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Draft Model Law on Secured Transactions

Compilation of comments

Note by the Secretariat

Contents

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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 first comments received from Governments. Any further comments will, upon receipt by the Secretariat, be included in document A/CN.9/887.

II. Comments on the draft Model Law

A. United Kingdom of Great Britain and Northern Ireland

[Original: English]
Date: 26 April 2016

Chapter I. Scope of application and general provisions

3. Article 2(i)(ii): The words "A transferor in an outright transfer of a receivable" should be deleted. The transferor is the grantor (in the transaction) (see art. 1(2)), and not the debtor of the receivable.

4. Article 2(j): The square bracketed words should be retained outside square brackets as they make the position clearer.

5. Note to Commission after article 2(u): This is a good idea. The term "immovable property" should be retained within square brackets as a different term might be used in the law of the enacting State (e.g., English law uses the term "land").

6. Article 2(x): We note that the draft Guide to Enactment explains that the draft Model Law does not include a provision implementing the recommendations of the Secured Transactions Guide with respect to electronic communications (see Secured Transactions Guide, recs. 11 and 12) on the assumption that other law would address this matter (A/CN.9/885, para. 50), but we would like to raise the question whether the term "writing" should be defined in the draft Model Law.

Chapter II. Creation of a security right

7. Article 13(4)(a): Either the term "financial services" should be defined, or, at least, it should be made clear in the draft Guide to Enactment that it is a term which is likely to be defined elsewhere in national law and that the meaning here is to be the same.

Draft Model Registry-related provisions

8. The draft Guide to Enactment should stress that the terms, and therefore the rules, of these provisions are fully compatible with fully electronic registration, so

that a “prescribed registry notice form’’, for example, could be a website form, that communications from the Registry (e.g. under articles 5 and 6) could be automated messages and that the “entry of information” under article 13(2) could be automatic. Effectively, under an electronic system much of what is said to be done by the “Registry” is done by the computer programme setting up the registration system.

9. Article 5(4): Reference should be made to access “to registry services”, as the heading of each article is not actually part of the law and thus its contents could not be read down into the law.

10. Note to the Commission after article 5(4): The suggestion of an extra paragraph along the lines of article 6(3) is helpful, but the requirements of article 5(3) should also be included.

11. Article 20(1)(a): The words “and the secured creditor knows that the grantor will not authorize that registration” establish an impossible test, as the secured creditor has no way of knowing what the grantor will do in the future, and it is unreasonable to put an obligation on him depending on knowledge that he cannot have (it is different if the criterion is couched in terms of a communication from the grantor that he will not register, as that is a positive measurable act). So we would suggest the following revised draft: “… and the secured creditor has been informed by the grantor that he will not authorize that registration;”. The same change should be made to article 20(2)(a) and 20(3)(a)(i).

Chapter V. Priority of a security right

12. Article 36, option A (1): This is still too long and confusing. Reference should be made to equipment and its intellectual property equivalent. The same applies to article 39 Option A (1).

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

13. Article 51 and 53(1)(a): The words “and its value” should be deleted. There are many situations where the grantor (or secured creditor) cannot be expected to preserve the value of an asset. And this article cannot be contracted out of. If it is said that these situations are covered by the “reasonable” in “reasonable care”, this is very unclear.

14. Article 61(2): The term “payment instruction”, used here and elsewhere in this article and in other articles, should ideally be defined, as it is not clear that the instruction “subsequently by the secured creditor” is a “payment instruction” referred to here and subsequently. If “payment instruction” were not to be defined, it might be enough just to substitute “that” for “the” at the end of the paragraph.

15. Article 61(5): The phrase “its right from the initial or any other secured creditor” is confusing. It is not clear whether it is the “initial creditor” or the “initial secured creditor”. If it means the initial secured creditor, the sense could be clarified by commas: “its right from the initial, or any other, secured creditor”.

16. Article 61(6): Insert “either” and a comma after “notification” (an Oxford comma) to make it clear which are the two alternatives.

Chapter VII. Enforcement of a security right

17. Article 72, option A: In relation to "the debtor, the grantor or a competing claimant". To include a co-owner, say "the debtor, the grantor or any other person with a right in the encumbered asset".

18. Article 73(2): This is still unclear and does not take account of the fact that all the possibilities envisaged could happen. Revise to read as follows: "This right of termination may be exercised until the earliest of the following:

(a) The asset is sold or otherwise disposed of;

(b) The asset is acquired or collected by the secured creditor; or

(c) An agreement by the secured creditor for the sale or other disposition of the asset is concluded".

19. Article 75(1): Insert the words "or without applying" (perhaps as "either by applying or without applying to ..."), since otherwise paragraph 3 does not make sense as there is no right (established under the draft Model Law) to obtain possession without applying to a court.

20. Article 76(1): As mentioned above, the word "either" could usefully be inserted here so that it reads: "either by applying or without applying".

21. Article 76(4): The words "sell or otherwise dispose of, lease or license an encumbered asset" might be replaced with the words "exercise the right provided in paragraph 1" to be the same as in paragraphs 2 and 3.

22. Article 76(4)(b) and (c) and (5): The use of the term "notice" is potentially ambiguous. There are two notices, notice of intention to sell etc. and notification by the person with a right. Say: "before the notice of the secured creditor's intention is sent" (in article 76(5) as well).

23. Article 78(5): We would like to raise the question of what the sanction would be if the secured creditor did not proceed as indicated.

24. Note to Commission after article 78(5): A time restriction seems implicit in the wording of the Secured Transactions Guide, (see chap. VIII, para. 70).

B. United States of America

[Original: English]
Date: 27 April 2016

Chapter I. Scope of application and general provisions

25. Article 2(v): To conform exactly to the definition of "intermediated securities" in the Unidroit Convention on Substantive Rules for Intermediated Securities, the words "or interests" should be added after the words "and rights".

26. Article 2(jj): In the definition of "tangible asset", the reference to article "32" should be to article "31".

27. Article 3: A provision should be added making it clear that "Nothing in this Law affects any agreement to the use of alternative dispute resolution, including arbitration, mediation, conciliation and online dispute resolution".

[*Note to the Commission: Pursuant to a decision of the Working Group (see A/CN.9/871, para. 85), this matter was addressed in the draft Guide to Enactment (see A/CN.9/885/Add.3, paras. 55 and 58).*]

Chapter II. Creation of a security right

28. Article 6, heading: To carry out the decision of the Working Group to revise the heading of article 6 to better reflect its content (see A/CN.9/865, para. 48), the heading should be changed to "Creation of a security right; requirements for a security agreement". The reason is that article 6 deals not only with the general rules for the creation of a security right but also with the requirements for a security agreement. Alternatively, the Commission may wish to consider whether to limit article 6 to the general rules about creation and move rules about security agreements to their own article.

29. Article 6(3)(b): While this provision states that the security agreement must "describe the secured obligation", no standards are provided for the description of the secured obligation (art. 9(1) provides standards for the description of the encumbered assets). In addition, this language suggests that a security right may secure only one obligation. That point can be addressed in article 7, but we think that there should be some general guidance comparable to the standard in article 9(1) for the description of the encumbered assets. Language to the effect that "the obligations secured or to be secured must be described in the security agreement in a manner that reasonably allows their identification" would suffice. This would make it clear, for example, that a statement that the security right secures "all obligations owed to a secured creditor at any time" will be sufficient even though the description does not identify each obligation separately.

30. Article 7: To make it clear that a security right may secure more than one obligation, the first sentence should be amended to state: "A security right may secure one or more obligations of any type, …".

31. Article 10(2)(b): This provision should be slightly rewritten so that it reads: "The security right in the commingled money or funds is limited to the amount of money or the amount of funds credited to the bank account immediately before they were commingled". The reference to the value of the money or funds in the current text is unnecessary inasmuch as money and funds do not need to be valued.

32. Article 10(2)(c): Similarly, this provision should be rewritten so that it reads: "If at any time after the commingling, the amount of commingled money or the balance credited to the bank account is less than the amount of proceeds immediately before they were commingled, the security right in the commingled assets is limited to the lowest amount between the time when the proceeds were commingled and the time when the security right is claimed".

33. Article 11(1): This provision incompletely states the situation to which it applies. It should be amended so that it reads: "A security right in a tangible asset other than money that is commingled in a mass of tangible assets of the same kind

and is no longer separately identifiable or is combined with other tangible assets to create a new product extends to the mass or product".

34. Article 11[3][4]: This provision should be deleted, as the subject it addresses is addressed in article 31 (and addressed more completely there). In addition, the rule stated in this provision is a rule about the relative rights of two secured creditors and, thus, is not appropriate for this chapter, which is about the existence of a security right and not about the relative rights of that security right as against the rights of others.

35. Article 11, options A and B: These options are difficult to administer inasmuch as it will rarely be the case that encumbered assets will be valued immediately before commingling in a mass or product. In addition, in the case of encumbered assets commingled with other tangible assets to create a new product, the limit of the value of the secured creditor's interest in the product to the value of the encumbered asset before commingling with other assets may inappropriately create situations in which a product created solely from the commingling of encumbered assets is nonetheless partially unencumbered.[1]

36. Thus, an option C should be added to read: "In the case of a security right that extends to a mass, the security right is limited to the quantity of goods that were commingled. In the case of a security right that extends to a product, the security right in the product is limited to the same proportion of the value of the product as the value of the encumbered assets immediately before they became part of the product bore to the aggregate value of all of the assets that were combined to form the product".

37. According to this option: (a) in the case of tangible assets other than money that are commingled in a mass of tangible assets of the same kind, the security right will be limited to a quantity of encumbered assets commingled in the mass no greater than the quantity of its encumbered assets before the commingling (thereby eliminating the need to determine the value of those assets immediately before commingling); and (b) in the case of encumbered assets that become part of a product, the "same proportion" rule from option B, paragraph 2, will be utilized but in a way that is mathematically more precise.

38. Article 12: The current text conflates two different points. It should be amended so that it states: "A security right is extinguished when all obligations secured by the security right have been discharged (by payment or otherwise) and there are no outstanding commitments to extend credit secured by the security right".

39. Article 13(2): To assure that this provision does not override or limit the protection given to secured creditors in the last portion of article 13(2), it should be amended to begin with the phrase: "Without limiting in any way the protection against claims provided to secured creditors in paragraph 2 …".

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[1] Consider a case in which $3,000 worth of sugar that is subject to a security right of SC1 is combined with $4,000 worth of flour that is subject to a security right of SC2 to create a cake worth $12,000. Under options A and B, only $7,000 of the cake would be encumbered and the remainder would be free of any security right, even though the cake was created entirely from the combination of encumbered assets.

40. Article 13(4)(d): To avoid confusion, this provision should be more closely aligned with article 1(3)(d) which limits the scope of the draft Model Law with respect to financial contracts governed by netting agreements to payment rights arising upon the termination of all outstanding transactions.

41. Article 14: The interaction between paragraphs 1 and 2 is potentially confusing, and the article should be amended to read as follows:

> "1. A secured creditor with a security right in a receivable or other intangible asset, or a negotiable instrument, has the benefit of any personal or property right that secures or supports payment or other performance of the encumbered asset.
>
> 2. Nothing in this Law imposes any requirement of a separate act of transfer of the personal or property right referred to in paragraph 1. If, under other law, the right referred to in paragraph 1 is transferable only with a new act of transfer, the grantor is obliged to transfer the benefit of that right to the secured creditor."

Chapter III. Effectiveness of a security right against third parties

42. Article 18(1): Inasmuch as the draft Model Law does not refer to specialized registries, the reference to "the general security rights registry" should be changed to a reference to "the security rights registry."

43. Article 22(1): The phrase "as a result of a change in the location of the encumbered asset or the grantor, whichever determines the applicable law under the provisions of chapter VIII" should be deleted because there are circumstances in which a change of the applicable law may occur for reasons other than a change in the location of the encumbered asset or the grantor. For example, in the case of funds credited to a bank account, the depositary institution may change its place of business.

44. Article 23: Option A raises the possibility that, rather than a security right either being effective against third parties or not effective against third parties, a security right can be effective against some third parties and not others. Thus, the phrase "other than a buyer or other transferee, lessee or licensee" is actually a priority rule, indicating that those parties have priority over a security right made effective against third parties solely under article 23, and should be stated as such. In option B, the reference within square brackets to the "value" to be specified by an enacting State should be changed to a "price" to be specified by an enacting State. The price of goods is usually determined quite easily, while the value of those goods can be the subject of dispute.

45. Article 25(3): The security right should remain effective against third parties "for [a short period of time to be specified by the enacting State] after the document *or the asset* has been returned to the grantor or other person ...". Otherwise, the rule would not be applicable to a situation in which the secured creditor instructs the issuer to release the asset and surrenders the document directly to the issuer. In such a case, the grantor never receives the document and, under the rule as written, the secured creditor would not be protected by the grace period. We believe that there is no practical reason to treat differently these two situations: (a) return of the document to the grantor; and (b) delivery of the document to the issuer with a

request that the issuer release the asset. It is essential that this rule adequately covers the existing practices, including where the negotiable document is released to a logistics provider, which is covered by the reference to an "other person."

Chapter IV. The registry system

Draft Model Registry-related provisions

46. Article 6(1)(a) and (2): These provisions should be reformulated to state that: "A notice if no information is entered in one of the mandatory designated fields or some information entered in one of the mandatory designated fields is illegible" and "The Registry must reject a search request if no information is entered in one of the fields designated for entering a search criterion or the information entered in a field designated for entering a search criterion is illegible." As presented, the rule may be interpreted to require the Registry to accept a notice if some, but not all, information in a mandatory designated field is legible, which was not the intended result. For example, an address may contain a street number that is illegible and a street name that is legible. Clarity of this provision is essential for the proper design of a registry system. The Registry would seem to have to accept such a notice under this formulation. This proposal would restore the wording of this provision as included in article 7(1) and (2) of document A/CN.9/WG.VI/WP.65/Add.1.

47. Article 8(a): It should be revised to read: "The identifier and address of the grantor in accordance with article 9 of these provisions [and any additional information that the enacting State may decide to require to be entered to assist in uniquely identifying the grantor]". The reason for moving that phrase "in accordance with article 9 of these provisions" to precede the bracketed language is that article 9 does not refer to additional information. It only prescribes rules in relation to the identifier of the grantor.

Chapter V. Priority of a security right

48. Article 28(2): For greater clarity, this provision which deals with a relatively uncommon issue, be removed from article 28 and placed in its own article.

49. Article 29: To avoid inadvertent inconsistency with articles 44-47 and 49, which give higher priority to security rights made effective by some methods (such as control) than other methods, the rule in this article should be made subject to those articles.

50. Article 30: In order to more clearly describe the topic that this article addresses, the heading should be changed to "Priority of a security right in proceeds". In addition, the text of this article should redrafted to read as follows: "If a security right in proceeds of an encumbered asset is effective against third parties as provided in article 19, the priority of the security right in the proceeds is determined by using the same date used to determine the priority of the security right in the encumbered asset against competing claimants". This is to make it clear that, if the proceeds are in the form of receivables arising from the sale of inventory, the priority of the security right in the receivables will be determined by using the same date as the date that would have been used to determine the priority of the security right in the inventory.

51. Article 31(2) and (3): As it stands, these paragraphs address matters also addressed in article 11 in a manner not consistent with that article. We have proposed deleting the inconsistent portions of article 11 (see para. 34 above). If that proposal is not accepted by the Commission, these paragraphs should be aligned with article 11.

52. Article 32: To avoid inadvertent inconsistency with articles 44-47 and 49, which provide that, in some circumstances, buyers or other transferees take free of security rights made effective against third parties by certain methods, the rule in this article should be made subject to those articles.

53. Article 35(2)(a): In order to make this provision more easily understandable, it should be reordered so that it reads: "Before the time when the secured creditor received a notice from the judgement creditor that the judgement creditor has taken the steps referred to in paragraph 1 or within [a short period of time to be specified by the enacting State] thereafter".

54. Note to the Commission after article 35: The matter raised in the notice should be addressed either by: (a) retaining the bracketed words outside square brackets in paragraph (2); or (b) rewriting paragraph 2 so that it reads: "If the right of a judgement creditor does not have priority under paragraph 1, the security right has priority but that priority is limited to the greater of the credit extended by the secured creditor".

55. Article 36, option A (2)(b)(i) and (2)(b)(ii): The word "notice" is used with two inconsistent meanings. In article 36(2)(b)(i), the term is used in the sense defined in article 1(f) of the Model Registry-related Provisions, while in article 36(2)(b)(ii) the term is used in the sense defined in article 2(x) of the draft Model Law. To avoid the confusion that will result from the use of the same term in adjoining provisions to convey different meanings, a different term, such as "notification", should be used.

56. Article 36, option A (3): The bracketed language at the end of this provision goes beyond aligning it with article 23, option B and, instead, inadvertently creates an unintended substantive rule. Article 23, option B provides that the automatic third-party effectiveness under article 23 is limited to consumer goods below a value to be specified by the enacting State. Of course, though, in such cases, the secured creditor can achieve third-party effectiveness of its security right by registration of a notice. Under the language of Article 36, option A (3), however, when the encumbered assets are above the value specified by the enacting State, the acquisition security right is ineligible for the "super-priority" provided by this article even if that security right is promptly made effective against third parties. As a result, it would be possible for a secured creditor to obtain "super-priority" for its security right in all assets subject to an acquisition security right (including high-value equipment and inventory) except for high-value consumer goods. To avoid this unintended result, option A (3) should be reworded to read: "An acquisition security right in consumer goods and intellectual property or rights of a licensee under a licence of intellectual property that is used or intended to be used by the grantor primarily for personal, family or household purposes has priority over a competing non-acquisition security right created by the grantor in the same asset [to be added only if the State has enacted article 23, option B], if the security right is effective against third parties under article 23 or a notice with respect to the

acquisition security right is registered in the Registry not later than the expiry of [a short period of time to be specified by the enacting State] after the grantor obtains possession of the consumer goods, or the agreement for the sale or licence of intellectual property has been concluded".

57. Article 36, option B (1)(a) and (1)(b): The references to "consumer goods" should be deleted inasmuch as consumer goods are already excluded in the chapeau of paragraph 1.

[*Note to the Commission: The Commission may wish to note that the same issue arises in article 36, option A (1)(a) and (1)(b)*.]

58. Article 39, option A (3): The phrase "the acquisition secured creditor notifying non-acquisition secured creditors" should be clarified to make explicit whether the reference is to the sending of a notification or the receipt of the notification.

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

59. Article 54(1): This provision should be amended to read: "Within [a short period of time to be specified by the enacting State] after receipt of a *written* request by a grantor …".

60. Article 57(1)(a) should be amended to read as follows: "If payment is made to the secured creditor or a tangible asset is returned to the *secured creditor* with respect to the receivable, …". Otherwise, it is essentially identical in effect to article 57(1)(b) with respect to returned tangible assets.

61. Article 60(4): The word "subsequent" qualifying a security right should be deleted as unnecessary and possibly confusing.

[*Note to the Commission: The Commission may wish to note that article 61(5) refers to "subsequent security rights in the same receivable created by a secured creditor that acquired its right from the initial or any other secured creditor"*.]

Chapter VII. Enforcement of a security right

62. Article 72: It should be made clear that the words "is entitled to …" apply to both options A and B.

63. Article 75(4): The reference to assets of a kind sold on a recognized market should be deleted as it is irrelevant to the right of the secured creditor to obtain possession of the encumbered asset without notice to the grantor.

64. Article 77(3): This provision states an absolute right to a deficiency following the application of the proceeds of a disposition of an encumbered asset. It should state that the deficiency is subject to reduction to the extent the grantor suffers damage by the secured creditor's failure to follow the rules in this chapter.

Chapter VIII. Conflict of laws

65. Article 83(2): The words "a competing security right made effective against third parties by another method" should be replaced with the words "a competing claimant" so the rule also covers priority of the security right vis a vis competing claimants that are not secured creditors, such as judgement creditors who obtain a right in the encumbered asset.

66. Article 83(4): This provision is a substantive law rule rather than a conflict-of-laws rule. Otherwise, it would conflict with article 89. While it need not be relocated to another chapter because of its substantive nature, clarification is needed. In particular, it is not clear as drafted whether this rule is intended to work as a substantive rule of the State in which the assets are located at the relevant time (indicating that that State will recognize creation and third-party effectiveness achieved under the law of the destination State even before the assets are in that State and thus governed by the law of that State under the general rule of paragraph 1) or a substantive rule of the destination State (indicating that the destination State will recognize creation and third-party effectiveness achieved under the law of the State in which the assets were located at the time of putative creation even after the assets leave that State and thus are no longer governed by the law of that State under the general rule of paragraph 1). We believe that the intent is to have this rule be treated as a rule of the State in which the assets are located at the time of the putative creation of the security right. If this is correct, paragraph 4 should state this explicitly. If another result is intended, paragraph 4 should state that result explicitly.

67. Article 85: In the interest of clarity, we suggest amending the opening words of this article so that it reads as follows: "Notwithstanding article 84, in the case of a security right in a receivable that *either* arises from the sale or lease of *immovable property* or is secured by immovable property, …".

68. Article 86(a): Inasmuch as the two options were presented within square brackets for the Commission "to have time to consider the matter carefully" (see A/CN.9/865, para. 90), the language in only one of the sets of bracketed words should be retained. Our preference is to retain the wording in the first set of bracketed words but amend that wording to state "the relevant act of enforcement takes place".

69. Article 89(1)(b): We believe that the phrase "at the time the issue arises" is imprecise and, thus, uncertain. It is not clear whether the phrase refers to the time an issue arises for the first time. In such a case, the location for purposes of conflict-of-laws rules would be locked in at that time; and clarity would be required as to whether an issue "arises", for example, at the first time a party makes an assertion with respect to that issue, at the first time litigation with respect to it is instituted, or at some other time. Alternatively, this phrase could simply mean "when the issue is relevant". We think that the latter is intended, subject to the rule in paragraph 2, and the language should be clarified to make that point clearly.

70. Article 93: The chapeau should be revised so that it reads as follows: "The law … *also applies to*:". This is because, without this change, the provision is ambiguous inasmuch as it could also be read as stating that the law governing the issues described in the chapeau is determined by determining the law applicable to the three issues described in the subparagraphs and applying that law to the issues described in the chapeau.

71. Article 96(2): It is not clear whether this provision is intended to be: (a) a substantive rule of the State whose law is applicable, in which case it will apply only if the State in which the intellectual property is protected has enacted the Model Law; or (b) a "validating" conflict-of-laws rule, under which the applicable law is the law of a State that "validates" either third-party effectiveness or priority

of the security right in question. In any event, it is anomalous to indicate, as does article 96(2), that a security right may be effective against some third parties but not others. Elsewhere in the draft Model Law, a security right is either effective against third parties or it is not effective against third parties, and rules preferring one method of achieving that third-party effectiveness over other methods are styled as priority rules. That practice should be followed here as well.

72. Article 97: We propose adding a new option D. This option blends the general applicable law approach of the draft Model Law with a recognition of the important applicable law rules in entity statutes of States (like the rule on intellectual property; see article 96(2)) of the draft Model Law). We believe this option expresses the correct policy decisions concerning this extremely important topic, and also reorganizes the article in a way that we believe will be more easily understood by users of the Model Law. This option should read as follows:

> 1. Subject to article 95, in the case of a security right in certificated non-intermediated securities:
>
> (a) Except as provided in subparagraph (b), the law applicable to the creation, effectiveness against third parties and priority of the security right is the law of the State in which the certificate is located;
>
> (b) If a security right in certificated non-intermediated securities may not be created under, or does not satisfy the requirements for creation of a security right in those securities under the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities), the security right has not been created; and
>
> (c) The law applicable to the enforcement of the security right is the law of the State in which [the relevant act of] enforcement takes place.
>
> 2. In the case of a security right in uncertificated non-intermediated securities, the law applicable to the creation, effectiveness against third parties, priority and enforcement of the security right is the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities).
>
> 3. The law applicable to whether a security right in non-intermediated securities is effective against the issuer and whether an act of enforcement of that security right is effective against the issuer is the law of the State under which the issuer is constituted (in the case of equity securities) or the law of the State whose law governs the securities (in the case of debt securities).

73. Article 98: The current wording of this article should be replaced with the wording suggested in the Note to the Commission.

Chapter IX. Transition

74. Article 100(1)(a): The square brackets should be removed so that the term “prior law” will refer to the law that the enacting State would have applied before the entry into force of its enactment of the Model Law. Two additional issues need clarification, however. First, the reference should be to the conflict-of-laws rules

that were in effect under the former law, since it was those conflict-of-laws rules that determined the State whose law governed an issue. Second, under prior conflict-of-laws rules, the law of different States might have been applicable to different issues (as in the case, for example, of a State that has different conflict-of-laws rules for creation and enforcement than for third-party effectiveness and priority), but the text of article 100(1)(a) seems to suggest that prior conflict-of-laws rules pointed to the law of a single State to apply to security rights generally. Accordingly, we suggest amending the text of article 100(1)(a) so that it reads as follows: "'Prior law' means the law applicable, under the conflict-of-laws rules of the enacting State existing immediately before the entry into force of this Law, to the relevant issue".

75. Article 104(3)(a): The words "as provided in article 103, paragraph 3" should be deleted inasmuch as the priority status of a prior security right has changed if it has ceased to be effective against third parties for any reason.