii) but clarifying the text to refer to an agreement for the outright transfer of a receivable (so as to confirm that the Law only applies to transfers effected by agreement versus operation of law and because the words "in an outright transfer of a receivable" are unclear); and (c) deleting the bracketed text in the definition of "secured obligation" in article 2(ee) (as it is unnecessary).

4. Article 2(c): We support retaining the text in the second set of square brackets.

5. Article 2(j): We support retaining the text in square brackets as this best reflects common drafting practice.

6. Article 2(o)(ii): We suggest: (a) deleting the reference to "lessee or licensee" as a lessee or licensee has only a right of possession or use and cannot be a grantor even when it acquires an encumbered asset subject to a security right; and (b) revising the definition to expressly limit the inclusion of a buyer or other transferee in the definition of grantor to those articles in which the term "grantor" is truly meant to include a transferee acquiring an encumbered asset from the initial grantor (for example, the articles relating to the creation of a security right and a grantor's liability for a post-enforcement deficiency should generally apply only to the initial grantor).

7. Article 2(r): We suggest revising the text after the word "including" to refer simply to "raw materials and work-in-process" (as the term "semi-processed materials" is included in the broader concept of "work-in-process").

8. Article 2(u), Note to the Commission: We support the suggestion to add a definition of "movable asset" to mean "a tangible or intangible asset other than immovable property" but we do not think the additional words "as defined by the enacting State" are necessary or appropriate.

9. Article 2(z): We support deleting the square-bracketed words "directly or indirectly" as their meaning is unclear and as the multimodal scenario referred to in the Note is adequately covered by the remaining wording.

10. Article 5: We support the inclusion of this article subject to the deletion from paragraph 1 of the reference to "the observance of good faith" (since, unlike the other UNCITRAL instruments from which this article is derived, article 4 of the Model Law recognizes a general obligation of good faith).

**Chapter II. Creation of a security right**

11. Article 6(3): We suggest deleting the words "[concluded in]" and retaining the words "evidenced by" as the latter wording best reflects our understanding of the intended substance of the article.

12. Article 8(a): We suggest deleting the words "including future assets" because: (a) "future assets" are not a "type" of movable asset but could involve any type of movable asset; and (b) article 6(2) already confirms that a security agreement may cover future assets.

13. Article 9(1): For simplicity of drafting, we suggest replacing the words "assets encumbered or to be encumbered" with the words "encumbered assets" (since, if the current wording is retained, it would be necessary to also use that wording in the many articles in which a reference to encumbered assets is meant to include future assets or assets that have not yet been encumbered because no security agreement has yet been concluded).

14. Article 11: We suggest that option A, para. 2, and option B, paras. 2 and 3, refer to "encumbered asset" and not "assets" (singular, not plural). We also note the overlap and inconsistency between article 11[3][4] and articles 31(2)-(3). To address the latter, we suggest that article 11[3][4] be deleted and articles 31(2)-(3) be revised in the manner suggested in our comment on article 31 below.

15. Article 14(2): To conform article 14 to article 10 of the United Nations Convention on the Assignment of Receivables in International Trade (the "Assignment Convention"), paragraph 2 should be revised to add the words "under the law governing it" following the word "transferable" in the first line.

**Chapter III. Effectiveness of a security right against third parties**

16. Article 18(1): For clarity, we suggest replacing the words "in the general security rights registry (the "Registry")" with the words "in the registry" and adding a definition of "registry" in article 2 to mean "the registry established under article 27 of this Law."

17. Article 19: While paragraph 2 incorporates the "identifiable" limitation in article 10, paragraph 1 does not do so even though it covers proceeds in the form of instruments and receivables where article 10 requires identifiability as opposed to traceability. For clarity and consistency, we suggest that the word "identifiable" in

paragraph 2 be deleted and that the opening words of paragraphs 1 and 2 be revised along the following lines: “If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of that asset that arises under article 10 is effective against third parties without any further act …”.

18. Article 19, Note to the Commission: We support the suggestion in the Note and suggest it could be implemented by wording along the following lines: “If a security right in a tangible asset is effective against third parties, a security right in a mass or product to which the security right extends under article 11 is effective against third parties without any further act”.

19. Article 22, Note to the Commission: We agree that the effectiveness of a security right against claimants whose rights arise during the grace period should be conditioned on the secured creditor making its security right effective against third parties before the expiry of that period. This result could be implemented by revising the text that comes after the words “chapter VIII” along the following lines: “… the security right remains effective against third parties under this Law if it is made effective against third parties in accordance with this Law before the earlier of …”.

20. Article 23: For clarity, we suggest that the bracketed text in option B be revised to refer to consumer goods “having an acquisition price below an amount to be specified by the enacting State” (as “value” is too vague). We also suggest that option B be revised to incorporate the special protection for buyers in option A as follows: “An acquisition security right in consumer goods [having an acquisition price below an amount to be specified by the enacting State] is effective against third parties, other than a buyer, upon its creation without any further act”.

### Chapter IV. The registry system

21. Article 27, title: For clarity, we suggest changing the title to “Establishment of the registry”.

### Draft Model Registry-related provisions

22. Article 6(2): We suggest deleting the word “mandatory”, since search requests, unlike notices, do not contain “mandatory” fields.

23. Article 7: We suggest that paragraphs 1 and 2 be relocated to article 5 as they relate to subparagraph 5(1)(b) and that the title then be changed to “Scrutiny of the form or contents of a notice by the Registry”.

24. Article 11: We suggest that: (a) paragraph 1 refer to “encumbered assets” not “assets encumbered or to be encumbered” (for the reasons stated in our comments on article 9 of the Law above); and (b) paragraph 2 refer to “generic category” not “particular category” (in order to align the wording with article 9 (2)).

25. Article 15: For clarity and correctness, we suggest subparagraph 2(b) be revised to refer to “the most recent address if known to or reasonably available to that person”.

26. Article 20(1): To align paragraph 1 with the policy in subparagraph 3(b), we suggest adding a new subparagraph 1(c) requiring a secured creditor to register an amendment notice deleting encumbered assets in a registered notice where: “The

grantor authorized the registration of a notice covering those assets but the authorization has been withdrawn and no security agreement covering those assets has been concluded".

27. Article 25: We suggest revising paragraph 2 to confirm that failure to register an amendment notice after a change in the identifier of the grantor within the grace period or at all does not prevent the secured creditor from claiming priority against a competing secured creditor or transferee on the basis of having obtained possession or control of the encumbered asset before their rights arise. To reflect this suggestion, and to further clarify the text of the entire article, we suggest dividing paragraph 2 into two paragraphs and revising article 25 along the following lines:

> "1. Subject to paragraphs 2 and 3, the third-party effectiveness and priority of a security right that was made effective against third parties by registration of a notice is not affected by a change in the identifier of the grantor after the notice is registered.
>
> 2. If the identifier of a grantor changes after a notice is registered, the registration of the notice is ineffective to give the security right to which the notice relates priority over a competing security right created by the grantor that was made effective against third parties after the change unless an amendment notice disclosing the new identifier of the grantor is registered:
>
> (a) Before the expiry of [a short period of time to be specified by the enacting State] after the change; or
>
> (b) If subparagraph (a) does not apply, before the competing security right is made effective against third parties.
>
> 3. If the identifier of a grantor changes after a notice is registered, the registration of the notice is ineffective to make the security right to which the notice relates effective against the right of a person to whom the grantor sells or otherwise transfers the encumbered asset after the change unless an amendment notice disclosing the new identifier of the grantor is registered:
>
> (a) Before the expiry of the period referred to subparagraph 2(a); or
>
> (b) If subparagraph (a) does not apply, before the encumbered asset is sold or otherwise transferred."

28. Article 26: We suggest revising paragraphs 1 and 2 in the same fashion and for the same reasons as suggested for article 25 above. We also suggest revising option B to require a secured creditor to register an amendment notice only if it acquires knowledge of the transfer and knowledge of the identifier of the transferee (since without knowing the transferee's identity, it would not be practically possible for it to take that step). We further suggest deleting the reference to subsequent transfers in option A (since the registered notice will be ineffective against a subsequent transferee of the initial transferee unless the secured creditor registers an amendment notice before the subsequent transfer occurs or before the expiry of the grace period). Finally, we suggest revising option B to clarify that if the asset is subject to subsequent transfers before the secured creditor finds out that it has been transferred, it is not required to take steps to preserve the effectiveness of its registered notice unless it has knowledge of the identifier of the most recent

transferee (since it would be practically pointless to register an amendment notice identifying a prior transferee). To reflect these suggestions, we suggest that article 26, options A and B, be revised along the following lines:

"1. Subject to [paragraphs 2 and 3 (Option A)] [paragraphs 2 to 4 (Option B], the third party effectiveness and priority of a security right in an encumbered asset that was made effective against third parties by registration of a notice is not affected by a transfer of the encumbered asset after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law.

2. If an encumbered asset covered by a registered notice is sold or otherwise transferred to a transferee that acquires its right subject to the security right to which the notice relates under article 32 of the Law, the registration of the notice is ineffective to give the security right priority as against a competing security right created by the transferee that is made effective against third parties after [the transfer (Option A)] [the secured creditor acquires knowledge of the transfer and the identifier of the transferee (Option B)] unless the secured creditor registers an amendment notice adding the transferee as a new grantor:

(a) Before the expiry of [a short period of time to be specified by the enacting State] after [the transfer (Option A)] [acquiring knowledge (Option B)]; or

(b) If subparagraph (a) does not apply, [before (Option A)] [after acquiring knowledge and before (Option B)] the competing security right is made effective against third parties.

3. If an encumbered asset covered by a registered notice is sold or otherwise transferred to a transferee that acquires its right subject to the security right to which the notice relates under article 32 of the Law, the registration of the notice is ineffective to make the security right effective against the right of a person to whom the transferee [subsequently (option A)] sells or otherwise transfers the encumbered asset [after the secured creditor acquires knowledge of the transfer and the identifier of the transferee (option B)] unless the secured creditor registers an amendment notice adding the transferee as a new grantor:

(a) Before the expiry of the period referred to subparagraph 2(a); or

(b) If subparagraph (a) does not apply, [before (Option A)] [after acquiring knowledge and before (Option B)] the transferee sells or otherwise transfers the encumbered asset.

[4. (Option B)] If there are one or more subsequent transfers of the encumbered asset before the secured creditor acquires knowledge of the transfer, the obligation to register an amendment notice under paragraphs 2 and 3 arises only if the secured creditor has knowledge of the identifier of the most recent transferee.]

[4. (Option A)] [5. (Option B)] The third party effectiveness and priority of a security right in intellectual property that was made effective against third parties by registration of a notice is not affected by a transfer of the

intellectual property after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law.”

29. To align the wording of Option C with the revised wording of articles 25(1) and 26(1) of Options A and B above, we suggest it be revised along the following lines:

“The third-party effectiveness and priority of a security right in an encumbered asset that is made effective against third parties by registration of a notice is not affected by a transfer of the asset after the notice is registered to a transferee that acquires its right subject to the security right under article 32 of the Law”.

**Chapter V. Priority of a security right**

30. Article 28: For clarity, we suggest that the title be changed to “Priority among competing security rights in the same encumbered asset”. To clarify the substance of paragraphs 1 and 3 and their relationship, we suggest that paragraph 3 be deleted and paragraph 1 be revised along the following lines:

“Subject to articles …., competing security rights created by the same grantor in the same encumbered asset rank in priority according to:

(a) The time of third-party effectiveness; and

(b) If a security right was made effective against third parties by registration of a notice in the Registry, the time of registration without regard to the time of creation of the security right.”

31. We also suggest that article 28 should only be made subject to articles 31, 36-37 and 39-41 (since articles 29-30, 32-35, 38 and 42 are not exceptions to article 28). We further suggest that paragraph 2 be made a separate article and the text be revised to: (a) state that priority is determined according to the rule in article 28 (as revised); and (b) clarify that it does not apply in the scenario where a pre-transfer secured creditor of a transferee of an encumbered asset claims priority on the basis of a security right covering after-acquired property that was made effective against third parties by registration before the transfer.

32. Article 29: To clarify the relationship of article 29 to article 28, we suggest that: (a) the opening words be revised to say that “the priority of competing security rights under article 28 is not affected …”; and (b) the title be revised to add the words “Priority among” at the beginning.

33. Article 30: To clarify its relationship with article 28, we suggest revising article 30 along the following lines: “A security right in proceeds of an encumbered asset that is effective against third parties under article 19 has the same priority as against a competing security right that the security right in the encumbered asset from which the proceeds arose has under article 28.” We also suggest that the title be changed to: “Priority of a security right in proceeds against competing security rights” (so as to cover the usual case in which a secured creditor claiming a proceeds security right is competing with a secured creditor claiming the proceeds as an original encumbered asset).

34. Article 31: To clarify its relationship with article 28, we suggest revising paragraph 1 along the following lines: “If two or more security rights in the same

tangible asset continue in a mass or product as provided in article 11, the priority of the security rights in the mass or product is the same as the priority that the security rights in the tangible assets had under article 28 immediately before the assets became part of the mass or product" (note that this wording assumes that the revision suggested in the Note to the Commission on article 19, above, is adopted.) To resolve the overlap and conflict between articles 31 and 11 noted in our comment on article 11 above, we suggest that article 11[3][4] be deleted and articles 31(2)-(3) be revised along the following lines:

> "2. If more than one security right extends to the same mass or product under article 11 and each was a security right in a separate tangible asset at the time of commingling, the secured creditors are entitled to share in the mass or product according to the ratio that the obligation secured by each security right bears to the sum of the obligations secured by all the security rights.
>
> 3. For the purposes of paragraph 2, the obligation secured by a security right that extends to the product or mass is limited to the value of the security right determined in accordance with article 11 [option A, para. 2 or option B, paras. 2-3]."

35. Article 35: For clarity and simplicity, we suggest that: (a) the opening clause of paragraph 1 need only say "Subject to article 38"; (b) the opening clause of sub-paragraph 2(a) be revised as follows: "Before or within [a short period of time to be specified by the enacting State] after the secured creditor receives a notice …"; and (c) the title be changed to: "Priority of a security right against the rights of the grantor's judgment creditors".

36. Article 36. For clarity and substantive correctness, we suggest: (a) changing the title to "Priority between acquisition and non-acquisition security rights"; (b) qualifying the exclusion of "consumer goods" and "and intellectual property or rights of a licensee under a licence of intellectual property that are used or intended to be used by the grantor primarily for personal, family or household purposes" in the opening clause of option A, paragraph 1 (so as to cover cases where the square bracketed text in option A, paragraph 3, is adopted by a State); (c) deleting the words "other than inventory or consumer goods" in option A, sub-paragraph 1(a) (since this exclusion is already stated in the opening clause); (d) deleting the words "or the agreement for the sale or licence of intellectual property has been concluded" from option A, subparagraphs 1(a) and 2(a), and option B, subparagraph 1(a) (as inconsistent with subparagraph 1(b)); (e) substituting the word "before" for the words "not later than" in option A, subparagraph 1(b), and option B, subparagraph 1(b) (for drafting consistency); (f) clarifying clause 2(b)(ii) of option A along the following lines: "the non-acquisition secured creditor that has registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind receives a notice from the acquisition secured creditor that states it has or intends to acquire an acquisition security right in the assets described in the notice and describes those assets sufficiently to enable the non-acquisition secured creditor to identify the assets that are or will be the object of the acquisition security right.";(g) revising option A, paragraph 3, as follows: "provided that the acquisition price of the asset is below [an amount to be specified by the enacting State]" (see our comment on article 23 above) and incorporating this same proviso at the end of paragraph 2 of option B; (h) qualifying the exclusion of "consumer goods and intellectual property or rights of a licensee under a licence of intellectual property

that are used or intended to be used by the grantor primarily for personal, family or household purposes" in option B, chapeau of paragraph 1 (so as to cover cases where the square-bracketed text in paragraph 3 of option A, which should be added also to paragraph 2 of option B, is adopted by a State); and (i) deleting the words "other than consumer goods" from option B, subparagraph 1(a) (since this exclusion is already stated in the opening clause).

37. Article 37: For clarity, we suggest: (a) adding the words "priority between" at the beginning of the title; and (b) replacing the words "over a competing acquisition security right of a secured creditor other than a seller or lessor, or a licensor of intellectual property" with the words "over a competing acquisition security right of a secured creditor who extended credit to enable the grantor to acquire rights in the encumbered asset" (since there cannot be more than one acquisition security right in favour of a seller, lessor, or licensor).

38. Article 39, option A: For clarity, drafting simplicity and correctness, we suggest that option A be revised along the following lines:

> "1. Subject to paragraph 2, a security right in proceeds of an encumbered asset in which the secured creditor has an acquisition security right has the same priority against a competing security right that the acquisition security right in the encumbered asset from which the proceeds arose has under article 36.
>
> 2. In the case of proceeds arising from an acquisition security right in inventory and intellectual property or the rights of a licensee under a licence of intellectual property that is held by the grantor for sale or licence in the ordinary course of the grantor's business:
>
> (a) Paragraph 1 does not apply if the proceeds take the form of receivables, negotiable instruments, or rights to payment of funds credited to a bank account; and
>
> (b) The priority of the security right under paragraph 1 in any other type of proceeds is conditional on the receipt by a competing non-acquisition secured creditor that registered a notice in the Registry with respect to a security right created by the grantor in an asset of the same kind as the proceeds of a notice from the acquisition secured creditor that states it has or intends to acquire an acquisition security right in assets of the same kind as the proceeds and describes those assets sufficiently to enable the non-acquisition secured creditor to identify the assets that are or will be the object of the acquisition security right."

**Chapter VI. Rights and obligations of the parties and third-party obligors**

39. Article 57(1): For clarity, we suggest that the words "to the debtor of the receivable" be added to the opening clause of paragraph 1. To conform paragraph 1 to article 14(1) of the Assignment Convention, we suggest: (a) deleting the words "delivery of" and replacing the word "grantor" with "secured creditor" in subparagraph 1(a); and (b) revising the first part of subparagraph 1(c) to say: "If payment is made or a tangible asset is returned to another person over whom the secured creditor has priority".

40. Article 59(2): For drafting consistency, we suggest replacing the words "original contract" in subparagraphs 2(a) and (b) with "contract giving rise to the receivable".

41. Article 60(4): To conform paragraph 4 with article 16 and the concept of "subsequent assignment" in article 2(b) of the Assignment Convention, we suggest it be revised as follows: "Notification of a security right in a receivable acquired by a secured creditor from an initial or subsequent secured creditor constitutes notification of all prior security rights in that receivable".

42. Article 61(5): To conform paragraph 5 with article 17(5) and the concept of "subsequent assignment" in article 2(b) of the Assignment Convention, we suggest that the words "created by a secured creditor that acquired its right from the initial or any other secured creditor" be replaced by the words "acquired by a secured creditor from the initial or any other secured creditor".

**Chapter VII. Enforcement of a security right**

43. Article 74(2): We suggest deleting paragraph 2 as it is in conflict with the general rule in article 79(2) and (4).

44. Article 76(4): We suggest deleting the references to "a short period of time" in subparagraph 4(b) and 4(c) as unnecessary and inappropriate.

45. Article 77: We suggest: (a) changing the title to "Distribution of the proceeds of disposition of an encumbered asset; debtor's liability for any deficiency" to more accurately reflect the substance of the article; and (b) replacing the term "shortfall" in paragraph 3 with the less colloquial term "deficiency".

46. Article 78: We suggest: (a) deleting the references to a "short period of time" in subparagraphs 1(b) and (c) as unnecessary and inappropriate; (b) aligning the wording of the first part of subparagraph 3(a) and the wording of article 76(5)(b); and (c) clarifying paragraph 4 by revising the text and dividing it into two paragraphs along the following lines:

> "4. A secured creditor that has made a proposal for the acquisition of an encumbered asset in full satisfaction of the secured obligation acquires the encumbered asset unless a person entitled to receive the proposal under paragraph 2 objects in writing before the expiry of [a short period of time to be specified by the enacting State] after the proposal is received by that person.
>
> 5. A secured creditor that has made a proposal for the acquisition of the encumbered asset in partial satisfaction of the secured obligation acquires the collateral only if it receives the affirmative consent in writing of all persons entitled to receive the proposal under paragraph 2 before the expiry of [a short period of time to be specified by the enacting State] after the proposal is received by each of them."

47. Article 79(1): We suggest deleting the words "except rights that have priority over the right of the enforcing secured creditor" in the square bracketed text as it is frequently the rule in the case of judicially ordered sales that the sale purges the asset of all encumbrances with the proceeds then distributed to claimants in order of priority.

48. New article: For clarity, we suggest adding a new article to chapter VII along the following lines: “If the maximum amount entered in an initial or amendment notice is lower than that indicated in the security agreement to which the notice relates, the security right to which the notice relates may be enforced only in respect of the amount entered in the registered notice”.

**Chapter VIII. Conflict of laws**

49. Article 83(4): We suggest deleting subparagraph (a) as it is a restatement of the general rule in paragraph (1).

50. Article 85, Note to the Commission: To avoid unduly limiting the scope of the rule in article 85, we suggest that the concern expressed in the Note could be addressed by excluding cases where the immovable property to which a receivable relates is not identified or identifiable in the contract giving rise to the receivable.

51. Article 86(a): We prefer the text in the second set of square brackets as it provides greater certainty and clarity whereas the alternative text fails to state a connecting factor.

52. Article 97: We suggest deleting option C as the distinction between equity and debt securities is uncertain in many instances (for example, convertible securities).

53. Article 98: We support replacing the current text with the text suggested in the Note to the Commission as we think it more clearly states the intended substance.

**Chapter IX. Transition**

54. Article 100(1)(b): We suggest deleting the word “security” in the second line to align with the term “right” in the first line.

55. Article 104(1): We suggest deleting paragraph 1 as its meaning is unclear and it conflicts with article 103. If it is retained, we support its revision and relocation in line with the suggestions made in the Note to the Commission.

## B. El Salvador

[Original: Spanish]
Date: 6 May 2016

**Chapter VII. Enforcement of a security right**

56. As discussed, the aim of article 72 of the Model Law, which is based on recommendation 137 of the Guide on Secured Transactions and is entitled “Relief for non-compliance”, is to indicate that any person whose rights are affected by the non-compliance of another person with its obligations under the provisions of chapter VII regarding the enforcement of a security right is entitled to apply for relief to a court or other authority.

57. Persons that may be affected by such non-compliance include the secured creditor, a guarantor or a co-owner of the encumbered assets and it is generally the enacting State that indicates the court or authority to which the party seeking relief should apply and the type of summary procedure applicable.

58. In this regard, we consider it appropriate to propose the inclusion of an article or paragraph on the use of the various forms of alternative dispute resolution, including the use of arbitration, online dispute resolution, mediation and conciliation, in the resolution of disputes over secured transactions.

59. The purpose of the inclusion of this article is to emphasize the importance of alternative dispute resolution in States and that it will serve as an incentive to introduce a system of secured transactions in countries that do not have one or to reform an existing system.

60. There are two main reasons why alternative dispute resolution is important. First, courts in many countries around the world do not resolve disputes in a timely manner. Second, slow legal proceedings become extremely expensive. Consequently, it is proven that prolonged and costly legal proceedings adversely affect the availability and the cost of credit.

61. In this regard, it is important to mention that many jurisdictions have developed alternative dispute resolution systems that have been much faster and more cost-effective than legal proceedings.

62. Article 68 of the Model Inter-American Law on Secured Transactions, adopted by the Organization of American States (OAS) in 2002, already provides for the use of arbitration in accordance with a security agreement. A number of jurisdictions expressly include article 68 of the OAS Model Inter-American Law in their legislation on secured transactions, including Colombia, Costa Rica, El Salvador and Honduras.

63. The fundamental importance of those systems in commercial transactions was also highlighted by many delegations at the 29th session of Working Group VI, including China, El Salvador and Sierra Leone.

64. In the specific case of El Salvador, article 64 of the Law on Secured Transactions establishes that the secured creditor may choose between an arbitration process, an extrajudicial process before a notary, or legal proceedings before a competent judge. These types of provision create a much more flexible and modern legal framework that enhances the value of moveable property, since a tool, other than judicial proceedings, is made available to the creditor to enforce a security or to provide conciliation in insolvency cases, this proving a less costly process, as is the case with enforcement proceedings through a notary.

65. Effective national commercial arbitration systems and mediation or conciliation are important to investors. Lawyers and business owners know that high costs and long delays can make the resolution of commercial disputes in courts difficult and expensive and may seek dispute resolution elsewhere, and companies may pass the costs on to consumers or refrain from investing in a jurisdiction.

66. In its current wording, the Model Law does not mention the use of alternative dispute resolution as an alternative to litigation in resolving disputes over secured transactions. Mention of these procedures in an article of the Model Law will draw the attention of investors to the parties' option of using them as it will be much more effective emphasizing their importance in the context of secured transactions.

67. Taking into account that there may be proposals from other delegations and to conclude this point, we suggest drafting the article along the following lines:

> "The secured creditor may use alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution, to resolve any dispute arising between them in connection with the exercise of rights or performance of obligations under the security agreement or [the present law] [any applicable law].

68. We consider that the need for a prior agreement between the parties to authorize such alternative measures will depend on each State and the special laws governing them.

69. Article 73 of the Model Law, which is based on recommendation 140 of the Guide on Secured Transactions and is entitled "Right of affected persons to terminate enforcement", states that any person whose rights are affected by the enforcement process is entitled to terminate the enforcement process by paying or otherwise performing the secured obligation in full. This provision is based on the assumption that the residual value of the asset is higher than the outstanding part of the secured obligation.

70. On this point the delegation of El Salvador also discussed the need to add a subparagraph that will allow the creditor to terminate the enforcement process by means of partial payment or another form of full compliance, as there is the possibility that the secured creditor may reach an extrajudicial settlement with the debtor with partial payment, provided that the creditor is satisfied and there is a written agreement between them based on autonomy of the parties and freedom of contract.

71. With no further comments of relevance, the delegation of El Salvador commends the Secretariat of the United Nations Commission on International Trade Law on the drafting of the document presented and the excellent work carried out by the Organization.

## C. Spain

[Original: Spanish]
Date: 25 May 2016

**Name of the draft Model Law on Secured Transactions**

72. In both the last and all the previous versions, the text in Spanish was entitled "Ley de operaciones garantizadas". The delegation of the Kingdom of Spain hereby submits for consideration by the Commission a change of the name of the Model Law in the Spanish language. The proposed name is: "Ley Modelo sobre Garantías Reales Mobiliarias".

73. Rationale: The title we propose to change is a literal translation of the English title "Model Law on Secured Transactions". The English term "secured transactions" has been and continues to be widely used in the legal field, both in practice, in academia and in legislative activity. Such prolific use has endowed it with a meaning that is unequivocal. The situation is, however, quite different as

regards its literal translation into Spanish. The term “operaciones garantizadas” neither has been nor is commonly used, nor has it acquired an unequivocal meaning nor, finally, is it a term that serves accurately to describe the content of the document. The Model Law deals only with security rights in moveable property, but in Spanish, “operaciones garantizadas” can refer to both movable and immovable property. Furthermore, in Spanish, “operaciones garantizadas” can signify both those transactions whose performance is secured by a right in rem (pledge, mortgage, etc.) and those that rely on a credit claim against a third party (bond, guarantee). The Model Law does not regulate the latter, thereby misleading the reader about the content of the regulations.

**Draft Model Registry-related provisions**

74. Article 5.4 provides that, if access to the Registry is refused, the reason must be communicated to the registrant or searcher “without delay”. We propose that “without delay” be replaced by the following: “within the time limit established by each State, which may not exceed [...] days”; and that a statement be included in the Implementation Guide indicating that the time limit should be as short as possible. The same is proposed for articles 6.4 and 13.2.

75. Rationale: The term “without delay” is highly inaccurate for use in a legal document.

76. It appears appropriate to add a paragraph (c) to article 6.1, stating: “In no case may a registrable form or document or its agreements added voluntarily by grantors contradict peremptory norms”.

77. Rationale: It appears appropriate to establish the need for that which is entered in the registry to be consistent with the applicable substantive rules, without prejudice to registration on the basis of models that have been pre-established and approved by the competent administrative authority, as grantors should be allowed to agree on or establish the specificities that best suit or interest them.

78. With regard to article 13, the following suggestions are made: (a) Replace the reference to “fecha y hora” [“date and time”] in Spanish with “momento temporal preciso” [precise time] since, given that the record should be fully electronic, the time will be fixed in its authentic form. Note that, in Spanish, “hora” [hour or time] is not necessarily the equivalent of “time”. It could be misleading, giving the impression that it is sufficient to note the hour without making reference to minutes or seconds; and (b) Since an “initial notice” or “notice” may be rejected, effectiveness should refer to the time of entry of the notice in the Registry and not the time of its entry into the registry record.

79. Article 22 sets out search criteria limiting them to data regarding the grantor or registration. We propose adding a paragraph (c) to read:

> “(c) Data identifying the assets given as security, provided that the nature of those assets allows them to be thus identified.”

80. Rationale: It appears reasonable that, in the case of an asset registry, albeit essentially documentary in nature, a search of the registry record may also be carried out using such identification data, given that much movable property is provided with identifiers that persist throughout its economic life.

## D. Switzerland

[Original: French]
Date: 23 May 2016

81. Switzerland welcomes the fact that the draft Model Law on Secured Transactions has been approved by Working Group VI (Security Interests) and that it has been submitted to the United Nations Commission on International Trade Law with a view to adoption at its forty-ninth session.

82. Switzerland pays tribute to the high quality work accomplished by Working Group VI: the Model Law is a remarkable step forward in the area of security rights and will undoubtedly serve as a highly useful source of inspiration for States wishing to establish a modern and effective legal regime in the matter.

83. However, it should be pointed out that the draft includes a not inconsiderable number of provisions, some of which are of a relatively high level of sophistication; it might have been desirable for the Model Law to reflect more closely the Commission's express wish for a simple, short and concise text. Moreover, one may wonder why the draft Model Law retains solely the unitary approach to acquisition security rights, abandoning the non-unitary approach, which is also proposed by the UNCITRAL Legislative Guide on Secured Transactions; each of these approaches still has its merits and it would have been preferable for the Model Law to have taken that fact into account.

84. In addition, Switzerland, after a careful analysis of the draft Model Law, submits to the Commission for its consideration the following three suggestions.

85. Under article 52 of the draft Model Law, a secured creditor in possession of an encumbered asset must return the asset to the grantor upon extinction of the security right. Pursuant to article 3, paragraph 1, of the draft Model Law, that rule is binding.

86. It is unclear, however, why the Parties should not be at liberty to derogate from the rule. Firstly, the encumbered asset may belong not to the grantor but to a third party; in such circumstances, the Parties should be able to agree that the creditor must return the asset to the owner (and not to the grantor) upon extinction of the security right. It may also be the case that the grantor intends to leave the encumbered asset in the possession of the creditor notwithstanding the extinction of the security right: why could the Parties not, for example, agree that an encumbered painting will remain deposited with the creditor once the security right is extinguished? Moreover, the asset may be encumbered with another (subordinate) security right; the Parties should be able to agree, in such a situation, that the creditor in possession must return the asset to the creditor for the benefit of the other (subordinate) security right upon extinction of its security right.

87. While article 52 provides a rule that is appropriate for the majority of cases, it is clear from the foregoing examples, however, that there are situations in which the Parties have a legitimate interest in choosing an alternative solution. In the view of Switzerland, it would be appropriate, therefore, to remove article 52 from the list of provisions from which the parties cannot derogate.

88. Article 77, paragraph 2, subparagraph (b), provides that the enforcing secured creditor must pay any surplus (after payment of its claim) to any competing claimants and remit any balance remaining to the grantor.

89. This process can only function satisfactorily, however, if the secured creditor duly reports on how it applies the proceeds of enforcement; a detailed account should be provided not only to the grantor of the security right (cf. article 77, paragraph 2, subparagraph (b)) but also to any third-party debtor (article 77, paragraph 3), as well as to any subordinate competing claimants (article 77, paragraph 2, subparagraph (b)).

90. It would be useful, therefore, if article 77 of the Model Law specified that the creditor was obliged to report to the grantor, the debtor and any subordinate competing claimant on the distribution of the proceeds of a disposition of an encumbered asset.

91. In chapter VIII on conflicts of law, article 83, paragraph 1, of the draft Model Law makes the creation, effectiveness against third parties and priority of a security right in a tangible asset subject to the law of the State in which the asset is located. The application of lex situs is not always justified, however: location may be of no significance for the secured transaction in question; it may also be the case that the Parties do not exclude relocating the encumbered object, without such relocation presenting the degree of certainty required for the application of article 83, paragraph 4 (res in transitu, etc.).

92. The Commission might therefore consider whether it would be appropriate to grant the parties a degree of freedom to decide in the matter. Thus, it might consider adding to the Model Law a rule stating that the Parties are at liberty to submit matters referred to in article 83, paragraph 1, to the law governing the rights and obligations arising from the security agreement (i.e., in principle, the law chosen by the Parties — article 82). That would allow the Parties to settle in their best interests the aforementioned situations. If necessary, the rule could provide that such choice of law is not effective against third parties, the latter being thus able to invoke the normally applicable law (i.e., in principle, lex situs).