

Should UNCITRAL Prepare a Model Law on Secured Transactions?

**(Outline of remarks to be presented at the
Third International Colloquium on Secured Transactions)**

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Background

1. In December 2007, UNCITRAL promulgated a comprehensive Legislative Guide on Secured Transactions (the “Legislative Guide”). In Summer 2010, UNCITRAL will likely promulgate a Supplement to the Legislative Guide concerning security rights in intellectual property.
2. The Legislative Guide is a substantial document, comprising well over 500 pages (not even taking into account additional materials that will be incorporated from the Supplement that is currently being prepared). The Recommendations and Terminology portions of the Legislative Guide comprise over 100 pages, and the remainder is commentary. The IP Supplement will contain approximately 100 additional pages, consisting mostly of commentary but also a few new recommendations.
3. Yet, the Legislative Guide does not create law.
 - a. It is not a treaty or convention, that becomes law upon ratification or accession by a sufficient number of States.
 - b. It is not a Model Law which can be enacted *in haec verba* by States that wish to be governed by it.
4. Rather, it is a guide to a legislator (or legislature) that wishes to enact secured transactions reform.
 - a. It is left to a State that decides to follow the recommendations of the Guide to draft the actual statutory language.
 - b. The language of the recommendations is quite specific. Some have suggested that, by deleting the phrase “the law should provide that” at the beginning of each recommendation, the remaining language is in a form that is close to statutory form.
5. 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.

Considerations in Favor of a Model Law

1. The Legislative Guide and its 242 recommendations are daunting. The time and expertise required to transform those recommendations into a legislative enactment may

prove to be a disincentive for action by individual States. The preparation of a Model Law, on the other hand, can provide States with a package that can be transformed into domestic legislation much more easily.

2. 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. The existence of a Model Law can lessen the possibility of inadvertent drafting issues that could lead a statute that does not work as intended.
3. By resolving the issues mentioned in points 1 and 2, the existence of a Model Law may increase likelihood that States enact legislation adopting the principles of the Legislative Guide.
4. Inevitably, it will be discovered that there are some rules necessary for a complete secured transactions regime that were not addressed in the Legislative Guide. The process of transforming the Legislative Guide's recommendations into statutory language will force the sort of careful thought that can lead to the Working Group discovering such lacunae and resolving them.

Considerations against a Model Law

1. Drafting statutory language requires slow, painstaking effort. In light of the substantial existing accomplishments of the Legislative Guide, the marginal gain from preparing a Model Law would likely be insufficient to justify the cost or such an effort.
2. 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 "relitigate" policy decisions explicitly stated in the recommendations of the Guide or implicit in them. After all, many of those decisions were reached only after extended vigorous debate and a slow process of consensus building. Yet the preparation of a Model Law will necessarily involve different people who, not having experienced the discussions that led to a painstaking achievement of consensus, may not share its conclusions. (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 explicating 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 documents are truly based on a consensus of States – or are merely products of the particular delegates who participated most actively.

3. In the event that preparation of the Model Law leads to deviation from recommendations in the Legislative Guide, the effect could be felt beyond the particular provision that is the subject of the deviation. After all, isolated differences from recommendations set out in the Legislative Guide will not really be isolated because of the interconnected nature of the recommendations. Even a simple-seeming change can have far-flung (and not always obvious effects). The result could be a Model Law with internal inconsistencies not noticed at the time of its preparation.
4. 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 than those that a State would select for itself.
5. The substantial accomplishment of UNCITRAL in building a consensus as to 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 style 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.
6. There is no strong evidence to support the proposition that the availability of a statutory text will promote enactment of statutes consistent with the Legislative Guide more

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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.

Tentative Conclusion

While a Model Law on Secured Transactions would present obvious benefits, in light of the existence of the Legislative Guide the marginal value of those benefits is not high. Moreover, achieving those benefits would come only after the investment of great time and effort on the part of UNCITRAL. The energies of the Working Group 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 less 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 turn the recommendations of the Legislative Guide into domestic law. It can productively be involved, and contribute its significant expertise, even without the substantial investment required for a formal project 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.