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Draft Model Law on Secured Transactions

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Addendum

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Chapter IX. Acquisition financing

Option A: Unitary approach*

Article 103. An acquisition security right as a security right

An acquisition security right is a security right, and, as a result, all the articles governing security rights, including those on creation, third-party effectiveness, registration, priority (except as provided in articles 105-110), enforcement and the law applicable to a security right, apply to acquisition security rights.

Article 104. Third-party effectiveness and priority of an acquisition security right in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation and, except as provided in article 106, has priority as against a competing non-acquisition security right created by the grantor.

Article 105. Priority of an acquisition security right in a tangible asset

Except as provided in article 106:

Alternative A**

(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, even if a notice with respect to that security right was registered in the general security rights registry before registration of a notice with respect to the acquisition security right, 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, even if that security right became effective against third parties before the acquisition security right became effective against third parties, 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

* A State may adopt option A (unitary approach), that is, articles 103-111, or option B (non-unitary approach), that is, articles 112-126. The articles outside this chapter are generally applicable except to the extent modified by the articles in this chapter.

** A State may adopt alternative A or alternative B of article 105.

b. A secured creditor with an earlier-registered non-acquisition security right created by the grantor in inventory of the same kind is notified by the acquisition secured creditor that it has or intends to acquire an acquisition security right;

(iii) The notice referred to in subparagraph (b) (ii) b. of this article must describe 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 given.

Alternative B

an acquisition security right in a tangible assets 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:

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

(b) A notice relating 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.

Article 106. Priority of a security right registered in a specialized registry or noted on a title certificate

The priority of an acquisition security right under article 104 or 105 does not override the priority of a security right or other right registered in a specialized registry or noted on a title certificate as provided in article 49.

Article 107. Priority between competing acquisition security rights

The priority between competing acquisition security rights is determined according to the general priority rules applicable to non-acquisition security rights, unless one of the acquisition security rights is an acquisition security right of a supplier that was made effective against third parties within the period specified in article 105, in which case the supplier's acquisition security right has priority as against all competing acquisition security rights.

Article 108. Priority of an acquisition security right as against the right of a judgement creditor

An acquisition security right that is made effective against third parties within the period specified in article 105 has priority as against the rights of an unsecured creditor that would otherwise have priority as provided in article 52.

**Article 109. Priority of an acquisition security right
in an attachment to immovable property as against an
earlier registered encumbrance on the immovable property**

An acquisition security right in a tangible asset that becomes an attachment to immovable property has priority as against third parties with existing rights in the immovable property, other than an encumbrance securing a loan financing the construction of the immovable property, provided that notice of the acquisition security right is registered in the immovable property registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the asset becomes an attachment.

**Article 110. Priority of an acquisition
security right in proceeds of a tangible asset**

Alternative A*

1. An acquisition security right in proceeds of a tangible asset other than inventory or consumer goods has the same priority as the acquisition security right in that asset.
2. A security right in proceeds of inventory has the same priority as the acquisition security right in 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 under paragraph 1 or 2 of this article is conditional on the acquisition secured creditor notifying secured creditors that, before the proceeds arise, registered a notice with respect to a security right in assets of the same kind as the proceeds.

Alternative B

if an acquisition security right in a tangible asset is effective against third parties, the security right in proceeds has the priority of a non-acquisition security right.

**Article 111. Acquisition security right
as a security right in insolvency proceedings**

In the case of insolvency proceedings with respect to the debtor, the provisions that apply to security rights apply also to acquisition security rights.

Option B: Non-unitary approach**

Article 112. Methods of acquisition financing

1. The regime of acquisition security rights in the context of the non-unitary approach is identical to that adopted in the context of the unitary approach.

* A State may adopt alternative A of article 110, if it adopts alternative A of article 105, or alternative B of article 110, if it adopts alternative B of article 105.

** A State may adopt option A (unitary approach), that is, articles 103-111, or option B (non-unitary approach), that is, articles 112-126.

2. All creditors, both suppliers and lenders, may acquire an acquisition security right in conformity with the regime governing acquisition security rights.
3. Acquisition financing based on retention-of-title rights and financial lease rights may be provided in accordance with article 188.
4. A lender may acquire the benefit of a retention-of-title right and a financial lease right through an assignment or subrogation.

**Article 113. Equivalence of a retention-of-title
right and a financial lease right to an acquisition security right**

The rules governing acquisition financing produce functionally equivalent economic results regardless of whether the creditor's right is a retention-of-title right, a financial lease right or an acquisition security right.

[Note to the Working Group: The Working Group may wish to consider whether articles 112 and 113 should be retained appropriately revised or deleted while the matters covered therein would be discussed in the commentary.]

**Article 114. Effectiveness of a
retention-of-title right and a financial lease right**

1. A retention-of-title right or a financial lease right in a tangible asset is not effective unless the sale or lease agreement is concluded in or evidenced by a writing that in conjunction with the course of conduct between the parties indicates the seller's or the lessor's intent to retain ownership.
2. The writing must exist not later than the time when the buyer or lessee obtains possession of the asset.

Article 115. 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 asset's value in excess of the amount owing to the seller or financial lessor.

**Article 116. Third-party effectiveness of a
retention-of-title right or financial lease right in consumer goods**

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 provided that the right is evidenced in accordance with article 114.

**Article 117. Third-party effectiveness
of a retention-of-title right in a tangible asset**

Alternative A*

1. An acquisition security right, a retention-of-title right or a financial lease right in tangible asset other than inventory or consumer goods is effective against third parties only if:
 - (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) A secured creditor with an earlier registered non-acquisition security right created by the buyer or lessee in inventory of the same kind is notified by the seller or lessor of its intention to claim a retention-of-title right or a financial lease right;
 - (c) The notice referred to in subparagraph 2 (b) (ii) of this article should describe 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 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 given.

Alternative B

- an acquisition security right, a retention-of-title right or financial lease right in a tangible asset other than consumer goods is effective against third parties only if:
- (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.

* A State may adopt alternative A or alternative B of article 117.

Article 118. One registration sufficient

1. Registration of a single notice in the general security rights registry is sufficient to achieve third-party effectiveness of 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 [with appropriate modifications as to terminology] to the registration of a retention-of-title right and a financial lease right.

Article 119. Effect of failure to achieve third-party effectiveness of a retention-of-title right or a financial lease right

If a retention-of-title right or a financial lease right is not effective against third parties, ownership of the asset as against third parties 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.

Article 120. Third-party effectiveness of a retention-of-title right or financial lease right in an attachment to immovable property

1. A retention-of-title right or a financial lease right in a tangible asset that becomes an attachment to immovable property is effective against third parties with rights in the immovable property that are registered in the immovable property registry only if it is registered in the immovable property registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the asset becomes an attachment.
2. If a seller or lessor fails to register a notice of its retention-of-title right or financial lease right in a tangible asset that became an attachment to immovable property within the time period provided in paragraph 1 of this article, the retention-of-title right of the seller or the financial lease right of the lessor is deemed to be a security right.

Article 121. 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 proceeds of the asset.

Article 122. 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 121 is effective against third parties only if the proceeds are described in a generic way in the registered notice by which the retention-of-title right or financial lease right was made effective against third parties or the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. If the proceeds are not described in a generic way in the registered notice or do not consist of the types of asset referred to in 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] days after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in article 18 or 20 before the expiry of that time period.

**Article 123. Priority of a security
right in proceeds of a tangible asset**

Alternative A*

1. If a retention-of-title right or financial lease right is effective against third parties, the security right in proceeds referred to in article 121 has priority as against another security right in the same asset.
2. If a retention-of-title right or financial lease right is effective against third parties, the security right in proceeds of inventory referred to in article 121 has the same priority as a retention-of-title or financial lease right in that 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 the seller or lessor notifying secured creditors that have registered a notice with respect to a security right in assets of the same kind as the proceeds before the proceeds arise.

Alternative B

1. If a retention-of-title right or financial lease right in a tangible asset is effective against third parties, the security right in proceeds referred to in article 121 has the priority of a non-acquisition security right if the security right in the proceeds is effective against third parties as provided in article 122.
2. The rule in paragraph 1 of this article applies also to the proceeds of a tangible asset subject to an acquisition security right.

**[Article 124. Enforcement of a
retention-of-title right or a financial lease right]**

1. Rules for the post-default enforcement of a retention-of-title right or a financial lease right in a tangible asset should deal with:
 - (a) The manner in which the seller or lessor may obtain possession of the asset;
 - (b) Whether the seller or lessor is required to dispose of the asset and, if so, how;
 - (c) Whether the seller or lessor may retain any surplus; and
 - (d) Whether the seller or lessor has a claim for any deficiency against the buyer or lessee.

* A State may adopt alternative A of article 123, if it adopts alternative A of article 117, or alternative B of article 123, if it adopts alternative B of article 117.

2. The regime that applies to the post-default enforcement of a security right applies to the post-default enforcement of a retention-of-title right or a financial lease right except to the extent necessary to preserve the coherence of the regime applicable to sale and lease.]

[Note to the Working Group: The Working Group may wish to note that article 124 is based on recommendation 200 of the Secured Transactions Guide and consider its substance as in its current formulation article 124 does not fit into a model law.]

Article 125. Law applicable to a retention-of-title right or a financial lease right

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

Article 126. Retention-of-title right or financial lease right in insolvency proceedings

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 this Law that apply to ownership rights of third parties apply also to retention-of-title rights and financial lease rights.

Chapter X. Conflict of laws

[Note to the Working Group: The Working Group may wish to consider whether chapter X should be retained in the draft Model Law. If the Working Group decided that chapter X should be deleted, the commentary could explain that States that wish to include conflict-of-laws provisions in their secured transactions (or other) law may implement the recommendations of the Secured Transactions Guide.]

Article 127. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 and articles 128 and 131, 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 issues mentioned in paragraph 1 of this article with respect to 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.

* A State may adopt alternative A or alternative B of article 126.

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 issues mentioned in paragraph 1 of this article 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.

**Article 128. Law applicable to a security
right in a tangible asset in transit or to be exported**

A security right in a tangible asset 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 127, 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] days after the time of creation of the security right, under the law of the State of its ultimate destination.

**Article 129. Law applicable
to 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 130. 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 the preceding paragraph applies only if registration is relevant under that law to the priority of a security right in the receivable.

Article 131. 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 the State in which the grantor is located is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

Article 132. 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 133. 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 134. Law applicable to the rights and obligations of third-party obligors and secured creditors

The law applicable to a receivable also is the law applicable to:

- (a) The relationship between the debtor of the receivable and the assignee of the receivable;
- (b) The conditions under which an assignment of the receivable may be invoked against the debtor of the receivable, including whether an anti-assignment agreement may be asserted by the debtor of the receivable, the obligor or the issuer; and
- (c) Whether the obligations of the debtor of the receivable have been discharged.

Article 135. Law applicable to enforcement of a security right

Subject to article 140, 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 136. Meaning of “location” of the grantor

1. For the purposes of the conflict-of-laws provisions of this Law, 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 137. 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 the conflict-of-laws provisions 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 the conflict-of-laws provisions 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 138. Exclusion of renvoi

A reference in the conflict-of-laws provisions 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 139. Public policy and internationally mandatory rules

1. The application of the law determined under the conflict-of-laws provisions may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.
2. The conflict-of-laws provisions 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 140. Impact of commencement of insolvency proceedings on the law applicable to security rights

1. Subject to paragraph 2 of this article, the law 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.

**Article 141. Special rules for situations in which
the applicable law is the law of a multi-unit State**

1. In situations in which the law applicable to an issue is the law of a multi-unit State subject to paragraph 2 of this article, references to the law of a multi-unit State are to the law of the relevant territorial unit, as determined on the basis of the location of the grantor or of an encumbered asset or otherwise under the conflict-of-laws provisions of this Law, and, to the extent applicable in that unit, to the law of the multi-unit State itself.
2. If, under its conflict-of laws provisions, 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.

XI. Transition

Article 142. Effective date

1. The effective date, at which this Law comes into force, is [a date to be specified by the enacting State] [six months after [a date to be specified by the enacting State]].
2. From its effective date, this Law applies to all transactions within its scope, whether entered into before or after that date, except as provided in articles 143-146.

**Article 143. Inapplicability of the law to actions
commenced before the effective date**

1. This Law does not apply to a matter that is the subject of litigation or alternative binding dispute resolution proceedings that were commenced before the effective date.
2. If enforcement of a security right has commenced before the effective date, the enforcement may continue under the law in force before the effective date.

Article 144. Creation of a security right

The law in force before the effective date determines whether a security right was created before the effective date.

Article 145. Third-party effectiveness of a security right

1. A security right that is effective against third parties under the law in force before the effective date remains effective against third parties until the earlier of:

(a) The time it would cease to be effective against third parties under the law in force before the effective date; and

(b) The expiration of a transition period of [a period of time, such as six months, to be specified by the enacting State] months after the effective date.

2. If the requirements for third-party effectiveness under this Law are satisfied before third-party effectiveness would have ceased under the preceding sentence, third-party effectiveness is continuous.

Article 146. Priority of a security right

1. Subject to paragraphs 3 and 4 of this article, this Law governs the priority of a security right.

2. The time when a security right referred to in article 145 was made effective against third parties or became the subject of a registered notice under the law in force before the effective date is the time to be used in determining the priority of that right.

3. The priority of a security right is determined by the law in force before the effective date if:

(a) The security right and the rights of all competing claimants arose before the effective date of this Law; and

(b) The priority status of none of these rights has changed since the effective date of this Law.

4. The priority status of a security right has changed if:

(a) It was effective against third parties on the effective date of this Law as provided in article 145 and later ceased to be effective against third parties; or

(b) It was not effective against third parties on the effective date of this Law and later became effective against third parties.