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Draft Model Law on Secured Transactions

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Chapter VIII. Conflict of laws[1]

A. General rules

[*Note to the Working Group: The Working Group may wish to consider when the conflict-of-laws rules should apply. One approach would be to apply the conflict-of-laws rules of the forum whether or not a situation involves a choice between the laws of different States. A reason to follow this approach might be that requiring a determination as to whether a situation involves a choice of laws would create uncertainty because a court may view the issue as involving a choice of laws, while another court may see the issue differently. In addition, the conflict-of-laws rules should apply in any case, as they are also the rules that provide whether the applicable law is the domestic law of the forum or a foreign law. Another approach would be to apply the conflict-of-laws rules in all cases involving a choice between the laws of different States. Under this approach, the conflict-of-laws rules would apply, unless there was absolutely no element in the facts of a case that might require a decision as to which of two or more laws might be applicable; any foreign element would trigger the applicability of the conflict-of-laws rules. This approach could ensure a relatively broad application of the conflict-of-laws rules but also result in uncertainty as to their application. Yet another approach would be to require always or only in the particular circumstances that additional specified criteria be met for the conflict-of-laws rules to apply. Under such an approach, the application of the conflict-of-laws rules could be limited and uncertain.*]

Article 78. 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 79. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 5 and article 93, 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. [Subject to paragraph 4, the] [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. If ownership of a [motor vehicle, ship, aircraft or similar tangible asset to be specified by the enacting State] is registered in a specialized registry or noted on a

[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).

title certificate, and a notice with respect to a security right in that asset may be registered in that registry or noted on that certificate], the law applicable to the creation, third-party effectiveness and priority of the security right in a tangible asset is the law of the State under whose authority the registry is maintained or the certificate is issued.

5. Subject to paragraph 3, a security right in a tangible asset (other than a negotiable instrument, negotiable document or certificated non-intermediated security) 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 short period of time to be specified by the enacting State] after the time of the putative creation of the security right.

[*Note to the Working Group: The Working Group may wish to note that paragraph 1, which is based on recommendation 203 of the* Secured Transactions Guide*, reflects the generally acceptable* lex situs *(or* lex rei sitae*) approach. The Working Group may also wish to note that paragraph 2, which is based on recommendation 206 of the* Secured Transactions Guide*, addresses the question whether the law applicable to the priority of a security right in tangible assets covered by a negotiable document that was made effective against third parties by possession of the document should be the* lex situs *of the assets or the document. This rule is the logical consequence of article 44, under which a security right in tangible assets covered by a negotiable document that was made effective against third parties by possession of the document has priority over a competing security right made effective by another method (e.g. by possession of the assets or registration of a notice in the Registry in the State of the grantor's location).*

In addition, the Working Group may wish to consider the bracketed text in paragraph 3, which is intended to ensure that, if mobile goods are subject to the specialized registration system referred to in paragraph 4, paragraph 4 would apply. In addition, the Working Group may wish to note that paragraph 4 has been revised to be aligned more closely with recommendation 205, on which it is based, and address the points made in the Secured Transactions Guide *(see chap. X, paras. 37 and 38). In particular, the Working Group may wish to note that the need for a special rule seems limited to title registries and title certificates. If a State has a specialized registry for notices of security rights and other encumbrances, but which does not also serve as a title registry (in which initial ownership and outright sales can be recorded, for example), the general conflict-of-laws rules can handle the matter and, if those rules point to the law of a State that has such a registry, the substantive law of that State will tell a secured creditor to register in that registry rather than the general security rights registry of the State. However, the Working Group may wish to consider that paragraph 4 should be deleted, because: (a) there are few specialized title registrations systems that permit the registration of a notice of a security right for third-party effectiveness purposes; (b) to the extent that there are such specialized title registrations systems and a notice of a security right may be registered in the specialized title registry of more than one State, paragraph 4 would not work well; and (c) to the extent that such specialized registration is based*

on an international convention, of which the enacting State is a party, article 3 (international obligations of the enacting State) would be sufficient to preserve the application of the convention.

Moreover, the Working Group may also wish to consider whether in this provision (and in other provisions in this chapter that include a reference to the location of the encumbered asset or the grantor), explicit reference should be made to article 85, which indicates the relevant time for determining the location of the encumbered asset or the grantor. Alternatively, such a reference may be included in the Guide to Enactment, which could also explain that the provisions of the draft Model Law, in particular those contained in the same chapter, should be read together.

The Working Group may also wish to consider whether: (a) paragraph 5 is a conflict-of-laws rule rather than a substantive rule of the receiving State like article 21; and (b) the wording in parenthesis is necessary, as negotiable instruments, negotiable documents and certificated non-intermediated securities are normally not captured by the expression "tangible asset in transit or to be exported".]

Article 80. Law applicable to a security right in an intangible asset

Except as provided in articles 81 and 90-93, 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 81. Law applicable to a security right in receivables arising from a sale or lease of or a transaction secured by immovable property

1. The law applicable to the creation, effectiveness against third parties and priority of a security right in a receivable arising from a sale or lease of, or a transaction secured by, immovable property is the law of the State in which the grantor is located.

2. Notwithstanding paragraph 1, the law applicable to the priority of a security right in a receivable arising from a sale or lease of, or a transaction secured by, immovable property as against the right of a competing claimant that is registered in the immovable property registry, in which rights in the relevant immovable property are registered, is the law of the State under whose authority the immovable property registry is maintained, provided that under that law registration is relevant to the priority of the security right in the receivable.

[*Note to the Working Group: The Working Group may wish to note that, while this article reflects recommendation 209 of the* Secured Transactions Guide *(see also chap. X, para. 54), the rule in paragraph 1 is the same as the general rule in article 80. The Working Group may thus wish to consider whether paragraph 1 should be deleted and paragraph 2 be amended to read as follows: "Notwithstanding article 80, in the case of a security right in a receivable arising from a sale or lease of, or a transaction 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 registered in the immovable property registry in which rights in the relevant immovable are registered is the law of the State under whose authority the immovable property registry is maintained". The Working*

Group may wish to note that this rule would apply only if: (a) the State under the authority of which the immovable property registry was organized required registration by a competing claimant for triggering the application of a different priority rule for security rights in such receivables; and (b) a competing claimant did in fact register in the immovable property registry. The Working Group may wish to reconsider these requirements as they add complexity to the rule in this article.]

Article 82. 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 [the relevant act of] enforcement takes place, except as provided in article 93; and

(b) In an intangible asset is the law applicable to the priority of the security right, except as provided in articles 90, 92 and 93.

[*Note to the Working Group: The Working Group may wish to consider the text within square brackets in subparagraph (a), which is intended to clarify that enforcement may involve several distinct acts (e.g. notice of default, notice of the secured creditor's intent to obtain possession of an encumbered asset without applying to a court or other authority, disposition of an encumbered asset, and distribution of the proceeds of disposition) that may take place in different States (see A/CN.9/802, para. 105). For example, a secured creditor may take possession of the encumbered assets in one State, dispose of them in a second State, and distribute the proceeds of disposition in a third State. Alternatively, the matter may be discussed or explained in the Guide to Enactment.*]

Article 83. 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 asset of the same kind as the proceeds.

[*Note to the Working Group: The Working Group may wish to note that, if the original encumbered asset is inventory, which is sold, and the purchase price is paid into a bank account: (a) under paragraph 1, the law applicable to the question of whether the secured creditor automatically acquires a security right in the right to payment of the funds credited to a bank account as proceeds of the original encumbered inventory would be the law of the location of the inventory; and (b) under paragraph 2, the law applicable to the third-party effectiveness and priority of any security right in the proceeds would be the law applicable to the right to payment of funds credited in the bank account. The Working Group may wish to consider whether this type of bifurcated rule may lead to difficulties in cases where the law governing creation recognizes a broad automatic proceeds rule whereas the law governing third-party effectiveness and priority recognizes no or only a very limited automatic proceeds right. In addition, the Working Group may wish to consider whether the text of this article should be revised to make it clear*

that it is dealing only with the law applicable to proceeds derived from the original encumbered assets as a result of a disposition by the grantor or other event prior to default, whereas article 82, subparagraph (a), deals with the law applicable to the distribution of proceeds derived from a disposition of the encumbered assets pursuant to post-default enforcement proceedings.]

Article 84. 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, if any;

(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 85. 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 rights of all competing claimants in an encumbered asset are created and made effective against third parties 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.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2, which is based on recommendation 220 of the* Secured Transactions Guide*, is correct in referring to "the rights of all competing claimants" having been "created and made effective against third parties before a change in the location of the asset or grantor". It would seem that this language only works for competing claimants that are competing secured creditors, and not for competing claimants that are outright transferees, judgement creditors or the grantor's insolvency representative. In addition, the Working Group may wish to note that, under a combined application of articles 82 and 85: (a) enforcement of a security right in a tangible asset would seem to be referred to the law of the State in which enforcement takes place (i.e. in most instances, the law of the State in which the asset is located) at the time of enforcement; (b) enforcement of a security right in an intangible asset would seem to be referred to the law governing priority (i.e. for receivables, the law of the State in which the grantor is located) at the time the issue arises; and (c) if the location changed after enforcement commenced, the relevant location would be the location at the time enforcement commenced. In addition, the Working Group may wish to consider whether this article produces the appropriate result where there is a change of location of the encumbered assets or the grantor after the creation of a security right or after the beginning of*

enforcement proceedings. For example, in the case of a change in the location of a tangible asset after the creation of a security right in it and thus a change to the law applicable to enforcement, the secured creditor's right to repossess the asset without applying to a court or other authority may be limited or regulated differently. In this regard, the Working Group may wish to take into account that: (a) a rule providing that the relevant time for determining the location of a tangible asset for enforcement issues should be the time of the putative creation of the security right might be inconsistent with article 82, subparagraph (a); (b) article 21 of the draft Model Law clearly contemplates that there could be a change in the applicable law; and (c) article 85, paragraph 2, deals with the issue for all claimants whose rights arose before the change.]

Article 86. 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 87. 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 permit the application of the provisions of the law of the forum [or another State] to the third-party effectiveness and priority of a security right.

[*Note to the Working Group: The Working Group may wish to note that, pursuant to a decision by the Working Group (see A/CN.9/802, para. 106), articles 86 and 87 of the draft Model Law have been revised to be aligned with articles 8 and 11 of the Hague Principles on Choice of Law in International Commercial Contracts (the "Hague Principles). In addition, the Working Group may wish to consider whether article 11, paragraph 5, of the Hague Principles, which deals with the public policy and mandatory law exception in the case of arbitral proceedings should also be added to this article. Moreover, the Working Group may wish to consider whether paragraph 5 of this article, which is based on recommendation 222, subparagraph (c), of the* Secured Transactions Guide*, should be revised to clarify that the forum State may not displace the provisions of the law applicable to third-party effectiveness and priority, and apply its own provisions or the provisions of another State (unless the forum law or the law of another State is*

the law applicable under the provisions of this chapter). "This approach is justified by the need to achieve certainty with respect to the law applicable to third-party effectiveness and priority. The same approach is followed in articles 23, paragraph 2, 30, paragraph 2, and 31 of the Assignment Convention*. It is also followed in article 11, paragraph 3, of The Hague Securities Convention" (see* Secured Transactions Guide*, chap. X, para. 79). In this regard, the Working Group may wish to consider an alternative formulation of paragraph 5 along the following lines: "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", or "This article does not permit the overriding application of the provisions of the law of the forum or another State, the law of which is applicable under the provisions of this chapter, that relate to the third-party effectiveness and priority of a security right".*]

Article 88. Impact of commencement of insolvency proceedings on the law applicable to a security right

1. Subject to paragraph 2, the law applicable to a security right under the provisions of this chapter applies notwithstanding the commencement of insolvency proceedings relating to the grantor.

2. The application of the law applicable to a security right under the provisions of this chapter is subject to the application of the insolvency law of the State in which insolvency proceedings are commenced to the treatment of security rights in the grantor's insolvency.

[*Note to the Working Group: In view of the fact that the draft Model Law does not deal with insolvency law issues (or the law applicable in the case of the grantor's insolvency), the Working Group may wish to consider whether this article, which is based on recommendation 223 of the* Secured Transactions Guide*, should be retained. If the Working Group decides that this article should be deleted, the matters addressed therein could be discussed in the Guide to Enactment as matters for other law of the enacting State. If the Working Group decides that this article should be retained, it may wish to consider whether paragraph 2 should be deleted, as: (a) while the second sentence of recommendation 223, on which paragraph 2 is based, is appropriate for a guide, it may not be sufficiently specific for a model law; and (b) the scope of paragraph 2, as revised to be included in a model law, may be broader than the second sentence of recommendation 223. If paragraph 2 is deleted, the Guide to Enactment could explain the impact of the application of the law applicable to insolvency (i.e., the* lex fori concursus*) on the law applicable to the validity, enforceability and priority of a security right (see* Secured Transactions Guide*, rec. 223, and chap. X, paras. 80-82, and* Insolvency Guide*, rec. 31, and part two, para. 88).*]

B. Asset-specific rules

Article 89. 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 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.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 217 of the* Secured Transactions Guide *(see chap. X, paras. 62 and 63) and article 29 of the* Assignment Convention.]

Article 90. Law applicable to a security right in a right to payment of funds credited to a bank account

1. Subject to article 91, 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 bank and the secured creditor, is

Option A[2]

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

2. If the bank 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 bank 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.

3. If the applicable law is not determined pursuant to paragraph 1 or 2, the applicable law is to be determined pursuant to [the enacting State to insert here 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].

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

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 210 of the* Secured Transactions Guide*. The Working Group may wish to consider whether option A or the Guide to Enactment should clarify that a branch (or office) of a bank should be considered as being located in a particular jurisdiction irrespective of whether the bank offers its branch services through physical offices or only through an online connection accessible electronically by customers located in that jurisdiction. In this connection, the Working Group may wish to take into account that a bank must have a physical presence or legal address in a jurisdiction for regulatory and other purposes (anti-money-laundering laws, Foreign Account Tax Compliance Act, court jurisdiction, etc.).*]

Article 91. 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 or in a right to payment of funds credited to a bank account, the law of that State is the law applicable to the issue of whether third-party effectiveness has been achieved by registration under the laws of that State.

[*Note to the Working Group: The Working Group may wish to consider whether this article, which is based on recommendation 211 of the* Secured Transactions Guide*, should be retained. In this regard, the Working Group may wish to note that the effect of this rule would be that, if the State in which the grantor is located recognizes registration of a notice as a method of third-party effectiveness, a secured creditor would have the option of achieving third-party effectiveness by registration under the law of the State in which the grantor is located (art. 91) or under the law of the State in which the instrument is located (art. 79, para. 1). However, the Working Group may wish to consider that this result may have unintended consequences. For example, a potential competing claimant will need to review the law of the grantor's location to determine if registration is a method for achieving third-party effectiveness and then search in the registries of two different States in order to determine whether there is a security right in the instrument that is effective against third parties. If the Working Group decides that this article should be retained, it may wish to consider whether it should apply only to negotiable instruments and rights to payment of funds credited to bank accounts or also to other types of asset (e.g. tangible assets covered by a negotiable document, the third-party effectiveness of a security right in which would be determined by the location of the document).*]

Article 92. 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 93. 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.

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 consider the above-mentioned options. Option A provides separate rules for certificated and uncertificated securities and, with respect to certificated securities, different rules for the various matters (which are rules similar to those applicable to tangible assets; see articles 79, para. 1, and 82, subpara. (a)). In particular with respect to certificated securities, this approach has the advantage of flexibility but also the disadvantage of uncertainty as it may lead to inconsistencies and overlaps. For example, to the extent that a clear distinction cannot be drawn among those matters, they may be referred to the law of the issuer's constitution rather than the law of the certificate's location. However, this is an issue that may arise with respect to other*

types of intangible asset, such as receivables, where, under article 80, the law of the grantor's location applies to creation, effectiveness against third parties and priority, while, under article 89, the law applicable to the receivable applies to the relationship between the debtor of the receivable and the secured creditor. Thus, the Working Group may wish to consider concluding that this allocation of applicable law is sound or addressing this concern in the draft Model Law or the Guide to Enactment also with respect to other types of intangible asset. In addition, by referring the creation, third-party effectiveness and priority of a security right in certificated securities to the law of the certificate's location, option A makes it possible for the secured creditor to manipulate the law applicable to third-party effectiveness and priority under option A (but presumably not creation in light of article 85) by moving the certificate from one country to another. Again, this concern would also arise with respect to other types of tangible asset in which the secured creditor has physical possession, whether they embody a claim against a third party (such as negotiable instruments and negotiable documents) or not (e.g. precious metals). Moreover, with respect to uncertificated securities, option A has the advantage that only one rule would apply to all issues and refer to one and the same law (which would be different from the law applicable to other types of intangible asset). It has, however, the disadvantage that it does not draw a distinction between equity securities (with respect to which, for the effectiveness of a security right against an issuer, the law of the State of the constitution of the issuer is appropriate) and debt securities (with respect to which, the law governing the securities may be more appropriate). A variant of option A might be to limit the application of paragraph 2 to equity securities and add a new paragraph for debt securities along the following lines: "The law applicable to the effectiveness of a security right in non-intermediated debt securities against the issuer is the law governing the securities" (while deleting the reference to the effectiveness against the issuer from current paragraph 3). Alternatively, this new paragraph may track the language of, or be addressed in, article 89. In this regard, the Working Group may wish to note that the issuer of securities is treated as a third-party obligor in the draft Model Law and the effectiveness of a security right as against third parties obligors is addressed in article 89 (with the exception of effectiveness as against a depositary bank, which is addressed in article 90).

Option B provides one single rule that would apply to both certificated and uncertificated securities and to all issues (creation, effectiveness against third parties, priority and enforcement, as well as the effectiveness of a security right against the issuer). This approach eliminates the risks of inconsistencies or overlaps between the law of the State of issuer's constitution and another law that the conflict-of-laws rules of the forum may designate for other issues (e.g. the law of the location of the certificate for the priority of a security right in certificated non-intermediated securities). In addition, referring to only one law for all issues provides greater certainty, as some matters (e.g. limitations on the transfer of securities under corporate law) may be viewed as being relevant not only to the effectiveness of the security right against the issuer but also to its creation and its enforcement. Moreover, by not referring to the law of the location of the certificate with respect to certificated securities, option B prevents the person in possession from manipulating the designation of the applicable law by moving the certificate from one country to another. The disadvantage of option B, however, is that it departs from the lex situs *rule for the creation, effectiveness against third parties*

and priority of a security right in certificated securities. Thus, the conflict-of-laws rules for certificated securities would then be different from those applicable to other intangible assets that have been assimilated for certain purposes to tangible assets (under article 79, the creation, effectiveness against third parties and priority of a security right in negotiable documents or instruments are governed by the law of the location of the document or instrument). Another disadvantage of option B is that it does not differentiate between equity and debt securities and thus refers even security rights in debt securities to the law of the State under which the issuer is constituted, which may not always be appropriate.

Option C retains option B for equity securities (whether certificated or uncertificated) but refers to a different rule for debt securities (whether certificated or uncertificated), that is, the law of the State governing the securities. The justification for that approach is that, if the issuer has selected a law other than the law of the State of its constitution as the governing law of the securities, that other law should also be the law applicable to security right matters. The benefit of this approach is that one single law would govern all matters relating to debt securities, which would avoid the risks of inconsistencies arising from different laws being applicable to the various issues. The disadvantage of option C, however, is that the distinction between equity securities and debt securities may be blurred in certain circumstances (e.g. convertible securities). In addition, while option C focusses on the contractual nature of debt securities, which are analogous to receivables in that respect, it would not be consistent with the conflict-of-laws rule on the creation, effectiveness against third parties and priority of a security right in a receivable (under article 80, in the case of a receivable, the law of the State in which the grantor is located would govern those issues). As debt securities are receivables in a generic sense (monetary obligations), then a variation of option C would be to apply to debt securities the same conflict-of-laws rule as for receivables.]

Article 94. 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 95. 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 96. Transitional application of this Law

1. For the purposes of this chapter:

(a) "Prior law" means [the law to be specified by the enacting State] that was in force immediately before the entry into force of this Law; and

(b) "Prior security right" means a right created in accordance with prior law 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.

[*Note to the Working Group: The Working Group may wish to consider the question of whether "prior law" could be only the law of the enacting State or also the law of another State applicable by virtue of the conflict-of-laws rule of the forum State. In this regard, the Working Group may wish to take into account that the provisions of the transition chapter (and any other chapter of this Law) will be triggered only if the law of the enacting State is the applicable law. The Working Group may also wish to note that the term "this Law" in paragraph 2 includes the provisions of the conflict-of-laws chapter of "this Law".*]

Article 97. 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.

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned more closely with recommendation 229 of the* Secured Transactions Guide*, on which it is based. As a result, even though article 96, paragraph 2, provides that new law applies, a secured creditor that has already begun enforcement on the date of the entry into force of the new law has the option to continue enforcement under the rules of prior law (but may, instead, comply with the new rules). This is important if, for example, the new rules are clearer or more useful, in which case the secured creditor would decide not to exercise the option and, instead, proceed under the new rules.*]

Article 98. 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 that was created under prior law remains effective between the parties notwithstanding that its creation did not comply with the creation requirements of this Law.

Article 99. 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 entered into before the entry into force of this Law 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 100. 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 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 99, paragraph 1, and ceased to be effective against third parties as provided in article 99, 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.

[*Note to the Working Group: The Working Group may wish to note that, based on recommendations 232-234 of the* Secured Transactions Guide*, this article refers to situations in which prior law applies to the priority of a prior security right.*]

Article 101. Entry into force of this Law

This Law enters into force

Option A

on [a date to be specified by the enacting State in this Law].

Option B

[…] months [after a date to be specified by the enacting State].

Option C

on [a date to be specified by the enacting State in a decree to be issued once the Registry is operational.]

[*Note to the Working Group: The Working Group may wish to note that this article has been revised to be aligned more closely with the* Secured Transactions Guide *(see rec. 228 and chap. XI, paras. 4-6). The Working Group may also wish to note that the Guide to Enactment will: (a) refer in this regard to the discussion in the* Secured Transactions Guide *(see chap. XI, paras. 4-6); (b) explain that the expression "date on which the Law enters into force" means the date on which the Law begins to apply to transactions within its scope; and (c) explain that this article may be introduced at the beginning or the end of this Law.*]