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Draft Model Law on Secured Transactions

Note by the Secretariat

Addendum

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Chapter VIII. Conflict of laws¹

A. General rules

Article 81. Law applicable to the mutual rights and obligations of the grantor and the secured creditor

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

Article 82. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 5 and article 96, the law applicable to the creation, effectiveness against third parties and priority of a security right in a tangible asset is the law of the State in which the asset is located.
2. The law applicable to the priority of a security right in a tangible asset covered by a negotiable document made effective against third parties by possession of the document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located.
3. The law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.
4. Subject to paragraph 3, a security right in a tangible asset that is in transit at the time of its putative creation or intended to be relocated to a different State than the State in which it is located at the time of the putative 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 the putative creation of the security right or under the law of the State of the asset's ultimate destination, provided that the asset reaches that State within [a period of time to be specified by the enacting State] after the time of the putative creation of the security right.

Article 83. Law applicable to a security right in an intangible asset

Except as provided in articles 84 and 93-96, 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 84. Law applicable to a security right in receivables relating to immovable property

Notwithstanding article 83, in the case of a security right in a receivable arising from a sale or lease of, or secured by, immovable property, the law applicable to the priority of the security right in the receivable as against the right of a competing claimant that is registrable in the immovable property registry in which

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

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

[Note to the Working Group: The Working Group may wish to note that it may not be easy for a secured creditor with a security right in receivables to find out that they are secured by a mortgage and thus that a law other than the law of the grantor's location will apply to the priority competition with a mortgagee. The Working Group may, therefore, wish to consider whether the rule in article 84 should be limited to receivables arising from the sale or lease of immovable property or whether article 84 should be deleted altogether.]

Article 85. 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] [the encumbered asset is located], except as provided in article 96; and
- (b) In an intangible asset is the law applicable to the priority of the security right, except as provided in articles 93, 95 and 96.

[Note to the Working Group: The Working Group may wish to consider the options within square brackets in subparagraph (a) (see A/CN.9/865, para. 90), noting that recommendation 218(a), on which article 85(a) is based, refers to the place of enforcement on the assumption that, in most cases, this place will be the place in which the encumbered asset is located (see Secured Transactions Guide, chap. X, paras. 66-71).]

Article 86. Law applicable to a security right in proceeds of an encumbered asset

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

Article 87. Meaning of “location” of the grantor

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

- (a) In the State in which it has its place of business;
- (b) If the grantor has a place of business in more than one State, in the State in which the central administration of the grantor is exercised; and
- (c) If the grantor does not have a place of business, in the State in which the grantor has his or her habitual residence.

Article 88. Relevant time for determining location

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

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

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

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

Article 89. Exclusion of *renvoi*

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

Article 90. Overriding mandatory rules and public policy (*ordre public*)

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

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

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

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

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

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

Article 91. Impact of commencement of insolvency proceedings on the law applicable to a security right

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

B. Asset-specific rules

Article 92. Law applicable to the relationship of third-party obligors and secured creditors

The law applicable to the relationship between the grantor of a security right in a receivable, negotiable instrument or negotiable document and the debtor of the receivable, the obligor under the negotiable instrument or the issuer of the negotiable document is the law applicable to:

(a) The relationship between the debtor of the receivable, the obligor under the instrument or the issuer of the document and the holder of a security right in the receivable, instrument or document;

(b) The conditions under which a security right in the receivable, instrument or document may be invoked against the debtor of the receivable, the obligor under the instrument or the issuer of the document, including whether an agreement limiting the grantor's right to create a security right may be asserted by the debtor of the receivable, the obligor under the instrument or the issuer of the document; and

(c) Whether the obligations of the debtor of the receivable, the obligor under the instrument or the issuer of the document have been discharged.

Article 93. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 94, the law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in a right to payment of funds credited to a bank account, as well as to the rights and obligations between the depositary institution and the secured creditor, is

Option A²

the law of the State in which the depositary institution with which the account is maintained has its place of business.

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

Option B

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

2. The law of the State determined pursuant to paragraph 1 applies only if the depositary institution has, at the time of the conclusion of the account agreement, an office in that State that is engaged in the regular activity of maintaining bank accounts.

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

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

Article 94. Law applicable to the third-party effectiveness of a security right in certain types of asset by registration

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

Article 95. Law applicable to a security right in intellectual property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in intellectual property is the law of the State in which the intellectual property is protected.
2. A security right in intellectual property may also be created under the law of the State in which the grantor is located and may also be made effective under that law against third parties other than another secured creditor, a transferee or a licensee.
3. The law applicable to the enforcement of a security right in intellectual property is the law of the State in which the grantor is located.

Article 96. Law applicable to a security right in non-intermediated securities

Option A

1. Subject to paragraph 2:
 - (a) The law applicable to the creation, effectiveness against third parties and priority of a security right in certificated non-intermediated securities is the law of the State in which the certificate is located; and
 - (b) The law applicable to the enforcement of a security right in certificated non-intermediated securities is the law of the State in which [the relevant act of] enforcement takes place.
- [2. The law applicable to the effectiveness of a security right in certificated non-intermediated securities against the issuer is the law of the State under which the issuer is constituted.]
- [2. The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities.]
3. The law applicable to the creation, effectiveness against third parties, priority and enforcement of a security right in uncertificated non-intermediated securities, as well as to its effectiveness against the issuer, is the law of the State under which the issuer is constituted.

Option B

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

Option C

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

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

[Note to the Working Group: The Working Group may wish to note that articles 92, 93 and 96 use a different wording to describe the relationship between a third-party obligor and the secured creditor, and consider whether these articles should be revised to use the same wording, or the matter should be addressed in a comprehensive way in article 92.]

Article 97. Law applicable in the case of a multi-unit State

1. If the law applicable to an issue is the law of a multi-unit State, subject to paragraph 3, 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 is to be determined on the basis of the location of the grantor or of the encumbered asset, or otherwise under the provisions of this chapter.

3. If the applicable law is 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.

Chapter IX. Transition

Article 98. Amendment and repeal of other laws

1. [The laws to be specified by the enacting State] are repealed.

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

Article 99. Transitional application of this Law

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

Article 100. Inapplicability of this Law to actions commenced before the entry into force of this Law

1. Prior law applies to a matter that is the subject of proceedings before a court or arbitral tribunal commenced before the entry into force of this Law.
2. If enforcement of a prior security right commenced before the entry into force of this Law, the enforcement may continue under the prior law.

Article 101. Creation of a prior security right

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

Article 102. Third-party effectiveness of a prior security right

1. A prior security right that was effective against third parties under prior law continues to be effective against third parties under this Law until the earlier of:
 - (a) The time it would have ceased to be effective against third parties under prior law; and
 - (b) The expiration of [a period of time to be specified by the enacting State] after the entry into force of this Law.
2. A written agreement between the grantor and the secured creditor creating or providing for a prior security right is sufficient to constitute authorization by the grantor for the registration of a notice after the entry into force of this Law.
3. If the third-party effectiveness requirements of this Law are satisfied before the third-party effectiveness of a prior security right ceases in accordance with paragraph 1, the security right continues to be effective against third parties under this Law from the time when it was made effective against third parties under prior law.
4. If the third-party effectiveness requirements of this Law are not satisfied before the third-party effectiveness of a prior security right ceases in accordance

with paragraph 1, the prior security right is effective against third parties only from the time it is made effective against third parties under this Law.

Article 103. Priority of a prior security right

1. The time to be used for determining priority of a prior security right is the time it became effective against third parties under prior law or, in the case of advance registration, became the subject of a registered notice under prior law.
2. The priority of a prior security right is determined by prior law if:
 - (a) The security right and the rights of all competing claimants arose before the entry into force of this Law; and
 - (b) The priority status of none of these rights has changed since the entry into force of this Law.
3. The priority status of a security right has changed only if:
 - (a) It was effective against third parties at the time when this Law entered into force, in accordance with article 102, paragraph 1, and ceased to be effective against third parties as provided in article 102, paragraph 4; or
 - (b) It was not effective against third parties under prior law at the time when this Law entered into force, and became effective against third parties under this Law.

Article 104. Entry into force of this Law

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