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I. – BACKGROUND

In December 2007, after six years of deliberations, 12 Working Group meetings, and a comparable number of Expert Group meetings, the United Nations Commission on International Trade Law (UNCITRAL) promulgated a comprehensive *Legislative Guide on Secured Transactions* (hereinafter: the *Legislative Guide*). In December 2008, the *Legislative Guide* was endorsed by the United Nations General Assembly.

The *Legislative Guide* does not represent UNCITRAL's first foray into the creation of international instruments governing secured transactions. In 2001, UNCITRAL approved, and the General Assembly adopted, the *United Nations Convention on the Assignment of Receivables in International Trade* (hereinafter: the *Receivables Convention*). The *Receivables Convention* does not address the full range of secured transactions but, rather, focuses on an important subset of such transactions – transactions in which a receivable is assigned, either outright or as security for an obligation. While the *Receivables Convention* is an important first step for UNCITRAL, its contribution to the substantive law of secured transactions is limited. This is because, in preparing the *Receivables Convention*, UNCITRAL found it difficult to reach consensus on many important substantive rules. Accordingly, while the *Receivables Convention* contains such important substantive provisions as validation of bulk assignments of receivables and assignments of future receivables, the invalidation of many anti-assignment provisions in receivables, and a comprehensive statement of the rights of an assignee and the debtor of the receivable *vis-à-vis* each other, many consider the most important provisions of the *Receivables Convention* to be the conflict-of-laws rules that determine which State's law governs critical issues such as the

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effectiveness of an assignment against third parties and the priority of an assignment as against competing claimants.[1]

Using the *Receivables Convention* as a base, UNCITRAL then prepared the *Legislative Guide on Secured Transactions*. The *Legislative Guide* has a scope that is much broader than the *Receivables Convention*. The *Receivables Convention* addressed only one type of property – receivables – and, as noted above, addressed many important issues only from a perspective of conflict of laws because the Commission was unable to achieve consensus as to substantive resolution of those issues; the *Legislative Guide*, on the other hand, addresses security rights in almost all types of movables [2] and provides substantive rules for almost every issue within its scope. While the *Receivables Convention* provided only conflict-of-laws rules for issues of third-party effectiveness and priority, the *Legislative Guide* provides detailed recommendations with respect to those issues. More particularly, the *Legislative Guide* contains extensive chapters addressing the key objectives of an effective and efficient secured transactions regime, basic approaches to secured transactions, creation of security rights, effectiveness of security rights against third parties, security rights registries, priority of security rights as against competing claimants, the rights and obligations of parties to a security agreement, the rights and obligations of third-party obligors, enforcement of security rights, acquisition financing, conflict of laws, the effect of insolvency proceedings, and transition principles to the new secured transactions regime.

One of the more contentious issues in the development of the *Legislative Guide* proved to be the extent to which the generally applicable recommendations of the *Legislative Guide* would apply to security rights in intellectual property. Ultimately, this was resolved by (i) a decision that the recommendations of the *Legislative Guide* would defer to existing rules of intellectual property law that apply to secured transactions,[3] and (ii) a commitment to address security rights in intellectual property in a Supplement to the *Legislative Guide*.

1 The *Receivables Convention* conflates effectiveness against third parties and priority (as those terms are used in the *Legislative Guide* into a single (somewhat infelicitously chosen) term – "priority." See Article 5(g) of the *Receivables Convention*.

2 In the United States and some other States, such property is referred to as "personal property".

3 This decision was effectuated by Recommendation 4(b) in the *Legislative Guide*, which states that the secured transactions law it envisages should not apply to "Intellectual property in so far as the provisions of the law are inconsistent with national law or international agreements, to which the State is a party, relating to intellectual property."

Immediately after completing work on the *Legislative Guide*, UNCITRAL honored its commitment to prepare a supplement to the *Legislative Guide* that addresses security rights in intellectual property. Five Working Group meetings and several Expert Group meetings were held and, in June 2010, at the annual Commission meeting, UNCITRAL gave final approval to a *Supplement to the Legislative Guide on Security Rights in Intellectual Property*. This, too, had proved to be a daunting task. While adding only six new recommendations, the Supplement exhaustively analyzes the application of each principle in the *Legislative Guide* to transactions in which the encumbered asset consists of intellectual property.

What have these years of effort produced? Most importantly, they have produced consensus. In any area as varied and difficult as secured transactions, with doctrines so imbued in legal culture that, barely a generation ago, the effort to achieve consensus was dismissed as unlikely,[4] UNCITRAL has achieved a remarkable accomplishment. It has produced an instrument that (i) makes recommendations that, if followed, would result in substantial change in fundamental legal doctrines for a majority of the States that are members of the Commission, and (ii) has met with approval by the vast majority of those States.

What is the instrument resulting from this consensus? The *Legislative Guide* is a substantial document, comprising 452 pages plus annexes (not even taking into account additional materials that will be incorporated from the Supplement). Of those 452 pages, 371 are devoted to analysis and commentary and the remaining 81 pages consist of Recommendations and Terminology. The Supplement on Security Rights in Intellectual Property will add an additional 100 pages or so to the *Legislative Guide*, consisting mostly of commentary but also containing six new recommendations.[5]

4 *Report of the Secretary-General: Study on Security Interests*, [1977] U.N. Doc. A/CN.9/131, & 4.2.1, at 218, reprinted in 8 *Yearbook of International Trade Law* 171, 218 (1977); [1977] U.N. Doc. A/CN.9/SER.A/1977.

5 The new recommendations are:

– *Recommendation 243*, concerning security rights in tangible assets with respect to which intellectual property is used;

– *Recommendation 244*, concerning the impact of a transfer of encumbered intellectual property on the effectiveness of the registration;

– *Recommendation 245*, concerning priority of rights of certain licensees of intellectual property;

– *Recommendation 246*, concerning the right of the secured creditor to preserve the encumbered intellectual property;

The *Legislative Guide*, together with the Supplement on Security Rights in Intellectual Property,[6] may fairly be regarded as a substantial legal achievement. Nonetheless, it must be remembered that the *Legislative Guide* does not create law (in the "hard law" sense). The *Legislative Guide* has no operative effect merely from its promulgation by UNCITRAL and endorsement by the United Nations General Assembly. Moreover, it is not a treaty or convention that becomes law upon ratification or accession by a sufficient number of States. Indeed, it is not even a model law that can be enacted *in haec verba* by States that wish to be governed by it.

What, then, is the role of the *Legislative Guide*? Quite simply, it is a guide to a legislator (or legislature) wishing to enact secured transactions reform. The guidance provided by the *Legislative Guide* goes well beyond that which would be found in a model law. A model law, by its nature, effectuates, through legislative language, a set of policy determinations and, if accompanied by comments, perhaps also includes some explication and justification for those determinations. By way of contrast, the guidance provided by the *Legislative Guide* consists primarily of its comprehensive analyses of the policy issues that must be addressed by a State that wishes to rethink its secured transactions law. These analyses typically start with a description of various ways that States currently address a particular issue and continue through a critical analysis of those variations, leading to a conclusion as to which approaches best serve the policies of modern secured transactions law. Then (and only then) does the *Legislative Guide* provide recommendations. At this point, however, the language of the *Legislative Guide* becomes quite specific, with the result that the recommendations, when taken together, bear a strong resemblance to statutory language. Indeed, it was commonly said during "consultation breaks" in Working Group meetings [7] that, by deleting the phrase "the law should provide that" at the beginning of each recommendation, the remaining language would be very close to statutory form. Yet, the language of the recommendations is not truly in statutory form (a task that would be challenging in light of the variety of statutory styles in

– *Recommendation 247*, concerning the application of acquisition security right provisions to security rights in intellectual property; and

– *Recommendation 248*, concerning the law applicable to a security right in intellectual property.

6 Subsequent references to the "Legislative Guide" refer to the *Legislative Guide* as augmented by the *Supplement on Security Rights in Intellectual Property*.

7 UNCITRAL Working Group meetings do not pause for "coffee breaks". They do, however, pause during mid-morning and mid-afternoon for "consultation breaks" (at which, not surprisingly, coffee is readily available).

UNCITRAL States) but, rather, is more akin to a "term sheet" for results that a statute should bring about. It is left to the legislator to decide whether to follow a recommendation and, if so, the form and language that would be best suited to the particular State.

It has been suggested by some that UNCITRAL should complete the mission of the *Legislative Guide* by preparing a Model Law on Secured Transactions based on the *Legislative Guide*. The remainder of this paper explores the advantages and disadvantages of embarking on such an endeavor. First, the paper addresses considerations in favor of UNCITRAL preparing a model law. Second, it addresses considerations that counsel against preparation of such a law. Finally, the paper weighs and balances these considerations, reaching a conclusion as to whether a Model Law on Secured Transactions should be prepared at this time.

II. – CONSIDERATIONS IN FAVOR OF A MODEL LAW

The proponents of the preparation of an UNCITRAL Model Law on Secured Transactions can point to several benefits that would accrue from the preparation and promulgation of such a Model Law. These benefits are not inconsiderable but, of course, they must be measured against potential negatives associated with preparation and promulgation.

First, a Model Law might help complete the *Legislative Guide*'s mission to serve as a guide to States. While the analyses provided in the *Legislative Guide*, and the recommendations that flow from them, are quite well crafted, the *Legislative Guide* and its 248 recommendations (including those in the Supplement on Security Rights in Intellectual Property) are daunting even for experts in the field. The time and expertise that would be required to transform those recommendations into a legislative enactment might not be available in all States and, more important, might be unavailable in States with the greatest need for secured transactions reform. The preparation by UNCITRAL of a Model Law, however, can provide such States with a package that can be transformed into domestic legislation much more easily. Moreover, because such a Model Law would be available in conjunction with the *Legislative Guide*, legislators and other policy makers would be able to consult the *Legislative Guide* for explanations as to why a particular provision, or set of provisions, in the Model Law is proposed as well as for greater understanding of the competing policy choices that may have led to it.

Second, a Model Law produced by UNCITRAL may be more proficient technically and lead to higher quality domestic law than a domestic law

drafted by local actors solely from guidance of the *Legislative Guide*. While the recommendations in the *Legislative Guide* are in a form that is, in many ways, similar to statutory language, there is always the possibility of their mistranslation into legislation that does not fulfill their intent. The existence of a Model Law can lessen the possibility of such inadvertent drafting issues that could lead to a statute that does not work as intended. Moreover, while the recommendations in the *Legislative Guide* are presented sequentially without explicit indication of how they fit together, assembling a statute from the recommendations is not as simple as picking and choosing those which the State wishes to enact, putting them in the form of domestic legislation, and enacting them. Such a "menu" approach to the recommendations of the *Legislative Guide* could easily lead to unintended or incoherent results. This is because the *Legislative Guide* is not a compilation of disconnected and abstract foundational principles; rather, it is a description of a complex, interdependent set of rules that must work well together. Drafting such an interconnected statute can be particularly difficult, especially if the enacting State's legislators are unfamiliar with either the topic or the approach taken by the *Legislative Guide*.

Third, in the absence of a Model Law, many States will be aware of the pitfalls described in the previous two paragraphs and conclude that there might not be sufficient domestic expertise in modern concepts of secured transactions law to assemble a workable statute from the recommendations of the *Legislative Guide*. This itself can serve as a disincentive for such a State to modernize its secured transactions laws along the lines recommended in the *Legislative Guide*. On the other hand, if the *Legislative Guide* were accompanied by a Model Law, the availability of which would instill confidence that a domestic enactment of the recommendations of the *Legislative Guide* in a coherent and consistent manner is possible, this could increase the number of States that modernize their law to be consistent with that recommended by the *Legislative Guide*.

The fourth consideration favoring the preparation of a Model Law based on the *Legislative Guide* does not relate to the difficulties experienced by States in implementing the recommendations of the *Legislative Guide*. Rather, it relates to the fact that the *Legislative Guide*, like all human endeavors, is imperfect. In particular, it is likely that some rules necessary for a complete secured transactions regime are not addressed in the *Legislative Guide*. These lacunae could prove troublesome for States that seek to transform the *Legislative Guide* into domestic legislation. The process of transforming the *Legislative Guide* into a Model Law, however, would likely force UNCITRAL

to engage in the sort of detailed analysis that will lead to the discovery of such gaps and to the preparation of statutory language to resolve them. Resolution of those issues by UNCITRAL, rather than by individual States, would likely result in greater consistency and coherence.

Finally, an UNCITRAL Model Law would be promulgated by an international body with work methods that require consensus.[8] The instrument resulting from those work methods might prove to be more acceptable than similar efforts promulgated by organizations that develop their products in a manner that is less participatory or that use compliance with their recommendations as a factor in determining aid or assistance to a State. (There is, of course, a down side to consensus-based approaches. They often lead to lowest-common-denominator approaches that can dilute the effect of policies that they seek to further.)

III. –CONSIDERATIONS AGAINST A MODEL LAW

While there are several considerations that point in favor of the preparation of a Model Law on Secured Transactions by UNCITRAL, several other considerations point in the opposite direction. Accordingly, a decision as to whether preparation of a Model Law would be an effective use of UNCITRAL's resources must take into account both the considerations in favor of its preparation and those that counsel caution. A brief analysis of some considerations that point against preparation of a Model Law at this time follows in the succeeding paragraphs.

UNCITRAL has already devoted substantial time and effort to the development of the *Legislative Guide*. Yet, this does not mean that the transformation of the recommendations of the *Legislative Guide* to a Model Law would be simple and speedy. Rather, the drafting of statutory language requires slow, painstaking effort. While the substantial talents of the UNCITRAL Secretariat can produce a draft that would provide an excellent starting point for an eventual Model Law, there is no substitute for line-by-line vetting of such a draft by talented participants who bring experience from a variety of perspectives to their analysis of the draft. As a result, production of a Model Law based on the recommendations of the *Legislative Guide* would be a substantial undertaking. Yet, the marginal gain that the Model Law would provide beyond the significant benefits of the *Legislative Guide* might be insufficient to justify such a substantial effort. After all, the *Legislative Guide*

8 See <http://www.uncitral.org/uncitral/en/about/methods_faq.html#decisions> (last visited on July 14, 2010).

provides not only extensive analysis but detailed recommendations that are close to statutory form already. Thus, a State wishing to enact the recommendations of the *Legislative Guide* is already brought very close to the "finish line" by the existing instrument. While a Model Law would certainly be a useful guide to enactment of the recommendations, the time and effort expended in creating a model that works in many States with varying legal cultures would almost certainly be greater than the time and effort needed to transform the recommendations to statutory form in the context of a single State.

Second, while the stated purpose of a project to create a Model Law from the recommendations of the *Legislative Guide* would be to implement those recommendations and not change them, such a purpose might prove difficult to maintain. There is a substantial risk that, in transforming the recommendations of the *Legislative Guide* into statutory form, the Working Group preparing the Model Law will reopen, or "relitigate", policy decisions that are explicitly stated in the recommendations of the *Legislative Guide* or which are implicit in them. Many of those decisions were reached only after extended vigorous debate and a slow process of consensus building in both the Working Group that prepared the *Legislative Guide* and in the Commission itself. Yet the preparation of a Model Law, even by the same Working Group (and, of course, the same Commission) will necessarily involve different people who, not having experienced the discussions that led to a painstaking achievement of consensus, may not share its conclusions. After all, even though a Model Law would be prepared by the same UNCITRAL Working Group that prepared the *Legislative Guide*, with essentially the same States as members of the Working Group, the delegates sent by those States will frequently differ from those sent by the same States during the preparation of the *Legislative Guide*. As a result, it is highly likely that some such delegates, when grappling with explication of a particular recommendation in statutory form, will conclude that a different rule would be more appropriate and advocate that the Model Law adopt such a different rule. Such relitigation will not only undermine the *Legislative Guide* but cast doubt on whether other UNCITRAL instruments are truly based on a consensus of States – or are merely products of the particular delegates who participated most actively in their preparation. It should be noted that, while some such "relitigation" may be openly presented as an attempt to have the Model Law adopt different rules from those in the Guide, relitigation can also take more subtle forms. It is simply human nature that enthusiastic supporters of a policy recommendation are likely to prefer codification of it in a relatively broad way while doubters of the wisdom of such a recommendation will be parsimonious in their

recommended codification of it. It is only a small step from narrow implementation of a recommendation to subtle adjustment of that recommendation so that it furthers somewhat different policies.

Moreover, in the event that preparation of the Model Law leads to deviations from recommendations in the *Legislative Guide*, the effect of those deviations could be felt beyond the particular recommendations from which the deviations are made. After all, in light of the interconnected nature of the recommendations in the *Legislative Guide*, isolated differences from recommendations set out in the *Legislative Guide* will not really be isolated. Even a simple-seeming change can have far-flung (and not always obvious) effects. The result of attempted isolated deviations could be a Model Law with internal inconsistencies not noticed at the time of its preparation. Such a fragmented and inconsistent Model Law would be problematic not only for that reason but because it would also cast doubt on the sort of secured transactions law recommended by the Commission as being capable of implemented in a coherent fashion.

Third, a project designed to culminate in a single Model Law on Secured Transactions based on the *Legislative Guide* would force UNCITRAL to make difficult choices about implementation techniques that can cause significant disharmony without adding significant value. After all, so long as national legislation is consistent with the recommendations of the *Legislative Guide*, the harmonization goals of the *Legislative Guide* do not require enactment of identical legislation from State to State. Indeed, most recommendations can be codified in a large number of ways. Yet, the need for precision of statutory language in a Model Law might force choices where none need be made. The necessity of making such choices might itself result in disharmony in the process of preparing a Model Law. Moreover, given the interconnected nature of the recommendations of the *Legislative Guide*, a choice made in the codification of a single recommendation can echo throughout a Model Law. The resulting Model Law might alienate as many States as it attracts by choosing methods of codification significantly different from those that a State would select for itself.

Fourth, substantial differences in domestic styles of legislation and codification could easily make the goal of a single Model Law unattainable.[9] The substantial accomplishment of UNCITRAL in building a consensus as to

9 Such differences can reflect basic differences in legal systems between civil law jurisdictions and common law jurisdictions, but they can also reflect differences within such broad categories.

the best practices for secured transactions law from an array of States with widely differing traditions of domestic secured transactions law is not accompanied (nor was it sought to be accompanied) by a consensus as to how those practices fit into the broader framework of a State's law. States' legislative styles can differ in many ways. Some States are accustomed to great detail in their legislation while others prefer generalities. Some would codify secured transactions law in a single stand-alone statute while others would spread the provisions over many areas of domestic law, perhaps codifying some in the law of property, others in the law of obligations or the law of remedies, and still others in the law of creditors' rights or even insolvency. Differences in legislative theory such as those and others abound across the variety of States who may consider enacting secured transactions reform. In light of those differences, a single "one size fits all" Model Law may satisfy the legislative preferences of some States but be antithetical to the preferences of many others. Indeed, it might be necessary to draft two or more alternative versions of a Model Law in order to have available for enactment a model that fits the legislative concept of a variety of States. This necessity would, of course, greatly increase the workload of a Working Group preparing a Model Law.

Finally, it is not clear that the basic premise behind the proposal to transform the *Legislative Guide* into a Model Law – that it will encourage the adoption of domestic legislation consistent with the *Legislative Guide* – is sound. There is no strong evidence to support the proposition that the availability of a statutory text will promote enactment of domestic statutes consistent with the *Legislative Guide* more effectively than if no such text is prepared and States can turn only to the *Legislative Guide* for guidance. For example, the United Nations Convention on the Assignment of Receivables in International Trade, which in many ways laid the groundwork for the *Legislative Guide*, is a completed text. Yet, ratification of/accession to the Convention is languishing. Indeed, more States have already embarked on legislation consistent with the *Legislative Guide* than have become Contracting States to the Convention.

IV. – CONCLUSION

There are substantial arguments both for and against UNCITRAL following its preparation of the *Legislative Guide* with a Model Law on Secured Transactions. It is this author's view, however, that the arguments against proceeding to preparation of a Model Law at this time are somewhat stronger. While a Model

Law on Secured Transactions would present obvious benefits, the marginal value of those benefits is lessened by the existence of the extensively reasoned *Legislative Guide*. Moreover, the risks associated with the possibility of "relitigating" matters settled in the *Legislative Guide*, thereby undermining the *Legislative Guide* in the course of creating the Model Law, are significant. The cost of that potential undermining of the existing *Legislative Guide*, and the fact that achievement of the benefits associated with a Model Law would come only after the investment of great time and effort on the part of UNCITRAL, counsel against undertaking such an effort at this time. Rather, the energies of UNCITRAL's Working Group on Secured Transactions might be more productively spent on topics within the law of secured transactions for which an UNCITRAL instrument would create greater benefits, or would cost lest in terms of human input as well as fiscal budgeting.

This does not mean that UNCITRAL should completely absent itself from any role in assisting States transform the recommendations of the *Legislative Guide* into domestic law. UNCITRAL can productively be involved, and contribute its significant expertise, even without the substantial investment required for the preparation of a formal instrument debated and adopted in accordance with current Working Group practice. In particular, the UNCITRAL Secretariat is well-qualified to provide technical assistance to States that wish to enact the recommendations of the *Legislative Guide*.

Furthermore, a decision against proceeding now to prepare a Model Law on Secured Transactions need not resolve the matter for all time. Rather, if it becomes clear at some point in the future that a large number of States would like to adopt the recommendations of the *Legislative Guide* but are having difficulty (or anticipate difficulty) in transforming those recommendations into legislation, UNCITRAL could then take up the preparation of a Model Law. Moreover, preparation of a Model Law then, when the difficulties faced by States can be more precisely identified, might lead to the development of a better Model Law than would be prepared if the topic were undertaken today.