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**Draft Model Law on Secured Transactions**

**Note by the Secretariat**

**Addendum**

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## Annex I. Acquisition financing<sup>1</sup>

### Option A: Unitary approach

*[Note to the Working Group: The Working Group may wish to note that, as noted in footnote 1 (which may be retained in the final text of the Model Law), the provisions on acquisition financing are presented in an annex to emphasize that a State may implement them either by including them in a separate chapter (as in the Secured Transactions Guide) or by integrating them into the relevant chapters. The Working Group may wish to consider whether this is the best way to present the provisions on acquisition financing, or whether the provisions on acquisition financing should be included in a separate chapter or integrated into the relevant chapter of the draft Model Law (perhaps at the end to avoid the numbering problem arising as a result of the fact that the number of articles of each approach is different).]*

#### Definitions

(a) “Acquisition secured creditor” means a secured creditor that has an acquisition security right. The term includes a retention-of-title seller or financial lessor;

(b) “Acquisition security right” means a security right in a tangible asset [or intellectual property] 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. The term includes a retention-of-title right or a financial lease right;

(c) The term “security right” includes an acquisition security right.<sup>2</sup>

*[Note to the Working Group: If the Working Group decides that the draft Model Law should apply to security rights in intellectual property, it may wish to retain the bracketed text in the definition of the term “acquisition security right”. The Working Group may also wish to consider replacing the words “to enable” with the words “that enable” in that definition to ensure that a security right qualifies as an acquisition security right only if credit provided for the acquisition of an asset is in fact used for that purpose.]*

#### Article 1. Third-party effectiveness of an acquisition security right in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation.

<sup>1</sup> The provisions on acquisition financing are a necessary part of the draft Model Law. They are presented in an annex to emphasize that a State may implement them either as a separate chapter (in which case the articles outside the chapter on acquisition financing would be generally applicable except to the extent modified by the articles in the chapter on acquisition financing) or by integrating them into the relevant chapters of the draft Model Law. A State may adopt option A (unitary approach) or option B (non-unitary approach).

<sup>2</sup> A State that decides to follow a unitary approach may wish to include this wording in article 2, subparagraph (cc).

## Article 2. Priority of an acquisition security right<sup>3</sup>

### Alternative A

Except as provided in article 54:

(a) An acquisition security right in a tangible asset other than inventory or consumer goods has priority as against a competing non-acquisition security right created by the grantor, provided that:

- (i) The acquisition secured creditor retains possession of the asset; or
- (ii) A notice with respect to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting States] after the grantor obtains possession of the asset;

(b) An acquisition security right in inventory has priority as against a competing non-acquisition security right created by the grantor, provided that:

- (i) The acquisition secured creditor retains possession of the inventory; or
- (ii) Before delivery of the inventory to the grantor:
  - a. A notice with respect to the acquisition security right is registered in the general security rights registry; and
  - b. Another notice is received by a secured creditor with an earlier-registered non-acquisition security right created by the grantor in inventory of the same kind, stating that the acquisition secured creditor has or intends to acquire an acquisition security right and describing the inventory sufficiently to enable the non-acquisition secured creditor to identify the inventory that is the object of the acquisition security right;

(c) A notice, sent pursuant to subparagraph (b) (ii) b. of this article, may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights in tangible assets of which the grantor obtains possession within a period of [a period of time, such as five years, to be specified by the enacting State] after the notice is [sent] [received]; and

(d) An acquisition security right in consumer goods has priority as against a competing non-acquisition security right created by the grantor.

### Alternative B

Except as provided in article 54:

(a) An acquisition security right in a tangible asset other than consumer goods has priority as against a competing non-acquisition security right created by the grantor, even if a notice of that security right was registered in the general security rights registry before registration of a notice of the acquisition security right, provided that:

- (i) The acquisition secured creditor retains possession of the asset; or

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<sup>3</sup> A State may adopt alternative A or alternative B of this article.

(ii) A notice with respect to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] after the grantor obtains possession of the asset; and

(b) An acquisition security right in consumer goods has priority as against a competing non-acquisition security right created by the grantor.

*[Note to the Working Group: The Working Group may wish to note that subparagraph (b) (ii) b. of this article refers to a notice received by an earlier registered inventory financier and consider whether this formulation is better than the formulation of the same subparagraph in recommendation 180 of the Secured Transactions Guide on which this subparagraph is based and which referred to an earlier registered inventory financier being “notified”. The Working Group may also wish to consider that the receipt rule should apply to any notice sent to a person under the draft Model Law (e.g., article 5, Alternative A, paragraph 3 below).]*

### **Article 3. Priority among acquisition security rights**

1. Subject to paragraph 2 of this article, the priority between competing acquisition security rights is determined according to the general priority rules in chapter V.

2. An acquisition security right of a retention-of-title seller that was made effective against third parties within the period specified in article 3, subparagraph (a) (ii), has priority as against a competing acquisition security right of a secured creditor other than a retention-of-title seller.

### **Article 4. Priority of an acquisition security right as against the right of a judgement creditor**

Notwithstanding article 50, an acquisition security right that is made effective against third parties within the period specified in article 3 subparagraph (a) (ii), has priority as against the rights of a judgement creditor.

### **Article 5. Priority of an acquisition security right in proceeds of a tangible asset<sup>4</sup>**

#### **Alternative A**

1. The priority of an acquisition security right in proceeds of a tangible asset other than inventory or consumer goods extends to the proceeds of that asset.

2. The priority of an acquisition security right in inventory extends to the proceeds of that inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive the proceeds under an independent undertaking.

3. The priority of an acquisition security right in proceeds under paragraph 1 or 2 of this article is conditional on secured creditors receiving a notice from the

<sup>4</sup> A State may adopt alternative A of this article, if it adopts alternative A of article 2, or alternative B of this article if it adopts alternative B of article 2.

acquisition secured creditor stating that, before the proceeds arose, it registered a notice with respect to a security right in assets of the same kind as the proceeds.

### **Alternative B**

The priority of an acquisition security right in a tangible asset does not extend to the proceeds.

*[Note to the Working Group: The Working Group may wish to note that article 5 addresses the question whether an acquisition security right in proceeds has the special priority of an acquisition security right or the general priority of a non-acquisition security right. The Working Group may wish to consider whether an article should be included in the draft Model Law (perhaps in article 53) to explicitly address the question of the priority of a security right in an asset extending to the proceeds of that asset. The Working Group may also wish to note that no article has been included to deal with the application of these special priority rules in the case of insolvency (recommendation 186) as it goes without saying that insolvency law operates against the background of secured transactions law and that there is nothing in these articles to imply otherwise.]*

### **Option B: Non-unitary approach**

*[Note to the Working Group: The Working Group may wish to note that recommendations 187 (methods of acquisition financing) and 188 (equivalence of a retention-of-title right and a financial lease right to an acquisition security right) have not been reflected in an article of the draft Model Law as they do not seem to be suitable for a legislative text. A State enacting the non-unitary approach would instead incorporate the text of the unitary approach above into its law, while clarifying that it does not apply to creditor's rights that take the form of retention-of-title or financial lease rights and go on to also incorporate into its law the provisions below on retention-of-title and financial lease rights.]*

#### **Definitions**

(a) "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 term 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);

(b) "Retention-of-title right" means a seller's right in a tangible asset (other than a negotiable instrument or negotiable document) 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; and

(c) The terms “security right” and “acquisition security right” do not include a retention-of-title or financial lease right.<sup>5</sup>

*[Note to the Working Group: The Working Group may wish to consider whether the right of the lessee to buy the asset at a nominal price should exist at any time and not only at the end of the lease as provided in subparagraph (a)(ii).]*

### **Article 1. Right of buyer or lessee to create a security right**

1. A buyer or lessee may create a security right in a tangible asset that is the object of a retention-of-title right or a financial lease right.
2. The maximum amount for which the security right may be enforced is the value of the asset in excess of the amount owing to the seller or financial lessor at the time of enforcement.

### **Article 2. Effectiveness of a retention-of-title right or a financial lease right<sup>6</sup>**

#### **Alternative A**

1. A retention-of-title right or a financial lease right in tangible assets other than inventory or consumer goods is effective only if the sale or lease agreement is concluded in or evidenced by a writing that meets the requirements of article 6 of this Law; and
  - (a) The seller or lessor retains possession of the asset; or
  - (b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the buyer or lessee obtains possession of the asset.
2. A retention-of-title right or a financial lease right in inventory is effective against third parties only if:
  - (a) The seller or lessor retains possession of the inventory; or
  - (b) Before delivery of the inventory to the buyer or lessee:
    - (i) A notice relating to the right is registered in the general security rights registry; and
    - (ii) Another notice is sent by the seller or lessor to a secured creditor with an earlier registered non-acquisition security right created by the buyer or lessee in inventory of the same kind, stating that the seller or lessor has or intends to acquire a retention-of-title right or a financial lease right and describing the inventory sufficiently to enable the secured creditor to identify the inventory that is the object of the retention-of-title right or the financial lease right.
3. A retention-of-title right or a financial lease right in consumer goods is effective against third parties upon conclusion of the sale or lease agreement.

<sup>5</sup> A State that decides to follow a non-unitary approach may wish to include this wording in the definitions of “security right” and “acquisition security right”.

<sup>6</sup> A State may adopt alternative A or alternative B of this article.

4. A notice sent pursuant to subparagraph 2 (b) (ii) of this article may cover retention-of-title rights and financial lease rights under multiple transactions between the same parties without the need to identify each transaction. The notice is effective only for rights in tangible assets of which the buyer or lessee obtains possession within a period of [a period of time, such as five years, to be specified] years after the notice is [sent] [received].

**Alternative B**

1. A retention-of-title right or a financial lease right in a tangible asset other than consumer goods is effective only if the sale or lease agreement is concluded in or evidenced by a writing that meets the requirements of article 6 of this Law and:

(a) The seller or lessor retains possession of the asset; or

(b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] after the buyer or lessee obtains possession of the asset.

2. A retention-of-title right or a financial lease right in consumer goods is effective against third parties upon conclusion of the sale or lease agreement.

*[Note to the Working Group: The Working Group may wish to note that this article deals with effectiveness of a retention-of-title or financial lease right against all, as States that may wish to follow the non-unitary approach will normally know only the erga omnes effect of a retention-of-title or financial lease right. The Working Group may also wish to note that the thrust of recommendation 189 of the Secured Transactions Guide has been included in paragraph 1 of this article, slightly revised to refer to the contents of a security agreement under article 6 of the draft Model Law. The Working Group may wish to consider whether this article or the commentary should clarify that, if a retention-of-title right is not effective, ownership passes to the buyer (without the retention of title).]*

**Article 3. One registration sufficient**

1. Registration of a single notice in the general security rights registry is sufficient with respect to a retention-of-title right or a financial lease right under multiple transactions between the same parties, whether concluded before or after the registration, which involve tangible assets that fall within the description contained in the notice.

2. The provisions of this Law on the registry system apply to the registration of a retention-of-title right and a financial lease right.

**Article 4. Effect of failure to achieve the timely effectiveness of a retention-of-title right or a financial lease right**

If a retention-of-title right or a financial lease right in a tangible asset is not made effective within [the time period provided in Alternative A of article 2, subparagraph 1 (b), or Alternative B of article 2, subparagraph 1 (b)], upon expiry of that period, ownership of the asset passes to the buyer or lessee, and the seller or lessor has a security right in the asset subject to the provisions of this Law applicable to security rights.

*[Note to the Working Group: The Working Group may wish to note that this article has been revised on the basis of explanations given in the commentary (paragraph 181) of chapter IX of the Secured Transactions Guide.]*

**Article 5. Existence of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right**

A seller or lessor with a retention-of-title right or financial lease right in a tangible asset has a security right in any proceeds of the asset.

**Article 6. Third-party effectiveness of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right**

1. A security right in proceeds referred to in article 5 is effective against third parties only if a description of the proceeds in conformity with article 32 is included in the registered notice or the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. In a case not within paragraph 1 of this article, the security right in the proceeds is effective against third parties for [a short period of time, such as thirty days, to be specified by the enacting State] after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in chapter III of this Law before the expiry of that time period.

**Article 7. Priority of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right<sup>7</sup>**

**Alternative A**

1. If a retention-of-title right or financial lease right in a tangible asset other than inventory or consumer goods is effective, the security right in proceeds referred to in article 5 has priority as against another security right in the same asset.
2. If a retention-of-title right or financial lease right in inventory is effective, the seller's or lessor's security right in the proceeds of the inventory referred to in article 5 has priority over any other security right in the inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account and rights to receive the proceeds under an independent undertaking.
3. The priority referred to in paragraph 2 of this article is conditional on secured creditors that have registered a notice with respect to a security right in assets of the same kind as the proceeds receiving a notice from the seller or lessor stating that, before the proceeds arose, the seller or lessor acquired a security right in the proceeds.

**Alternative B**

If a retention-of-title right or financial lease right in a tangible asset is effective, the priority of the security right in the proceeds of that asset referred to in article 5 is determined on the basis of the general rules of chapter V of this Law.

<sup>7</sup> A State may adopt alternative A of this article, if it adopts alternative A of article 5, or alternative B of this article, if it adopts alternative B of article 5.

**Article 8. Enforcement of a retention-of-title right or a financial lease right**

1. Chapter VI of this Law applies to the enforcement of a retention-of-title right or a financial lease right [the enacting State may wish to specify any exceptions necessary to preserve the regime applicable to sales and financial leases].

*[Note to the Working Group: The Working Group may wish to note that the bracketed text is intended to draw the attention of States to the following issues: (a) the manner in which the seller or financial lessor may obtain possession of the asset; (b) whether the seller or financial lessor is required to dispose of the asset and, if so, how; (c) whether the seller or financial lessor may retain any surplus; and (d) whether the seller or financial lessor has a claim for any deficiency against the buyer or financial lessee. The Working Group may wish to consider whether these issues should be addressed instead in this article or in the commentary.]*

**Article 9. Law applicable to a retention-of-title right or a financial lease right**

Chapter [enacting State to specify the number of the conflict-of-laws chapter] applies also to retention-of-title rights and financial lease rights.

**Article 10. Retention-of-title right or financial lease right in insolvency proceedings<sup>8</sup>**

In the case of insolvency proceedings with respect to the debtor,

**Alternative A**

the provisions of this Law that apply to security rights apply also to retention-of-title rights and financial lease rights.

**Alternative B**

the provisions of [the law to be specified by the enacting State] that apply to ownership rights of third parties apply also to retention-of-title rights and financial lease rights.

*[Note to the Working Group: The Working Group may wish to consider whether this article should be retained or deleted and the matter addressed therein discussed in the commentary.]*

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<sup>8</sup> A State may adopt alternative A or alternative B of this article.

## **Annex II. Conflict of laws<sup>9</sup>**

*[Note to the Working Group: The Working Group may wish to note that, as explained in footnote 9 (which may be retained in the final text of the Model Law), the provisions of conflict of laws are presented in an annex to emphasize that a State may implement them as part of its secured transactions law (at the beginning or at the end of it) or incorporate them in its private international law statute (civil code or other law). The Working Group may wish to consider whether including the conflict-of-laws provisions in an annex to the draft Model Law is the best way to present them or whether they should be included in a chapter of the draft Model Law.]*

### **Section I. General rules**

#### **Article 1. Law applicable to the 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, by the law governing the security agreement.

#### **Article 2. Law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset**

1. Except as provided in paragraphs 2 to 4 of this article, the law applicable to the creation, third-party effectiveness 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 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.
3. If a security right in a tangible asset is subject to registration in a specialized registry or notation on a title certificate providing for registration or notation of a security right, the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State under whose authority the registry is maintained or the title certificate is issued.
4. The law applicable to the priority of a security right in a tangible asset made effective against third parties by possession of a negotiable 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 at the time when the secured creditor obtained possession of the document.

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<sup>9</sup> The provisions on conflict of laws are a necessary part of the draft Model Law. They are presented in an annex to emphasize that a State may implement them as part of the secured transactions law (at the beginning or at the end of it) or as part of a separate law (civil code or other law).

**Article 3. Law applicable to the creation, third-party effectiveness and priority of a security right in an intangible asset**

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 4. Law applicable to the enforcement of a security right**

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

- (a) In a tangible asset is the law of the State where enforcement takes place; and
- (b) In an intangible asset is the law applicable to the priority of the security right.

**Article 5. Law applicable to a security right in proceeds**

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 asset of the same kind as the proceeds.

**Article 6. Meaning of “location” of the grantor**

1. For the purposes of chapter [the enacting State to specify the number of the conflict-of-laws chapter], the grantor is located in the State in which it has its place of business.
2. If the grantor has a place of business in more than one State, the grantor’s place of business is that place where the central administration of the grantor is exercised.
3. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

**Article 7. Relevant time for determining location**

1. Except as provided in paragraph 2 of this article, references to the location of the assets or of the grantor in chapter [the enacting State to specify the number of the conflict-of-laws chapter] refer, for creation issues, to the location at the time of the putative creation of the security right and, for third-party effectiveness and priority issues, to the location at the time the issue arises.
2. If the rights of all competing claimants in an encumbered asset were created and made effective against third parties before a change in location of the asset or the grantor, references in chapter [the enacting State to specify the number of the conflict-of-laws 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 in location.

### **Article 8. Exclusion of renvoi**

A reference in chapter [the enacting State to specify the number of the conflict-of-laws chapter] to “the law” of another State as the law applicable to an issue refers to the law in force in that State other than its conflict-of-laws provisions.

### **Article 9. Public policy and internationally mandatory rules**

1. The application of the law determined under the provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter] may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.
2. The provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter] do not prevent the application of those provisions of the law of the forum which, irrespective of conflict-of-laws provisions, must be applied even to international situations.
3. Paragraphs 1 and 2 of this article do not permit the application of the provisions of the law of the forum to the third-party effectiveness and priority of a security right.

### **Article 10. Impact of commencement of insolvency proceedings on the law applicable to security rights**

1. Subject to paragraph 2 of this article, the commencement of insolvency proceedings does not displace the conflict-of-laws provisions that determine the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right [and, if the enacting State adopts the non-unitary approach, a retention-of-title right and financial lease right].
2. The rule in paragraph 1 of this article is subject to the effects on such issues of the application of the insolvency law of the State in which insolvency proceedings are commenced to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds.

## **Section II. Special rules**

### **Article 11. Law applicable to a security right in a tangible asset in transit or to be exported**

A security right in a tangible asset (other than a negotiable instrument) in transit or to be exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in article 2, paragraph 1, or, provided that the asset reaches that State within [a short period of time, such as thirty days, to be specified by the enacting State] after the time of creation of the security right, under the law of the State of its ultimate destination.

**Article 12. Law applicable to  
receivables arising from a sale, lease or  
security agreement relating to immovable property**

1. The law applicable to the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale, lease or security agreement relating to immovable property is the law of the State in which the assignor is located.
2. Notwithstanding paragraph 1 of this article, the law applicable to a priority conflict involving the right of a competing claimant that is registered in an immovable property registry is the law of the State under whose authority the registry is maintained.
3. The rule in paragraph 2 of this article applies only if, according to the law of the State under whose authority the registry is maintained, registration is relevant to the priority of a security right in the receivable.

**Article 13. Law applicable to the third-party effectiveness of a  
security right in specified types of asset by registration**

If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument or a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

**Section III. Special rules for situations in which  
the applicable law is the law of a multi-unit State**

**Article 14. Law applicable in the case of multi-unit States**

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3 of this article, references to the law of a multi-unit State are to the law of the relevant territorial unit and, to the extent applicable in that unit, to the law of the multi-unit State itself.
2. The relevant territorial unit referred to in paragraph 1 of this article is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of chapter [the enacting State to specify the number of the conflict-of-laws chapter].
3. If the applicable law is that of a multi-unit State or one of its territorial units, the internal conflict-of laws provisions in force in the multi-unit State or territorial unit determine whether the substantive provisions of law of the multi-unit State or of a particular territorial unit of the multi-unit State apply.