The OAS Model Law on Secured Transactions: A Comparative Analysis

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The Market and Regulatory Forces behind the OAS Model Law of Secured Transactions

This article highlights the basic principles that inform a modern secured transactions law. It focuses on the reasons why such a law is essential to bring about increased availability of cheaper commercial credit and the economic development that goes with it. It also describes the essential features of the Model Inter-American Law on Secured Transactions of the Organization of American States (“the model law”) by contrasting them with those of Article 9 of the United States’ Uniform Commercial Code (“U.C.C.”) and the Mexican

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2 The model law was adopted on February 8, 2002, by the Sixth Inter-American Specialized Conference on Private International Law (known as “CIDIP-VI”, for its Spanish acronym) [CIDIP-VI, Final Act 3(f), OEA/Ser.K/XXI.6/CIDIP-VI/doc.24/02 rev.3 (March 5, 2002)]. Hereinafter the document shall be referred to as the “model law” (its name in Spanish is Ley Modelo Interamericana sobre Garantías Mobiliarias). At the inaugural plenary session of CIDIP-VI on February 4, 2002, the Conference assigned discussion of the working draft of the model law to its working committee II. According to the report of committee II’s reporter, at the end of the week’s sessions at the Specialized Conference on February 8, 2002, the working committee decided to leave consideration of the final project in the hands of the drafting committee, so that the draft could be transmitted directly to the plenary session. [OEA/Ser.K/XXI.6/CIDIP-VI/doc.8/02 (February 8, 2002)]. In completion of that charge, the post-conference style committee made several changes. Notably, it consolidated articles 16, 17, and 20 into new articles 16 and 17, thereby reducing the numbers of articles after 19 by one. All references in this analysis are to the draft of the model law submitted by the style committee subsequent to the Specialized Conference (draft on file with the authors and available at <http://www.natlaw.com/seminar/doc12.doc>).

3 Article 9 of the Uniform Commercial Code (“U.C.C.”), entitled “Secured Transactions”, was revised in 1999, based on the efforts of a drafting committee that met fifteen times between 1993 and 1998. All references herein are to the 1999 Revision of Article 9, which is the version of the U.C.C. currently in effect.
Reform Laws of May 2000\textsuperscript{4} and June 2003.\textsuperscript{5} The contrast will reveal the advantages of adopting the model law and of amending Mexican law, among others, to conform with it.

It is well known that those who wish to compete in our increasingly global marketplace must keep the costs of their products or services as low as possible. It is not so well known that the high interest rates caused by commercial, legal and political risks disqualify many a hopeful competitor even in the most industrialized of Latin American nations. A Central Bank of Brazil 1999-2000 study estimated that fully one-third of the approximately 40 percent per annum interest rate paid by Brazilian commercial borrowers is attributable to legal uncertainties of collection.\textsuperscript{6} Similarly, the high cost of commercial credit continues to frustrate the large pent-up demand for commercial credit in Latin America. The absence of commercial credit has been estimated by World Bank economists to amount to a loss in excess of ten percent of a Latin American country’s GDP.\textsuperscript{7}

From the credit supply side, banking systems attempting to provide commercial credit are now subject to regulatory forces that require standards of capitalization and transparency of information regarding the lenders’ assets. The capital adequacy of banks (and thereby their ability to lend) is now measured nationally and internationally by standards that weigh the risks of loans (among

\begin{itemize}
\item \textsuperscript{4} Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito (Decree Reforming, Amending, or Derogating Various Dispositions of the General Law on Negotiable Instruments & Credit Transactions, the Commercial Code, and the Law on Credit Institutions), Law of April 29, 2000, published in the May 23, 2000 \textit{Diario Oficial de la Federación} 3 (hereinafter referred to as the “Reform Law of 2000”).
\item \textsuperscript{5} Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio, de la Ley de Instituciones de Crédito, de la Ley del Mercado de Valores, de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, de la Ley Federal de Instituciones de Fianzas y de la Ley General de Organizaciones y Actividades Auxiliares del Crédito (Decree Reforming, Amending, or Derogating Various Dispositions of the General Law on Negotiable Instruments and Credit Transactions, the Commercial Code, the Law on Credit Institutions, the Securities Market Law, the General Law on Insurance Companies, the Federal Law on Bonding Institutions and of the General Law of Organizations and Activities Ancilliary to Credit), Law of April 24, 2003, published in the June 13, 2003 \textit{Diario Oficial de la Federación} 21.
\item \textsuperscript{6} Departamento De Estudios E Pesquisa, Banco Central Do Brasil, Juros E Spread Bancário no Brasil (1999) (hereinafter referred to as the “BCB Study”).
\end{itemize}
other assets) on the basis of their collateralization. These standards make lending more difficult unless the loans are properly collateralized. Similarly, the standards of transparency and disclosure of financial information to which banks are now being subjected by their central banks (and central banks by the international bodies from which they need to borrow) require that loans be classified by taking into account the quality of their collateral. Simply put, those lenders who are inadequately collateralized and/or inadequately report their collateralization are being driven out of the lending business.

By far, the better portion of the wealth that might serve as collateral in the twenty-first century resides in movable goods and other economic interests apart from real estate, which in pre-industrial times provided the pre-eminent source of wealth. Many legal systems have not yet taken account of this basic fact, thereby suppressing the availability of credit where lenders encounter no legal mechanisms with which they can effectively guarantee their loans against collateral other than immovable assets.

The day is fast approaching when only those lenders who are protected by a modern secured transactions law, such as that set forth in the model law of the Organization of American States (“OAS”), will be able to provide credit at competitive rates in their local, regional or hemispheric markets. The model law contemplates and implements an effective low-risk system of collateral guarantees that relies on movable goods and other economic interests apart from real estate.

Conceptual Bases of the OAS Model Law

The English Eighteenth and Nineteenth Century Commercial Self-Liquidating Loan

Although the possessory pledge as a device to secure consumer loans is of ancient origin, the commercial, non-possessory lien that guarantees modern credit was an eighteenth century English invention. In contrast to the real estate

8 The view of commercial loans (extended to “able” men) as self liquidating, and of retail trade and consumption loans as dependent upon the honesty of “good” men, which became part of the Bank of England’s credit policies, was articulated in the following two excerpts from Nicholas Barbon, A Discourse of Trade (1690), reprinted in Money and Banking in England, B.L., at 132 (Andersen & P.L. Cottrell, eds., 1974):

“There are Two sorts of Credit; the one is Grounded upon the Ability of the Buyer; the other, upon the Honesty: The first is

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mortgage, the commercial non-possessory loan was, for a period of time, measured in days and months and only occasionally in years. Its collateral was movable and often perishable or quickly depreciable in value. Reliance on saleable goods for collateral meant that most such loans were self-liquidating in nature; i.e., lenders expected that borrowers would repay the loan from the proceeds of the resale of collateral, consisting of business assets such as cash, accounts receivable, inventory, and equipment. Significantly, the very business assets that made repayment possible were those whose acquisition was made possible by the commercial loan.

Nineteenth century English practices already evinced a fully-fledged credit pyramid. Retailers, moneylenders and their consumer borrowers were at the base; wholesalers and their bankers and factors were found at the next ascending levels. At the top of the pyramid was the Bank of England as lender or discounter of paper produced at the lower levels of the pyramid. These practices, however, were not fully recognized by statutory or decisional law. Some of the most important practices, like the lender’s “floating charge” over a merchant’s inventory, remained uncodified and provided insufficient notice to secured creditors and bona fide purchasers.

The Twentieth Century United States Commercial Loan as the Prototype of Contemporary Secured Lending

Twentieth century United States commercial lending added more levels and intermediaries to the English credit pyramid — e.g., United States banks were more numerous and less specialized than the English banks, with more than 15,000 engaged in commercial lending at one point in the twentieth century —

called a Good Man, which implies an Able Man; he generally buys upon short Time; to pay in a Month, which is accounted as ready Money, and the Price is made accordingly. The other is accounted an Honest Man; He may be poor; he Generally buys for three and Six Months or longer, so as to pay the Merchant by the Return of his own Goods; and therefore, the Seller relies more upon the Honesty of the Buyer, than his Ability: Most of the Retail Traders buy upon this Sort of Credit, and are usually Trusted for more than double they are worth.”


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and in the decades following the Second World War, consumer lending grew exponentially in the United States, especially after banks introduced credit cards and “personal lines of credit”.

Widespread consumer credit at reasonable (or near commercial) rates of interest made it possible to finance not only consumer purchases from retailers, but also retailers’ purchases from wholesalers, wholesalers’ purchases from manufacturers and, finally, manufacturers’ production. Presently, the supply and demand of commercial and consumer credit in the United States is such that no society in the history of humankind has used credit to the extent that this country does. The system rests on the proposition that any goods or services with ascertainable and obtainable value in the marketplace are acceptable collateral, including future inventory, accounts receivable, proceeds, intangible objects such as good will, rights to the performance of contracts, dematerialized investment securities and intellectual property of all types, including royalties.

Principles that Govern United States and Canadian Secured Transactions Law from a Civil and, Especially, Roman Law Perspective

While Anglo-American and Latin American secured transactions law share some common principles, especially on possessory pledges, other principles diverge sharply. The cause of the divergence can be traced, ultimately, to a conception of social wealth that regards real property as the most important social and business asset. In contrast, personal or movable property is regarded by their civil and commercial codes — mostly dating from the nineteenth century, and based on principles far older — as less valuable, even “vile”, property (res mobilis, res vilis). The codifier pays little attention to the possessory pledge; it is considered a device used by subjects with a social status as low as that of pawnshop operators.

Such an approach stands in sharp contrast with that which shapes the Canadian and United States law of secured transactions. While real estate continues to be a valuable asset in these two countries, tangible movable goods including equipment and inventory and intangible rights such as those in the performance of valuable contracts (including those involving real estate), in the royalties derived from the use of intellectual property or from the capital gains or dividends derived from the acquisition or sale of investment securities have long since surpassed real estate as a source of assets that provide collateral guaranties.

In discussing with Latin American jurists the following principles that underlie Anglo-American secured transactions law, one of the writers found it

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9 See Kozolchyk, Transfer, supra n. 8.
useful to formulate them in comparative fashion. The comparison with Roman law showed that many of the Roman legal institutions that helped to shape contemporary Latin American secured transactions law were more compatible with contemporary Anglo-American secured transactions law and with the proposed model law than with the Latin American law they supposedly influenced.

**Principle 1. An open number of collateral goods and of rights in rem or ad rem.**

In contrast with the limited number of rights *in rem* in Latin American real property law, the “security interests” (or rights in the collateral) that can be acquired in personal property under United States law are open in number.\(^{10}\) Any goods\(^ {11}\) or services\(^ {12}\) that have value in the marketplace can become collateral; and unlimited security interests in them can be granted simultaneously to an unlimited number of secured creditors.\(^ {13}\) This means that the goods or services that comprise the collateral can exist at the time of execution of the security agreement and can thus support the creation of rights *in rem* or can come into existence in the future thereby supporting the creation of rights *ad rem*.\(^ {14}\) Similarly, these goods can be encumbered with past, present or future debt. They can comprise an entire estate (or “universality of goods” in civil law terminology) or just specified categories or types of goods or services.\(^ {15}\) They can also include goods derived from the sale or exchange of existing goods or services without limitation as to the number of re-sales or exchanges.\(^ {16}\)

**Principle 2. A security interest is not ownership, but a possessory right to the collateral.**

a) **Possessory Rights in Collateral and the Influence of the English Notion of “Time in the Land”**

As heirs to the English, feudally inspired common law, United States lawyers are used to thinking about rights in land-based estates as nothing more than “time in

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10 U.C.C. secs. 1-201(37), 9-109.
11 Id., sec. 9-102(a)(44) and official comment (4)(a) to sec. 9-102.
13 See U.C.C. sec. 9-322, entitled “Priorities Among Conflicting Security Interests”.
14 U.C.C. sec. 9-204.
15 Id., sec. 9-108.
16 Id., sec. 9-205.
the land”. By “time in the land”, the English conveyancers and judges meant rights in land whose fee simple absolute (or absolute ownership, in civil law parlance) belonged to others. This notion echoes what Roman law lawyers refer to as possessory rights or iura in re aliena. These are also rights in property owned by others, and even though they were lodged below the exalted level of dominium, or absolute ownership, they were also lodged above the level of rights of detention or of physical (albeit legitimate) control of real or personal property.

Among the rights in rem in property that belonged to others were the Roman usufruct, which could be granted for the life of its beneficiary or for the life of third parties and the predial servitudes. However, unlike the English common law, which regarded time in the land rights as transferable and saleable by their holders, Romans, as a rule, regarded the usufruct and analogous rights as personal to their beneficiary and therefore non-saleable.

b) “Security Interests”, Possessory Rights, and the Animus Possessionis

During the second half of the twentieth century, United States lenders, borrowers, legislators, judges and legal commentators transformed multiple “time in the land” types of rights held by, among others, conditional sellers, chattel mortgagees, and holders of factors’ liens and of trust receipts into a unitary right known as a security interest in personal property. From a common law, as well as from a civil law, standpoint, what the secured debtor conveys to his secured creditor in a “security interest” is not ownership, but a possessory right in personal or movable property. This right, unlike the Roman usufruct, can be transferred, in some cases by assignment and in others, by negotiation.

The fact that only a possessory right is required for the creation of a security interest allows a large number of borrowers to become secured debtors: installment buyers, buyers of goods yet to be manufactured, borrowers who hold rights to future goods, holders of documents of title or commercial paper, obligees of contractual rights including accounts receivable, holders of


18 As stated by J.A.C. Thomas, Textbook of Roman Law 206 (North Holland Publishing Company, 1976): “[L]egacy was the original and commonest source of these rights but they could also come into existence by cessio in iure, deductio in a mancipatio or adiudicatio in a divisory action . . . in the later empire a paterfamilias had a usufruct in property given to members of the family . . . .” Typical of the personal features of these iura was that they would end not only with their specified duration but also with the death or the capitis diminutio of their holder.
intellectual property rights and beneficiaries of letters of credit can all become secured debtors. Their requisite possessory intent is not Savigny’s “animus domini” (or intent to possess as an owner), but von Jhering’s “animus possessionis”, as an inseparable element of the possessor’s physical control, or the simple fact of one’s apparent control, as was the case with Roman law tenants at suffrage and pledgee-creditors, among others.

c) Security Interests and the Fragmentation of Ownership of Personal Property

The Anglo-American concept of a “security interest” written into the U.C.C. was a response to the demands made on the financial marketplace by the mass merchandising of goods. Widespread extension of credit to, for example, purchasers of industrial equipment, to retailers for their inventory and to consumer-buyers required that the seller’s dominium over the goods sold be split between him and his installment buyer. The seller would retain “title”, while the buyer would obtain the possession of the goods sold. As stated by a Costa Rican housewife with respect to her purchase of a Singer sewing machine (one of the first mass merchandised products in Central America, shortly after the First World War), “They (meaning the sellers) have a paper with my signature on it and I use this machine to make a living.”

However, this was only the beginning of fragmentation. As of the middle of the twentieth century, when negotiable ocean bills of lading and warehouse receipts came into widespread use, the rights of ownership of shipped or stored goods were also “fragmented” into ownership and possessory rights, the latter often prevailing over the former. Thus, a seller-exporter of goods who “retained”

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21 As stated by J.A.C. Thomas, supra n. 18, at 140: “For Savigny, animus was the intention to hold the thing as one’s own, i.e., the animus domini: in his view, the man who had control of a thing de facto with the intention to control for himself was in law its possessor and would be granted the interdicts. This theory, concededly accords with most cases of possession . . . but it does not explain the possession of the precario tenens, sequester, pledge creditor and emphyteuta . . . (Jhering’s view was) . . .” that corpus was the essence of possession which was itself the outward manifestation of ownership; a man would be possessor of a thing if he was, in relation to it, in the position that an owner would normally be; animus was merely an intelligent awareness of the factual situation . . .” (Parenthesis and emphasis added).

22 See Grant Gilmore, 1 Security Interests in Personal Property 66-68 (Boston: Little, Brown, 1965). This approach still prevails in Germany today. See comments by Dr. Uwe Schneider at the Fourth Session of UNCITRAL Working Group Six on Security Interests (Vienna, September 8-12, 2003).
title to the goods shipped could no longer recover “his” goods from a holder in due course of the negotiable ocean bill of lading or warehouse receipt. The possessory rights of this holder were, in turn, subordinated to the possessory lien of the carrier for payment of the freight or the warehouseman for payment of the storage fee. Thus, possessory liens succeeded in gaining or retaining possession of shipped or stored goods where retained title or “historical” ownership-derived rights could not.

As noted earlier, Article 9 of the U.C.C. succeeded in reducing all of the fragmented possessory rights relied upon by secured creditors at the end of the Second World War (as well as their possible future successors) into one possessory right: the creditor’s security interest. As of the enactment of Article 9, the former conditional sellers, chattel mortgagees, holders of factors’ liens, trust receipts and other holders for security of documents of title and commercial paper were all deemed to hold the same type of security interest in the collateral, or nothing at all, with priority over third parties. All had to be filed, and the date of filing established the order of priority, with one major exception: for purchase money security interests. Only the time of “perfection” (a U.C.C. Article 9 term that means the acquisition of rights in identifiable goods not only vis-à-vis the secured debtor, but also vis-à-vis third parties) differentiated between security interests. To make its security interest valid against third parties, the creditor had to “perfect” it by duly constituting it — normally by executing any proper form of security agreement, regardless of its special name, and by otherwise carrying out the credit bargain — and by properly publicizing it— normally by filing a brief financing statement at a universal registry to put third parties on notice.

In other words, after the enactment of Article 9 of the U.C.C., the law of secured transactions in the United States no longer differentiated among secured creditors who based their rights upon retention of ownership and those who based them on the acquisition of a security interest or possessory right.

Principle 3. The security interest is created by contract but can, and frequently does, become an abstract or autonomous principal right in rem or ad rem.

A security interest is created under U.C.C. Article 9 by contract, but its effect upon third parties (“perfection”) depends upon notice to such third parties

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23 U.C.C. sec. 9-308 et seq.
24 See U.C.C. sec. 9-203.
25 See U.C.C. sec. 9-310.
(known to civil law lawyers as “publicity”). The perfection of the security interests creates rights in rem and ad rem. The priority among perfected security interests, in turn, depends upon the time of notice, with some variation for the type of notice and its timeliness.

a) **Contractual versus Statutory Liens**

As is the case with many civil and commercial codes in civil law countries, the U.C.C. reflecting the pre-existing common law also enforces “statutory liens”. These are set forth in statutes (as in the civil law codes), usually in favor of parties who contribute value to the items in question: suppliers of materials for the manufacture or repair of the debtor’s personal property; mechanics who repair such property; harvesters of crops; innkeepers and warehousemen who store such property and, in some jurisdictions, to lawyers, accountants and physicians for the collection of their fees for professional services. Such liens are outside the scope of U.C.C. secured transactions law — although it defers to their priority — because Article 9 applies only to contractually created security interests. The fact that the creation of the security interest is by contract, underlies the basic dichotomy of rights: rights between the parties to the loan agreement and rights between or among third parties and the parties to the loan agreement.

b) **The Principal and Autonomous Nature of the Security Interest Lien**

While it is true that a security interest under U.C.C. Article 9 cannot exist without an agreement to lend between lender and borrower, the loan itself need not have taken place to fix a priority date that becomes effective retroactively the instant an Article 9 security interest is subsequently perfected.

Under U.C.C. Article 9’s “notice filing” system, a lender and a borrower can agree to a line of credit extension for a certain amount on a revolving or

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26 On perfection by filing under Article 9, see sec. 9-310; on “publicity” in Latin America, e.g., Argentina’s Cod. Civ. art. 2505; Mexico’s C.C.D.F. art. 3042 et seq.; and Venezuela’s Cod. Civ. art. 1920 et seq.

27 See U.C.C. sec. 9-322(1)(a).

28 See U.C.C. sec. 9-325.

29 U.C.C. sec. 9-333(a)(2).

30 See, e.g., U.C.C. sec. 2A-306; U.C.C. sec. 7-209(1).

31 Id., sec. 9-333(a)(2).

32 Id., sec. 9-109(d)(2).

33 Id., secs. 9-501 to 9-527 describe the U.C.C.’s entire notice filing system in specific detail.
cumulative basis; and even though money or credit is not actually given to the borrower until a later date, the secured creditor may simply file a financing statement with general reference to the categories of assets against which it will later perfect a security interest, thereby establishing a priority that predates the time of the agreement, specification of the amount of credit, and its actual disbursement to the debtor. Thus, even though a loan can be awaiting disbursement, the security interest can be filed and thereby affect third party rights.

One should add, parenthetically, that this practice may be compared to that of the “marginal notes” or “annotations” used by Latin American notaries and real property registrars to record provisional judgment liens (litis pendentia).

If one were to strictly apply the civil law principle that a loan (as contrasted with the agreement to lend) is always the principal transaction, and the secured transaction (mortgage or pledge) is the accessory and thus a totally dependent transaction, notice filings could simply not be: a loan would inevitably have to be in place before a security interest could be recorded. Mutatis mutandis, financial instruments such as mortgage bonds, could not have come into existence and the middle and low income housing that they helped to finance in Europe and Latin America (among other regions) would similarly have had to await the emergence of other “non-accessory” financing formulas.

Mortgage bonds, among other instruments, could not have been created, because of the strict construction of the notorious rule that “accessory must follow the principal” and of its no less notorious corollary, “which came first, the chicken or the egg?”. If the “principal” loan underlying the issuance of mortgage bonds did not occur until the underwriter or the public bought the mortgage bond, how could the accessory mortgage exist prior to its sale? In other words, there could be no mortgage right to sell until the loan extended by the mortgagor-buyer of the bond was in place, but that “loan” could only take place once the lender bought a non-existent mortgage.

In U.C.C. Article 9, secured transactions law neatly finesses this conundrum by creating a general notification not of the accessory agreement itself, but of the potential for such an agreement, by way of warning to all third parties that any subsequent claims that they might have shall be vulnerable to the earlier filing, should the filing party consummate a principal agreement and an accessory agreement at any time thereafter.

c) **Securitization and the Need for Independence or Abstraction of Security Interests**

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34 Id., sec. 9-322(a)(1).

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The expansion of the global financial marketplace to include the sale of security interests to the public at large has made it necessary to assure these buyers of the legal independence or “abstraction” of the security interests they buy. Among the security interests being bought by the public are certificates of participation in collateral as diverse as “securitized” pools of accounts receivable (usually in excess of one hundred million U.S. dollars) of real estate mortgages. Such remote creditor-buyers would not buy their certificates if their rights in the security interests sold did not enjoy a very high degree of certainty and enforceability. The enforceability of security interests requires not only that they be perfected and enjoy the necessary priority, but also that they not be subject to disabling underlying claims or equities by third parties.

Principle 4. Perfection of the security interest depends upon notice to third parties that is not merely mechanical, but also functional.

a) Modalities of Public Notice

Public notice (or publicity, in civil law parlance) of transactions was used by Roman law to legitimate the conveyance of valuable personal or real property (res mancipi). The public conveyance of res mancipi in the public square in the presence of the libripens, of the impressive weighing scales and the planting of the Roman legionnaire’s flag for acquisitions of conquered land “sub hasta”, were the legal symbols chosen by Roman law to place the world of actual or potential third party creditors on notice of the right-transforming transaction that had just taken place.35 German law, one of the most sensitive on the effects of public notice upon the rights of third parties, can similarly trace the evolution of its land registry (Grundbuch)36 as well as of its doctrine of abstraction of negotiable instruments to the equally symbolic medieval Gewere.37

Since Roman days, public notice of secured or preferential rights encumbering the debtor’s estate, as a whole or on specific assets thereof, has become an inevitable feature of Western legal systems. It is part of an elementary equation of what one of the present writers has described as the fairness of the marketplace. If the rights of marketplace participants are to be affected by the rights created by a secured loan, marketplace participants have to be made aware of the existence and scope of these rights. 38

35 Kozolchyk, Transfer, supra n. 8.
36 See <http://www.grundbuch.de>.
37 See Kozolchyk, Transfer, supra n. 8.
What has differed from one legal system to another is the method of implementing public notice (hereinafter referred to as “publicity”). The publicity of U.C.C. Article 9 is functional in the sense that it apprises third parties in the most accessible manner possible of accurate, relevant and timely information about who the debtor may be and what collateral may be pledged. Contrary to the detailed information found in the recording of real estate mortgages in both U.S. and Latin American land registries, the Article 9 registry does not pretend to describe specific transactions; it usually refers to the collateral in generic terms, such as “inventory” or “equipment” or “accounts receivable”.

In fact and in law, the U.C.C. Article 9 registry is not a registry of collateral, but of debtors. Under United States law, registries of collateral are used only when the individual item is highly valuable and susceptible of being identified by serial number or transferred by a certificate of title. The U.C.C. specifically recognizes that federal law overrides its system in such cases.

Since the recording of a security interest in personal property must be succinct to be timely, relevant, and easily accessible, only small sections of what may constitute the final loan agreement are recorded, as part of what is known as a “financing statement”. Moreover, it can be registered in paper-based or electronic format.

The functionality of the notice also means that it must be flexible enough to accommodate the needs of the various transactions and their participants. Thus, a functional notice can be provided by the creditor’s or third party’s possession, as in the case of the traditional pledge, or by symbolic possession by third parties or designated agents. Alternatively, it can be provided by filing a summary notification coupled with the requirement that the loan and security agreement(s) be made available to third parties for their examination of specific

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39 See U.C.C. sec. 9-521 for the form suggested by the statute itself. It is likely that the drafters originally settled on a summary form for the registry, so that it could serve for the many different security devices they needed to have filed. Had they required filing of the various security agreements themselves, it might have created an impossible problem for the registries that would somehow have had to give all of them a common classification and index. A summary form, demanding only the barest essentials common to all transactions (debtor, creditor, generic collateral description) readily provided a much simpler solution.
41 U.C.C. sec. 9-109(c)(1).
42 U.C.C. secs. 9-207, 9-313(a).
43 U.C.C. sec. 9-313(c), (h).
details thereof. Additionally, it can be provided by special notices to holders of perfected security interests in the case of “super-priorities”.

**Principle 5. Priority among perfected security interests is generally based upon the “first to file or to acquire possession” principle, and is best attained by a unitary and universal system of registration where all types of secured transactions are reduced to one recordable type.**

Priority under U.C.C. Article 9 assumes the equality of all security interests and their subjection to the principle of prior tempore, potior iure. Accordingly, the first to file or to acquire possession of the collateral has priority over subsequent secured creditors. This principle is subject to only limited exceptions. These exceptions encourage the financing of the purchase of certain assets such as those that enrich the value of the secured debtor’s inventory or equipment and thereby enrich the overall value of the secured debtor’s estate.

**Principle 6. The need to eliminate secret or unrecorded liens requires recording only those judicial liens that can acquire priority over subsequently recorded contractual liens.**

A functional system of notice or publicity has no worse an enemy than the rules that encourage creditors’ reliance on secret liens. One of the main virtues of the U.C.C. Article 9 absorption of all of the pre-existing security interest devices into a single, all-inclusive generic category is that it reduced to a minimum the pernicious effect of secret liens. Thus, no longer could an unrecorded conditional sale, factor’s lien, trust receipt or “simulated” financial lease be invoked to defeat a recorded chattel mortgage or its functional equivalent. Regardless of the label given to the transaction and its supposed title-retention features, notice through recording became essential to affect third party rights.

Consistent with the principle of functional notice, only those judicial liens that are recorded can enjoy priority over subsequently recorded, contractually created security interests. Otherwise, all an unsecured creditor would have to do

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45 U.C.C. sec. 9-324(b)(2)-(4).
46 U.C.C. sec. 9-322(a)(1).
47 U.C.C. sec. 9-324.
48 U.C.C. sec. 1-201(37) defines “security interest” as including any “interest in personal property or fixtures which secures payment or performance of an obligation.”
49 U.C.C. sec. 9-310(a) states as its “general rule” that “a financing statement must be filed to perfect all security interests.”
is obtain a judicial lien and enforce it with preference over a registered security interest. If this were allowed, functional notice and, with it, secured lending would cease to exist.

**Principle 7. Purchases by buyers in the ordinary course of business are immune against claims by secured creditors, although the latter’s security interest continues in the proceeds of the sale or exchange.**

Consistent with the self-liquidating nature of the secured loan and with the location of the consumer-buyer in the ordinary course of business at the very base of the commercial credit pyramid, his purchase of goods from a seller’s inventory must be immune against the enforcement of perfected security interests. The cash stream generated by a consumer’s purchases irrigates the entire credit pyramid: the retailer relies on the proceeds of his sale to the buyer in the ordinary course of business to repay his loan to his wholesaler; the wholesaler relies on the retailer’s repayment of the wholesale goods to repay the manufacturer or financier, and so on. If the buyer of goods in the ordinary course of business feared being dispossessed of what he bought from the retailer, this fear would be translated into fewer sales and a much smaller flow of cash to the upper layers of the credit pyramid.

The protection of the buyer in the ordinary course does not mean that the secured creditor will lose his ability to recover the proceeds of the sale. For if the collateral is sold or re-pledged fraudulently or without authorization by the debtor in possession of such collateral, or otherwise improperly disposed of by the secured debtor or by a third party, a creditor’s secured right follows the collateral wherever it goes. In addition, it continues to be enforceable against the original collateral’s replacement or its proceeds. In the final analysis, the right secured by proceeds is a right to the economic value of the original collateral and not to the original collateral itself.

**Principle 8. To be cost effective, security interests require a quick and inexpensive method of enforcement, which, whenever possible, should be extra-judicial, peaceful, and mutually agreed upon.**

50 U.C.C. sec. 9-315(a)(1) expresses the general rule, that “a security interest continues in collateral notwithstanding sale, lease, license, exchange or other disposition thereof, unless the secured party authorized the disposition free of the security interest,” to which U.C.C. sec. 9-320(1) provides an exception in favor of buyers in the ordinary course, who “take free of a security interest created by the buyer’s seller, even if the security interest is perfected and the buyer knows of its existence.”

51 See U.C.C. sec. 9-315(a)(1, 2).
One of the most important features of United States secured transactions law is that it allows the secured creditor to extra-judicially repossess the collateral and resell it to pay the amount of the indebtedness. If there is a surplus, it is returned to the debtor; if there is a deficiency, it can be pursued with respect to other encumbered collateral or unencumbered assets.

The United States secured creditor can thus engage in self-help as long as he or she does not “breach the peace”. In this respect, United States law is not too different from what Roman law was prior to Emperor Constantine’s prohibition of the *pactum commissorium*. This *pactum* allowed a secured creditor to appropriate to his own use or to resell the collateral pledged by the debtor if the latter defaulted.

Significantly, the main policy reason given for Constantine’s prohibition of the *pactum* was that it enabled lenders to evade the severe penalties imposed by Christianized Roman law upon usury. Usury was defined in Constantine’s time as any interest charged above and beyond the return of the principal amount. By encumbering property worth considerably more than the value of the loan, a secured creditor who recovered such property by invoking the *pactum* could wind up collecting his principal and interest in a usurious loan.

Despite the fact that the prohibition against usury was considerably attenuated in Latin America’s nineteenth and twentieth century civil and commercial codes, the prohibition against the *pactum* continues unabated to this day. It has retarded the modernization of not only secured transactions, but also of commercial and remedial law. In contrast with, say, German law, where a

52 U.C.C. sec. 9-609(b)(2).
53 U.C.C. sec. 9-610.
54 U.C.C. sec. 9-615(d)(1).
55 U.C.C. sec. 9-615(d)(2).
56 U.C.C. sec. 9-609(b)(2). This standard meets the constitutional guaranty of due process, since the debtor may at any time invoke all judicial procedures and safeguards if so desired. Where the debtor peacefully accedes to the repossession, however, such rights are waived in the eyes of the law.
57 Constantine Const. of 324 and Justinian 3d Const. Code 7, 54. This pact was outlawed during Constantine’s reign in 326 A.D. in the following manner: “Since among other captious practices the harshness of the provision for forfeiture (*lex commissoria*) is especially increasing, it is our pleasure that this provision shall be invalidated . . . .” *De Commissoria Rescindenda*, Constantine Augustus Jan. 31, 326, cited and translated by Pharr, *The Theodosian Code* 65 (1952). The *pactum* was used again during the Middle Ages as a method of securing the repayment of interest for loans by conveying to the creditor an object of greater value than the amount lent. On the interaction between usury and the invalidation of the *pactum commissorium*, see also Boris Kozolchyk, *Law and the Credit Structure in Latin America*, 7 Va. J. Int’l L., 10, 11 (1967).
58 *Id.*
secured creditor and debtor can agree that in the event of default the debtor transfers his rights in the collateral to the creditor acting in a fiduciary or chattel mortgagee capacity (sicherungsbereignung) and can repossess and sell the collateral extra-judicially, such an agreement would be regarded by many Latin American courts as an illegal pactum. Moreover, the Latin American law of remedies for breach of contracts is seriously hampered by the pactum-inspired assumption that the parties are not free to agree on the bases for a unilateral rescission of contracts. Consistent with the pactum’s spirit of prohibition, all rescissions must be court-ordered. Needless to say, much economic waste is imposed upon contracting parties, especially when the goods involved are perishable or highly depreciable, by having to await a judicial determination that often takes years to obtain.

**Law and Practice in Latin America**

As noted earlier, commercial and related consumer credit is still largely unavailable in Latin America and the Caribbean; and when it is available, it is so risky that it is extremely costly. Numerous statutes, court decisions and commercial practices have attempted to eliminate the high risks of commercial lending in Latin America. Unfortunately, none of these have succeeded. As early as 1914, Argentina enacted an agrarian pledge statute that attempted to achieve certainty of collection by recording the pledge and immobilizing the collateral. In many of the subsequently enacted statutes throughout Latin America, the debtor’s failure to keep the collateral immobilized or under lock and key in the debtor’s own or in a third party’s warehouse could have landed him in jail as a thief or embezzler.

During the years 1999-2001, in order to prepare the first draft proposal by the National Law Center for Inter-American Free Trade (“NLCIFT”) proposal to

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59 See, e.g., the decision of the federal supreme court of Germany (BGH, VIII ZR 322/99 of November 15, 2000). The Bundesgerichtshof upheld the creditor’s rightful enforcement of a security interest without the involvement of the courts. A brewery made a loan to two restaurant/bar owners. In return, they promised to buy the brewery’s beer exclusively. Part of the bar equipment was conveyed to the creditor as a chattel mortgage. Later, the brewery terminated the loan contract and sued the owners for approximately DEM 77,000. After the brewery enforced the chattel mortgage for DEM 11,500, it reduced the claim to DEM 65,500. The court held that the creditor was justified in acting as it did and focused on the remaining claim. [The authors are indebted to Susan Butler, Esq., LL.M., for the summary and translation of this decision.]

60 BCB Study, supra n. 6.

the OAS, the NLCIFT conducted a comparative study of all the Latin American secured transactions laws and classified them by type of collateral, persons that can encumber the collateral, encumbrance of future goods, junior liens, persons that retain possession of the collateral, and registration requirements, among others.62

**The NLCIFT NAFTA Country Studies**

During 1993 and 1994, a study group whose participants included Professors Ronald C.C. Cuming (of the University of Saskatchewan, Canada) as Research Director, Todd Nelson (currently of the Instituto Tecnológico de Monterrey), and one of the present authors, Boris Kozolchyk, among others, conducted an empirical study of various financial scenarios involving secured commercial lending in the country members of the North American Free Trade Agreement (“NAFTA”).63

The study showed that most of the secured lending available in Canada and the United States was not available in Mexico and that the reasons for the unavailability of the numerous loans to various sectors of the economy could be found in the inflexibility of existing statutory and decisional law. Even though Mexican secured creditors had access to more than twenty legal methods of structuring secured transactions, few, if any, satisfied their need for certainty of enforceability.64

Furthermore, when enforceability was obtained, it was at the expense of self-liquidation. For example, loans to agricultural producers relied on the warehousing of crops, but presupposed the immobilization of collateral. If the grains were sold or re-pledged by the secured debtor, he could be guilty of the crime of embezzlement. Similarly, inventory could not be encumbered unless it was described very specifically (i.e., item by item); proceeds could be encumbered only when they amounted to replacement “products”, i.e., goods of the exact type as sold or exchanged.

Secret liens abounded, as in the case of conditional sales, guarantee trusts and simulated equipment or financial leases; no system of functional notice existed, and the exclusively judicial method of enforcement of creditors’ rights


63 *Id.*

was quite dilatory and thus ineffective. At the same time, it appeared that Mexico’s banking system had created its own *de facto* system of functional notice. In cities whose population exceeded 50,000 inhabitants, banks maintained their own registries of debtor performance, which they shared with each other, and only with each other.

**Central and South American Studies**

Studies conducted by the NLCIFT, one of the present writers and others at different times during the last thirty years in Central and South America confirmed the presence of the same problems and failures observed in Mexico. Substantive law deficiencies aside, nothing illustrates as dramatically the inadequacy of functional notice as a graffiti in a San Salvadoran registry: “*Aquí lloran los valientes*” (“Here, even the brave cry”).

Costa Rica experimented for some time with its own version of public notice and debtors’ prison. Public notice for a while consisted in the public shaming of debtors by debt collectors dressed in vivid green [and thus dubbed “*pericos*” (parakeets)]. These debt collectors followed the delinquent debtors at close range in public. Their silent pursuit continued until the shamed debtors repaid their loans. This practice was discontinued, however, after some of the parakeets mysteriously disappeared never to be seen again.

Nevertheless, Costa Rica persisted on relying on the personal element of enforcing security interests in movables. This democratic country had a civil code provision which gave rise to a form of debtor’s prison. Its remedy was known as “*apremio corporal*”, and it was in force until rather recently when it was declared unconstitutional. The *apremio* resulted from a court order directing the debtor to return the collateral, pay the debt, or face a term of imprisonment from two months to two years for contempt of court. Despite, or perhaps because of, the criminal implications of this remedy, it was also unsuccessful. Empirical

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66 Maria Alejandra Rodriguez, Esq., a Venezuelan lawyer and staff member of the NLCIFT, described a similar practice in Venezuela, involving black-suited “penguins,” who apparently met the same fate as the Costa Rican parakeets.

studies of its lack of enforcement showed that, aside from impeding self-
liquidation of the commercial loans, it was ignored by debtors and enforcement
officials alike. A judicial official stated in an interview: “If the criminal sanctions
were to be implemented, most of Costa Rica would wind up in jail, including our
former president and most of our judges.”

With few exceptions, legal uncertainty in the enforcement of commercial
and consumer loans persisted throughout Latin America, as did a presumption
that, given the opportunity, commercial and consumer lenders and borrowers
would act in bad faith. It was clear that transparency in the form of public notice
of what was borrowed—by whom and against what collateral—was badly
needed, especially if commercial lending was going to become a viable
enterprise.

Indicative of this trend, most Latin American countries had started relying
on the same sort of informal bank clearinghouses of debtor information as had
Mexico. In Chile, for example, the clearinghouse known as “Central de Riesgo”
was on line and was accessible to all banks licensed to do business in Chile. Even
though the clearinghouses did not contain recordings of security interests, but
merely banking data on debtor indebtedness and repayments of loans, the
availability of this information to potential lenders apparently expedited the
processing of loan applications by a factor of four to one. As compared to places
where the clearinghouse of information was unavailable, commercial loans were
processed three times as fast in Chile.

The Model Law’s Break with a Past Dominated by Real Property Law

In order to succeed, the Model law had to replace the existing systems for
secured transactions in Latin America. As discussed earlier in this article, the
dominant legal culture (including attitudes as well as principles, concepts and
rules) reflected in the nineteenth century and early twentieth century Latin
American codes regarded real property as the most valuable asset, and the real
property mortgage as the queen of all security devices. This meant that the
“principal” property was always real property and personal property was
always the “accessory”. Accordingly, the principal always “absorbs” the
accessory in terms of the legal mechanisms for contracting, securing and
foreclosing on the security interest created in real property. This meant that,
when creating a security interest in moveable property, the description of
collateral imitated that for real property. In other words, it had to be highly
individualized and detailed; generic descriptions were never acceptable, even for

68 Boris Kozolchyk, Toward a Theory on Law in Economic Development: The Costa Rican
USAID-ROCAP Law Reform Project, supra n. 65, at 721-733 (especially n. 183).
the most fungible of goods. Registration of real property law influenced security interest in valuable moveable property, so that it had to be by public deeds (escrituras públicas) and foreclosure was as ponderous as it was with real estate.

Extra-judicial repossession of personal property collateral was seldom an alternative. As with real property, permission to resell or re-mortgage the “accessory” class of property was the exception; in principle, creditor safety required that the collateral be “immobilized”. In the case of inventory, it was placed in terminal or field warehouses and, unless expressly authorized, the debtor seeking cash by means of a re-sale or re-pledge could be guilty of the crime of embezzlement or unlawful appropriation. Perhaps it is needless to point out, but such unworkable restrictions were often disregarded in practice; debtors simply used the property in defiance of the legal restriction.

The OAS Model Inter-American Law on Secured Transactions

The model law attempts to alleviate the above-described shortcomings in Latin American and Caribbean countries. Its first objective is to create a non-possessory security interest that permits debtors to retain possession of the collateral while allowing secured creditors to enforce their security interest, extra-judicially whenever possible, in case of default. It also facilitates the creation of a regional credit market by laying the legal groundwork for a network of electronic registries.

The model law would create a single registry database for each country. This registry should contain all security interests that are valid against third parties and, by being subject to a uniform set of electronic commerce rules (see the Inter-American Rules on Electronic Documents and Signatures, hereinafter referred to as “IAREDS”), it would facilitate standardized electronic communications including filing, searches, certifications, amendments, and cancellations with similar registries throughout the hemisphere.

Background

The OAS regularly hosts the Inter-American Specialized Conference on Private International Law. In 1996, the General Assembly convened the sixth such

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See supra n. 2.

69 OAS Resolution CIDIP-VI/RES. 6/02 included an invitation to member states to examine the principles embodied in the draft Uniform Inter-American Rules for Electronic Documents and Signatures, and to consider the advisability of incorporating them into their national law.

70 OAS General Assembly Resolutions creating the Inter-American Specialized Conference on International Private Law (hereinafter “CIDIP”) can be found at <http://www.oas.org>.
In 1997, OAS member states and the General Assembly provided their comments and observations concerning proposed topics for the CIDIP-VI agenda, which included modernizing the law of secured transactions. The OAS Permanent Council convened a meeting of experts in December of 1998 to establish the precise scope of the topics. This meeting approved a Model Inter-American Law on Secured Transactions as a working document for the reform effort. In addition, OAS delegates agreed to study the secured financing topic at two subsequent experts’ meetings. Delegates and experts created a drafting committee, headed by the Delegations of Mexico and the United States, which produced an annotated draft of the model law in 2000.

The second and final meeting of experts was called by the U.S. chair of the CIDIP-VI Drafting Committee on Secured Transactions and was organized by the NLCIFT, in November 2000, in Miami, Florida. This meeting focused on the text of the model law drafted by the NLCIFT. Over sixty governmental delegates and independent experts from fifteen Latin American and Caribbean countries spent a week analyzing the provisions of the draft model law. The U.S. chair also presented draft electronic commerce rules (the IAREDS) to supplement application of the model law by providing a legal system for electronic execution of secured loans and for electronic registration of original filings, amendments, certification and cancellations of secured loan notifications, all of which would be available to electronic access and search.

The discussions among the experts at the Miami meeting triggered many suggestions for changes to the model law, to make it concur with both national and international considerations. Special emphasis emerged around registry and enforcement issues, which had not been discussed at the previous two CIDIP-VI preparatory meetings. In follow-up to the Miami meeting, the delegations of the

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72 OAS General Assembly Resolution AG/RES. 1393 (XXXVI-O/96).
73 Id., AG/RES 1472 (XXVII-o/97).
74 OAS Permanent Council Resolution CP/RES. 732 (1173/98).
76 OAS General Assembly Resolution AG/RES. 1558 (XXVIII-O/98).
77 Report of the Meeting on Government Experts to Prepare for the CIDIP-VI, OAS/Ser.KXXI, REG/CIDIP-VI/doc./00, February 17, 2000. Among the participants in Washington, D.C. for Mexico were Alejandro Ogarrio, Jorge Sánchez Cordero, Leonel Pereznieto, José Luis Siqueiros, and on behalf of the United States, José Astigárraga, Boris Kozolchyk, and John Wilson.
78 See Conference Transcript, Meeting of OAS-CIDIP VI Drafting Committee on Secured Transactions, 18 Ariz. J. Intl. & Comp. L. 311. Both authors of this article attended that meeting, the lead author acting as vice chair. Lic. Jose Luis Siqueiros of Mexico was the elected Chairman of the OAS drafting sessions.
79 Id.
United States and Mexico, co-chairs of the secured transactions topic, met and redrafted the model law. The final draft produced by their joint effort attempted to take into account all of the recommendations made by a consensus of the participants at the previous meetings.

In addition, this last redrafting effort paid close attention to language and implementation issues, in order to ensure that Latin American countries could more easily adopt the final text. A revised version of the model law was completed in September 2001 and submitted, along with a copy of the IAREDS, to the OAS for presentation to member states as the official draft for consideration at the CIDIP-VI in early 2002. The work on the model law culminated at the CIDIP-VI plenary conference, held from February 4-8, 2002, at the OAS headquarters in Washington, D.C.. At the plenary conference, the U.S. and Mexican delegations presented the revised version of the model law. Spirited discussions during the official daily sessions were followed by drafting sessions after hours and into the night to resolve the points raised during the day.

A drafting committee was created to ensure that all of the approved changes were added to the text and to create a final, definitive version. Several important changes were made to the provisions of the model law (described below) and approved. The delegation of Canada presented numerous suggested revisions that were incorporated into the final text, and the delegation of Uruguay played a key role in guiding the whole effort to a final product that met the concerns voiced by the group.

The CIDIP-VI concluded with the unanimous approval of the model law, which is now before the OAS member countries for adoption and implementation.\(^{80}\)

**Scope of the Model Law and the Concept of Preferential Possessory Rights**

Consistent with the first principle of contemporary secured transactions law set forth earlier in this analysis, the model law sets forth a comprehensive scheme to regulate all types of security interests in all types of movable property, whether corporeal or incorporeal, present or future.\(^{81}\) Application of the model law, however, is limited to consensual security interests.\(^{82}\) The principal right granted by the model law to the secured creditor who perfects his or her security interest

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\(^{80}\) *See supra* n. 2.

\(^{81}\) Model law, sec. 1. This first provision of the law states that it shall “regulate security interests in movable property securing the performance of any obligations whatsoever, of any nature, present or future, determined or determinable.”

\(^{82}\) Model law, sec. 5.
by publicizing it in the manner prescribed by the model law is referred to by article 2 of the model law as a “preferential right”: “When a security interest is publicized in accordance with this Law, the secured creditor has the preferential right to payment from the proceeds of the sale of the collateral.”

In accord with the previously discussed principle of replacing title or ownership-derived rights by possessory rights, the preferential right is indeed a new type of right:

1) It does not depend for its creation, publicity or enforcement upon the debtor’s or the creditor’s ownership of the collateral, but on the debtor’s right to possession thereof; and

2) It provides the holder of such a right not only with the special remedies granted by the model law, but also enlarges the scope of secured rights as they are known under current law. Defined as a “preferential right to payment” by the second paragraph of article 2 of the model law, the creditor’s security interest extends to the proceeds of the sale of collateral, as its scope can also extend to future goods and their substitutes under other provisions of the model law.

Although the model law’s expansive scheme covers security interests in most types of movable collateral, it also recognizes that special laws or markets should govern security interests in certain types of goods. As a result, the model law allows an adopting state to exclude security interests in certain types of collateral from its scope of application. Investment securities are one example of special types of collateral. Because of their “de-materialized format” in many marketplaces, their “indirect holding” by intermediaries, and their instantaneous transfer and pledge by means of electronic bookkeeping entries, they require separate regulation.

Other categories of collateral that may be excluded from the scope of the model law are those regulated by other domestic or international laws and which

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83 Model law, secs. 46-47, give this right priority over all other claimants to such proceeds, so long it is publicized as early as possible, either by registration or by possession. See model law, sec. 10.

84 Model law, sec. 1, para. 2, reads as follows: “A State may declare that this Law does not apply to certain types of collateral expressly specified in this text.” This provision is not meant to encourage the preservation of secret liens. The revised language is meant to allow states to exclude from application of the model law to certain types of movable goods (e.g., investment securities) wherever they may be expressly singled out in the law for special treatment, while not allowing states to exclude certain legal figures (e.g., pledges, conditional sales) from the general scheme.
may require registration in a separate registration/registry system. One example is collateral that falls within the scope of the Convention on International Interests in Mobile Equipment.\(^85\) Collateral that becomes a fixture to real property is another.\(^86\)

Finally, the model law also applies to security interests in movable property, the title of which may be registered under a different legal system. In dealing with this type of collateral, however, the model law defers to any special legislation or registry to the extent of any inconsistency between the model law and the title-specific legislation.\(^87\)

**Uniformity and the Unitary Security Interest**

Consistent with the principle of functional notice to third parties and with the need to eliminate secret liens, an overarching goal of the model law is to create a unitary and universal security mechanism. Uniformity of treatment of secured transactions requires merging all current mechanisms used for security in collateral into one. Such mechanisms include commercial pledges, chattel mortgages, guarantee trusts, agricultural and industrial production pledges or guarantees.

Uniformity of treatment must also include all legal devices in which possession of movable property, on the one hand, and title to movable property, on the other, reside in different parties. These include conditional sales and retention or reservation of title transactions, as well as financial leases and consignment agreements when used as financing devices, all of which serve the same function as chattel mortgages, commercial, agricultural, or industrial pledges. In addition, the sale or assignment of accounts receivable and other claims are very difficult to distinguish from security interests in these accounts. As a result, a truly uniform statute should also include these transactions as well.

The ideal approach to uniformity is to employ one single uniform mechanism to replace all current legal mechanisms that have been used to create rights in property as protection against default. However, eliminating legal figures with long-standing support and traditions, such as the pledge, the lease, and conditional sales contracts, was not possible within the context of the CIDIP-85

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\(^86\) Model law, sec. 51, para. IV.

\(^87\) Model law, sec. 36.
As a result, the model law uses an alternative approach: a uniform registry and priority system. Under this approach, states adopting the model law must create a unitary and uniform registration system for all security devices. That is to say, enacting states may keep current pledges, chattel mortgages, retention of title or conditional sales, and all other traditional devices, but all must be recorded in the same manner, in the same place and subject to the same principle of prior tempore potior iure, except when the law specifically excludes the application of this principle. Moreover, these states are required to create a single registry for their recording. In addition, regardless of the mechanisms used to create a right in property, priority will be tied to the date of such recording.

The model law allows adopting states to continue using possessory security interests based on the traditional civil law pledge. Even though the model law preserves present regulations concerning the structure of the pledge, it adds new rules concerning the obligations of a creditor in possession of the collateral. In addition, the model law limits the notice or “publicity” effect of possessory security interests to circumstances in which collateral is actually transferred to the creditor. This rule endeavors to eliminate the use of “constructive possession pledges” where the debtor retains possession and use of the collateral — a mechanism that goes against true pledge requirements of delivering the collateral to the secured creditor.

88 Nor was it possible for the U.C.C., which recognizes any legal device by any name with which the parties may wish to describe their transaction, so long as it complies with U.C.C. Article 9 requirements for its creation and publicity whenever its intention is to provide an interest in movable property as a protection against default. See U.C.C. sec. 1-201(37)’s comprehensive definition of “security interest.”
89 Model law, sec. 1.
90 Model law, sec. 47.
91 Model law, sec. 8.
92 Model law, sec. 32, states, “A creditor in possession of the collateral: I. Shall exercise reasonable care in the custody and preservation of the collateral [including] the necessary steps to preserve the value of the collateral and the rights derived therefrom. II. Shall maintain the collateral in such a way that it remains identifiable, unless it is fungible. III. May use the collateral only as provided in the security contract.”
93 Model law, sec. 10, para. 2.
94 One example of the “constructive possession pledge” occurs in Article 334 of the Mexican General Law on Credit Instruments and Operations (Ley General de Títulos y Operaciones de Crédito, or “LGTOC”), which requires that the debtor deliver possession of the collateral to the secured party. However, according to sub-paragraph (IV) of this article, a pledge may be constituted by depositing the goods with a designated third party, who is to keep them at the creditor’s disposal. The intent of this provision is to divest the debtor of possession of the collateral. Unfortunately, this mechanism is commonly used as a non-possessory device. In this case, instead of appointing an independent bailee to act as depository, the creditor names an officer or shareholder of the debtor as its agent. The assets remain in the debtor’s possession and are used
The goal of uniform treatment of all security devices may not be as
difficult to attain as may appear at first sight. Some Latin American jurisdictions
already require the registration of financial leases and other similar devices. This
should facilitate their adoption of the model law by simply altering the scheme of
various registries for different devices to one designating a single location for all
devices that have the effect of creating a security interest.95

Another equally crucial issue is the incorporation of the assignment of
receivables into proposed reforms. Although assignment and negotiation or
factoring of accounts usually involves the sale of accounts from the account
creditor to the secured creditor, there is little practical difference between the sale
of accounts and the taking of a security interest in accounts.96 This is especially
ture if the sale allows recourse against the seller of the accounts as secured
debtor.97 Assigned or factored accounts are also difficult to distinguish from
security interests in accounts, because quite often these accounts are intangible
and exist only in the debtors’ and creditors’ books or records and have no
physical manifestation that can clearly indicate who is the party in possession.
Consequently, proper implementation of the model law requires states to
assimilate these devices into a single system of registration and priority setting.98

How the Model Law Reflects the Principles of Modern Secured Lending

The model law blends most of the Anglo-American principles into an overall
effective normative system for secured transactions. We have discussed the
comprehensiveness of its scope and its unitary security interest, encompassing
all legal mechanisms — by whatever name — that in effect provide a creditor
with assets against which it can collect if the debtor does not pay. In addition, the
model law’s security interest (derecho posesorio preferencial):

1) Extends to “attributable” property within the all encompassing
category of collateral and to future, recurring or non-recurring
advances by the same or other lenders;

in the debtor’s operations. The model law attempts to curb this type of transaction, which creates
a secret lien and raises several questions concerning the legal validity of the pledge. See, Boris
Kozolchyk, et. al., supra n. 62, at 87.
95 Model law, secs. 34-45.
96 Model law, secs. 13-14. See also, Kozolchyk et. al., supra n. 62, at 88-91.
97 Model law, sec. 13.
98 Model law, secs. 1, 14.
2) Creates a special regime of functional publicity through the registration of a summary paper-based document or electronic message and, in certain instances, by creditor or third party possession;

3) Creates a new regime of priorities based upon the perfection of security interests through functional publicity and exceptions thereto, such as for purchase money security interests; and

4) Creates new rules for judicial and extra-judicial foreclosure and enforcement, and for conflict of laws.

Creation of the Security Interest

The model law requires a written security contract to create a non-possessory security interest, and specifies that it must include: (1) its date of execution; (2) information identifying the debtor and creditor, including the debtor’s signature, which may be electronic; (3) the maximum amount secured by the security interest; (4) a description of the collateral, which may be generic; (5) a description of the secured obligations, which may be generic; and, most importantly, (6) an express indication that the movable property described serves as collateral for a secured obligation.

The relatively simple requirements imposed by the model law reduce the size of the security agreement and make it easier for the creditor and debtor to agree to one general security contract that will support a series of specific loans over several years, or to easily execute a new security contract, as circumstances may dictate.

An important innovation of the model law with regard to the creation of the security interest is that it frees the security interest from the requirement that there must be an executed and disbursed “principal” loan agreement, and an accessory contract to that loan, for the security interest to exist. The model law replaces the principle that the security interest must depend on an executed principal transaction with the principle of “abstraction” or independence of the security interest from any specific, extant underlying loan. It provides that a security interest may take effect between the parties from the moment they agree

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99 Model law, sec. 2 and sec. 6, para. 1. The writing may be “by any method of communication that leaves a permanent record of the consent of the parties.” Id., sec. 7.

100 Model law, sec. 7.

101 Model law, sec. 2, para. 1.
to it. The security interest thus created takes effect against third parties as from the moment of its registration; and its priority also dates from that moment.

**Collateral and Attributable Property**

Under the model law, the creation of a security interest may reach all forms of “movable property . . . susceptible to pecuniary valuation at the time of creation or thereafter,” and defines “movable property collateral” in the broadest possible terms, to include any non-real property asset of economic value. A similarly innovative rule states that the security interest may extend to “attributable movable property . . . that can be identified as derived from the originally encumbered property, such as fruits, or other property resulting from [its] sale, substitution or transformation.”

In order for the security interest to reach such attributable property, it must be mentioned on the summary registration form provided by the model law. Thus, the security interest may extend to “future or after-acquired property”, although only from the moment the secured debtor acquires rights in such property. And these debtor rights need not be of ownership: possessory rights will suffice to vest the creditor’s security interest in future or after-acquired property.

In sum, the scope of the model law collateral is as broad as the imagination of lenders and borrowers, and unlike other attempts at regional uniformity, it includes collateral that is little used in Latin American countries, such as a business’ inventory, contract rights, royalties, accounts receivable, rights to draw under letters of credit and claims to the proceeds

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102 Model law, sec. 6, para. 1. The parties may agree otherwise.
103 Model law, sec. 34.
104 Model law, sec. 47.
105 Model law, sec. 2, para. 1.
106 Model law, sec. 3(V).
107 Model law, sec. 3(VI). The U.C.C. has a similar, if more detailed, definition. U.C.C., sec. 9-102(64).
108 Model law, sec. 11.
109 Model law, sec. 6, para. 2.
110 Model law, sec. 2.
111 Model law, sec. 30.
113 Model law, sec. 31.
114 Model law, secs. 13-19.
thereof, as well as incorporeal rights known in United States law as intangible property or general intangibles.

 Floating Liens, Their Importance and Their Security

The so called “floating lien” — in which a creditor takes a security interest in most or all of debtor’s assets, often consisting of inventory, receivables and bank deposits — may be subject to seasonal and other movements in the amount of the debt and the amount of the assets. The creditor typically will make a series of future advances as the debtor, for example, sells off inventory financed by credit, pays the debt and then needs fresh credit to replace inventory.

The model law covers floating liens and future advances and fixes their priority back to the date of registration of the original security interest. Yet, the creditor must be careful to declare a maximum amount to be secured by the security interest that is high enough so that no future advance will exceed the stated amount. This restriction should present only a minor difficulty at best, since there are no limits on the amount that may be declared.

 Purchase Money Security Interests as Exceptions to Floating Liens and Other Prior Security Interests

Utilizing the comprehensive scheme created by the mechanisms described above, a creditor can tie up all of debtor’s assets virtually forever so that no other lender may take a priority. This state of affairs could result in curtailing the debtor’s freedom to borrow from any but the original lender, thereby significantly reducing its business options. The concept that mitigates the restriction of the floating lien is that of the “purchase money security interest”, defined in the model law as “a security interest granted in favor of a creditor, including a supplier, who finances the acquisition by the debtor of the moveable corporeal property over which the security interest is granted.”

The key to effective implementation of the purchase money security interest is its preemptive priority over prior-existing security interests that would

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115 Model law, 22-25.
116 Model law, secs. 20-21.
117 Defined in model law, sec. 3(VIII).
118 Defined in model law, sec. 3(X).
119 Model law, secs. 1-2.
120 Model law, sec. 47.
121 In both the security contract [model law, sec. 7(III)] and the registration form [model law, sec. 37(III)].
122 Model law, sec. 3(IX).
normally take precedence based on their earlier registration.\textsuperscript{123} The model law provides the preemptive priority for the purchase money security interest, but “exclusively [for] the specific movable property acquired with it and the cash proceeds attributable to their sale, provided the secured creditor has complied with the conditions set out in Article [39].”\textsuperscript{124}

Articles 39 and 12 create special registration procedures for purchase money security interests. Article 39 requires the purchase money secured creditor to notify creditors previously perfected against the same collateral that is claimed for the purchase money security interest\textsuperscript{125} and to “register in the registration form a notation that indicates” the special priority claimed.\textsuperscript{126} The latter requirement appears again, in article 12 of the model law. The special registration procedures are not unduly onerous. It is only fair to notify existing creditors who — secure in their priorities — might otherwise not become aware of the purchase money security interest and might even loan a debtor money against collateral they thought was theirs.

\textit{Publicity and Registration}

A functional and effective publicity of perfected security interests, easily discoverable by subsequent potential creditors, is at the heart of an effective secured transactions system. The most common method contemplated by the model law is registration.\textsuperscript{127} However, some types of collateral — documentary credits or letters of credit,\textsuperscript{128} negotiable instruments and documents of title\textsuperscript{129} — depend on delivery to the secured creditor for their publicity. Most corporeal items may be given into the possession of a third party, in which case “detention by the third person effects publicity only from the time the third person receives evidence in writing of the security interest.”\textsuperscript{130} In similar fashion, an account debtor whose account has been assigned as collateral need not pay that account

\textsuperscript{123} See model law, sec. 47.
\textsuperscript{124} Model law, sec. 50. Although the official text says “Article 40,” this is an obvious error. The proper reference is clearly to “Article 39.” The numbering of the articles in the model law changed by one when the style committee combined the original secs. 16, 17 and 20 into the final secs. 16-17 (see supra, n. 2), thus reducing the number of all subsequent articles by one, an effect not translated here.
\textsuperscript{125} Model law, sec. 39(II).
\textsuperscript{126} Model law, sec. 39(I).
\textsuperscript{127} See Model law, secs. 10, 12, 14, 20, 30, 34-45.
\textsuperscript{128} Model law, sec. 22.
\textsuperscript{129} Model law, sec. 26.
\textsuperscript{130} Model law, sec. 29.
to the secured creditor until he receives notice, but after such a receipt he may only pay the secured creditor.131

By providing for different forms of publicity, depending upon the type of collateral and nature of the transaction, the model law has captured the gist of contemporary publicity of security interests in moveable property: require the registration most likely to give adequate notice to creditors and bona fide purchasers and treat creditor or third party designee possession also as a form of functional publicity. Consistent with this approach, any state adopting the model law must implement its initial mandate to “create a unitary and uniform registration system applicable to all existing movable property security mechanisms in the local legal framework.”132 If a state does so, the registration form specified in the model law — simple and generic — should function well.

The model law provides that the registration form should be a standard form that includes: (1) the name and address of the secured debtor; (2) the name and address of the secured creditor; (3) the maximum amount secured by the security interest; and (4) a description of the collateral, generic or specific.133 It should be noted that, in line with technological developments, no signatures are required and any person authorized by the secured parties may “effect a registration”.134 Finally, the model law establishes the bases for an electronic registry, easily and inexpensively accessible.135

Priorities and Exceptions Thereto

Some of the model law priorities and exceptions thereto have already been discussed. The model law provides a workable system predicated on “first in time to register, first in right” (prior tempore potior iure) and standard exceptions to this basic rule.136 As was just noted, the purchase money security interest is one of the most important exceptions,137 and so are the purchases by buyers in the ordinary course of business.138 The model law also provides for subordination of security interests by written agreement between secured creditors.139

131 Model law, sec. 17. For the security interest in receivables to affect third parties, it must be publicized by registration. Id., sec. 14.
132 Model law, sec. 1, para. 3.
133 Model law, sec. 37.
134 Model law, sec. 35.
135 Model law, secs. 42-45.
136 Model law, sec. 47.
137 Model law, sec. 50.
138 Model law, sec. 48.
139 Model law, sec. 49.
Foreclosure and Enforcement

The model law’s provisions on enforcement of security interests upon debtor’s default adopted a procedure that combines French Canadian, German, South American, and United States procedures. The parties are at liberty to agree on whatever form of execution they wish, including self-help, at any time during the life of the secured transaction. If they cannot agree, or if the debtor reneges and chooses to oppose the agreed-upon procedure, the model law sets forth summary judicial and quasi-judicial procedures.

While relatively summary in duration, the judicial procedure does require registration of an enforcement form at the same registry where security interests appear, followed by notarial or judicial participation and notice to the debtor, who then has three days to certify payment of the debt in full or suffer an order of repossession. After repossession, the debtor and “any other interested person” has a right of redemption up until “any time before the secured creditor disposes of the collateral.”

The model law does not go so far as the U.C.C., with its self-help or extra-judicial foreclosure procedure, but in some ways, it may provide a more efficient method of foreclosure by including official participation from the beginning in a summary process. In fact, under the U.C.C. scheme, the debtor may — and often does — throw foreclosure into an extended judicial process by simply objecting when the creditor attempts to repossess the collateral, since the repossession cannot then go forward without a breach of the peace. The model law requirement of official involvement means some extra, but not very onerous, documentation at the beginning. Once that routine is accomplished, however, the debtor may not slow the summary process down and can stop it only by proving payment of the debt within three days of receiving notice.

Comparison of the Model Law with Other Sources of the Law of Secured Transactions

140 Model law, sec. 61.
141 Model law, secs. 53-66.
142 Model law, sec. 53.
143 Model law sec. 54.
144 Model law, sec. 55.
145 Model law sec. 56.
146 Model law, sec. 57.
A word of caution

In comparing the OAS model law with contemporary codes and statutory provisions, we need to bear in mind that the highly-developed versions of U.S. and Canadian laws now in force did not spring full-blown into the statute books. They developed over time, through painstaking occasional amendments and periodic wholesale revisions. By now, the Canadian/U.S. system has achieved a high level of sophistication and is quite efficient in application, but its earlier statutory manifestations contained many provisions that initially disrupted the merchants, lawyers and courts attempting to apply them. Any system of commercial laws should accommodate, over time, the salutary practices of the market it controls. It cannot come to a stopping point in its development, nor will it ever. Technology and the ever-changing lending practices in the marketplace will always offer new challenges for the remarkably flexible system developed in Canada and the U.S., and for the model law as it is incorporated into the laws of Latin American countries.

The OAS Model Law and Revised Article 9 of the U.C.C.

a) Drafting style

The drafting style of Revised Article 9 of the U.C.C. is a function of its “casuistic” logic; i.e., the logic that identifies problems in the previous text by searching for them in court decisions rendered since the last revision and in the practice of lawyers specialized in secured lending. When identifying judicial and transactional problems, the casuistic logic seldom becomes inductive. It does not search for overarching concepts or general principles that could explain the reasons for the problems or their permanent cure. Instead, it attempts to restate its findings as narrow rules that address the specific problem, often in isolation from the whole system of rules. Thus, casuistic rules frequently are drafted as qualifications or exceptions to the pre-existing narrow rules and exceptions.

By following the casuistic approach to drafting, the focus of the U.C.C.’s Revised Article 9 is not so much on building a system of interpretation of secured transactions law based on overarching concepts and principles. Its goal is to provide answers to the narrow issues exposed by a massive number of transactional disputes.

The drafting of the model law follows the civil law tradition of first identifying the essential features of each of the categories of transactions, starting with the more general and proceeding to the specific. Hence, the model law found it necessary to identify as a preferential possessory right the new generic right contained in the concept of security interest. Its definitions are also of the
“essential” type. Each definition is supposed to reflect the peculiarities of the legal institution and avoid the tautologies of Revised Article 9 definitions. However, the model law also profited from empirical studies on secured lending practices in Latin America. Accordingly, the normative selection of the species of collateral was made after having established not only what was used as collateral in Latin America, but also what was not used and how it could be used. The combination of formal logic and empirical information resulted in a clearer and leaner text than would have been the case if the casuistic method of drafting had prevailed.

Because of its clarity and logical organization, the model law is a didactic enactment that can be used as a primer of secured transactions law for the uninitiated. It addresses some of the thornier concepts and their application with spare, fluid language, trusting the legally-trained reader to derive appropriate implications. In contrast, U.C.C. Article 9 is for the adept practitioner, familiar with the various transactions, but wishing to search for answers to virtually every specific factual situation and contingency imaginable.

Some examples may help to illustrate the contrasting drafting styles. Consider the definitions of Article 9. They are not based upon the Aristotelian “essences” which identify the peculiarities of the legal institution involved. Unlike the civil law codifier, with his Aristotelian approach, the U.C.C. codifier does not attempt to identify or define the essential characteristics of a legal “species” — such as a contract or a security interest — within the “genus” of “obligations” or of “guarantees”. In fact, even though the entire Article 9 addresses security interests in personal property, it neither defines the essence of “personal property” nor of a “security interest”. Many of its definitions are tautological; i.e., they include the defined term as part of the definition.147

The OAS model law’s statement of the basic priority rule takes less than one line.148 By contrast, Revised Article 9 buries its fundamental priority rule in a bramble patch of language. One can emerge the wiser from it only after negotiating several disentanglements and carefully tracking down various references to other provisions.149

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147 See, e.g., the definitions of such important terms as “security interest,” U.C.C. sec. 1-201(37); “fixtures”, U.C.C. sec. 9-102(41); “financing statement”, U.C.C. sec. 9-102(39); “goods”, U.C.C. sec. 9-102(44); “non-cash proceeds,” U.C.C. sec. 9-102(58); and “security agreement”, U.C.C. sec. 9-102(73).
148 Model law, sec. 48.
149 U.C.C., sec. 9-322. The fundamental rule is embedded principally in sec. 9-322(a)(1), but the whole of Article 9 must be considered and painstakingly parsed to work out the meaning of the priorities.
A final example of Revised Article 9’s casuistic style occurs in its treatment of the contents of the financing statement, that most basic document, whose filing fixes the date of priority for a lender’s security interest. Begin with section 9-502, entitled “Contents of the Financing Statement”. Despite its label, it neither provides a comprehensive formula of inclusion nor lists all the contents necessary to make a financing statement suitable for filing. Specifically, section 9-502 does not mention addresses for the debtor or creditor as necessary inclusions. Nonetheless, sections 9-516(b)(4) and (5) — in a section entitled “What Constitutes Filing; Effectiveness of Filing” — state that the filing office must reject a document that lacks those addresses. The clue to the requirement for addresses is hidden in Official Comment 4 to section 9-502. A reader of the statute must be either compulsive or highly sophisticated to make the connection, although the initiated make such a connection by reflex.

Should the filing party use the form provided in section 9-521, however, and simply fill in all of its spaces, it complies with all of the requisites scattered through the various different provisions of the U.C.C..\textsuperscript{150}

In contrast, the OAS model law provides one section, which clearly sets out the minimum requisites for a complete “registration form”.\textsuperscript{151} The statute provides no other references, nor are they necessary.

On the positive side, the 1999 Revision to Article 9 continues to reflect accurately and comprehensively the ever-changing mores of the secured lending market place. It readily accepted the Canadian improvement of doing away with the debtor’s signature on the financing statement,\textsuperscript{152} thereby ushering in the possibility of expeditious electronic filing.\textsuperscript{153}

Another key change in the 1999 Article 9 Revision introduced the new concept of “control”\textsuperscript{154} and used it as the means of perfecting a security interest in deposit accounts;\textsuperscript{155} electronic chattel paper;\textsuperscript{156} stocks, bonds and other securities...

\textsuperscript{150} If one wishes to test how daunting and impenetrable the statute can be, work through U.C.C. secs. 9-502, 9-503, 9-504, 9-516(b)(4) and (5), and 9-521 with an uninhibited mind, such as the one that a law student brings to a class in secured transactions. A seasoned lawyer who has had no exposure to secured transactions will do as well, however; so will a banker with considerable experience in the practice of secured transactions but little in its law.

\textsuperscript{151} Model law, sec. 37. This provision establishes the minimum data which must be included in the statement, leaving open the possibility that an adopting state may require additional items.

\textsuperscript{152} Compare the 1972 version of U.C.C. sec. 9-402(1), with the revised secs. 9-502(1) and 9-516(b)(5).

\textsuperscript{153} The model law in sec. 37 accepts the same possibility, by not requiring debtor’s signature.

\textsuperscript{154} U.C.C., sec. 9-314.

\textsuperscript{155} U.C.C., sec. 9-104.

\textsuperscript{156} U.C.C., sec. 9-105.
classified as “investment properties”;\(^\text{157}\) and letters of credit\(^\text{158}\) where any of those diverse assets were utilized as collateral. In doing this, it implicitly recognized that all of them shared the common characteristic of existence as electronic or physical documents.

In sum, because of these two fundamentally different drafting styles, Revised Article 9 and the OAS model law make an odd couple, no matter how harmonious their goals. In its casuistry, Revised Article 9 continues to provide groundbreaking concepts and rules. The OAS model law, on the other hand, emerges as a concise, sharply-focused and even elegant statute, albeit rudimentary in scope and untested in operation.

**Recent Attempts to Adopt the Model Law in Latin America: Mexico’s Reforms of 2000 and 2003**

Even though a number of Latin American countries are in the process of submitting the model law to their respective legislatures, Mexico’s congress has already adopted parts of the model law, first in May of 2000\(^\text{159}\) and more recently in June of 2003\(^\text{160}\) (the relevant legislation is hereinafter referred to as the “Reform Law of 2000”, the “Reform Law of 2003” and the “Regulations of 2003”).\(^\text{161}\)

\(^{157}\) U.C.C., sec. 9-106, and see sec. 8-106. The term “investment properties” is defined in U.C.C., sec. 9-102(49) to include “a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account.” In turn, many of those terms are defined in U.C.C., sec. 8-102. The Mexican Reform Law of 2003 introduced a similar mechanism by a reform to the Ley de Mercado de Valores, sec. 99, as changed by the Reform Law of 2003.

\(^{158}\) U.C.C., sec. 9-107.

\(^{159}\) Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio y de la Ley de Instituciones de Crédito (Decree Reforming, Amending, or Derogating Various Dispositions of the General Law on Negotiable Instruments and Credit Transactions, the Commercial Code, and the Law on Credit Institutions), Law of April 29, 2000, published in the May 23, 2000 Diario Oficial de la Federación, at 3 (hereinafter referred to as the “Reform Law of 2000”).

\(^{160}\) Decreto por el que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio, de la Ley de Instituciones de Crédito, de la Ley del Mercado de Valores, de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, de la Ley Federal de Instituciones de Fianzas y de la Ley General de Organizaciones y Actividades Auxiliares del Crédito (Decree Reforming, Amending, or Derogating Various Dispositions of the General Law on Negotiable Instruments and Credit Transactions, the Commercial Code, the Law on Credit Institutions, the Securities Market Law, the General Law on Insurance Companies, the Federal Law on Bonding Institutions, and of the General Law of Organizations and Activities Ancillary to Credit), Law of April 24, 2003, published in the 13 June 2003 Diario Oficial de la Federación, at 21 (hereinafter referred to as the “Reform Law of 2003”).

\(^{161}\) The first two enactments, despite their label “decrees”, are legislative acts by the Mexican congress, and are referred to here as “laws”. Both decrees, however, reformed existing laws, most
The Mexican reforms contain some remarkable conceptual strides forward. Perhaps most important, in light of its recognition and incorporation of some of the most significant advances achieved in the Canadian and United States approach to secured transactions in personal property, the May 2000 reform stated at the outset that, “[t]he pledge without transfer of possession [read: security interest], constitutes a real right over movable goods whose object is to guaranty an obligation and a preference in its payment.”

There are other, similar conceptual leaps, set out in the Checklist of Achievements and Concerns immediately below.

Unfortunately, despite such ground-breaking amendments, the results of Mexico’s partial adoption of the model law can only be characterized as mixed. For the sake of the other countries considering adoption, it would be helpful to identify why Mexico has not yet succeeded in providing secured creditors with the minimal assurance of certainty available under the model law.

The first problem with Mexico’s recent reforms to its law of secured transactions is its laberinthine process of amendments. One must pick carefully through the provisions of the re-constituted General Law of Negotiable Instruments and Credit Transactions (Ley General de Títulos y Operaciones de Crédito, or “LGTOC”) after the June 2003 reforms to discern all the changes, some of which meet the central criteria for a functional secured transactions law and some of which do not.

Mexico passed its reform laws during harsh economic conditions, in which the congress experienced significant populist pressure to protect a massive number of defaulting debtors, many of whom faced eminent loss of their residences. The legislative task became harder because the Mexican congress has had little experience in asserting its legislative prerogatives within a political system of effective separation of powers and checks and balances. Until recent years, the Mexican executive dictated the legislative agenda to the legislature,
which passed virtually without amendment whatever initiatives the president sent to it. Having never said “no” to the president, the newly independent legislature found it hard to say “no” to popular pressure from constituents.

**Checklist of Achievements and Concerns**

If we sort out the overall effects achieved by the two Mexican reform laws as they have attempted to address the central concepts and legal principles set out earlier in this study, we are left with the following results.

1) They did not adopt a unitary and exclusive security interest for Mexico, eliminating the risk of secret or unrecorded liens. They did enact a system of registration that, for one new type of security interest (the *prenda sin transmisión de posesión*), replaces the traditional filing of the security agreement by the filing of a “pre-codified” form in a national electronic debtor’s (as contrasted with a collateral) registry, but otherwise retained many secret liens and a congeries of security mechanisms thereby failing to implement fully the principle of functional notice.

2) They did adopt the concept of a priority security interest against after-acquired property, a huge change in Mexico’s law of

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164 Article 2 of the *Reglamento del Registro Público del Comercio, Diario Oficial de octubre 24, 2003* states, in relevant part: “(P)re-codified forms will be used as provided by the Ministry and published in the Federal Register pursuant to Article 20 of the Commercial Code . . . in order to record the commercial transactions which, according to the applicable laws, are susceptible to such recording. Responsible parties in the registry offices may not solicit the filing of information other than that set forth in the forms. The recording of these forms will be in an electronic commercial folio. It will be organized in accordance with the merchant’s personal, business or corporate name or designation and will include all the commercial transactions of such merchants.” (In the original Spanish: “Para la inscripción de los actos mercantiles que conforme a las leyes sean susceptibles de ello, se utilizarán las formas precodificadas que la Secretaría, en términos de lo dispuesto por el artículo 20 del Código de Comercio, dé a conocer mediante publicación en el Diario Oficial de la Federación. Los responsables de las oficinas del Registro, no podrán solicitar otros requisitos distintos a los que se incorporen en dichas formas. La inscripción de actos a que se refiere este artículo se efectuará en el folio mercantil electrónico, en atención al nombre, denominación o razón social de cada comerciante o sociedad mercantil, el cual comprenderá todos los actos mercantiles relacionados con dicho comerciante o sociedad.”)

In fact, the registry for the Federal District already accepts summary forms that substantially anticipate the formularios *pre-codificados* provided for in the Regulations of 2003.

165 See infra, nn. 175-176 and accompanying text.
secured transactions.\textsuperscript{166}

3) They did adopt the concept of notice filing by dating the priority of the newly-recognized security interests from the time of registration, even if the actual transaction were consummated later.\textsuperscript{167} This will permit a single renewable filing to fix the date of priority for subsequent secured transactions. However, there are problems with implementing the concept,\textsuperscript{168} as will be described below.

4) They adopted the preemptive priority for purchase money lenders\textsuperscript{169} and the protection of purchases by buyers in the ordinary course of business.\textsuperscript{170}

5) They wrestled mightily with the adoption of cheap, effective extra-judicial remedies to enforce security interests. Yet, while the reforms made progress, they fell short of the certainty needed by repossessing or foreclosing creditors. Concern for constitutional due process led to inserting so many safeguards and delays into the law that it makes the foreclosure process unduly time-consuming and expensive.\textsuperscript{171}

The remainder of this article will discuss each of these accomplishments and near-accomplishments.

1) \textit{A Less Than Universal Unitary System}

The model law sets forth “a unitary and uniform registration system applicable to all existing movable property security mechanisms in the local legal framework, in order to give effect to this Law.”\textsuperscript{172} Likewise, the U.C.C.’s Article 9

\begin{footnotesize}
\begin{itemize}
\item[166] See LGTOC, sec. 355(II)-(V), as reformed by the Reform Law of 2000.
\item[167] See LGTOC, secs. 365-366, as reformed by the Reform Law of 2000.
\item[169] LGTOC, sec. 358, as reformed by the Reform Law of 2000.
\item[170] LGTOC, sec. 356(III), as reformed by the Reform Law of 2000; sec. 398(III), as reformed by the Reform Law of 2003. See also sec. 373, as reformed by the Reform Laws of 2000 and 2003, defining a “bad faith purchaser” who would not escape the security interest when purchasing collateral.
\item[171] See amendments to the Código de Comercio, especially secs. 1414bis to 1414bis 20, as reformed by the Reform Laws of 2000 and 2003.
\item[172] Model law, sec. 1, para. 3.
\end{itemize}
\end{footnotesize}
provides that it shall apply to all security interests in personal property,\textsuperscript{173} “regardless of the form of the transaction or the name that parties have given to it,”\textsuperscript{174} and then defines “security interest” so broadly as to include virtually any credit arrangement secured by a legal interest other than real property.\textsuperscript{175} As with the United States prior to the adoption of U.C.C. Article 9, Mexico relied (and relies) on a large and varied number of secured transactions in moveable property.\textsuperscript{176} Mexican law lacks a provision like the U.C.C.’s section 1-201(37) and the model law’s section 1, paragraph 1, and section 2, paragraph 1, which require registration of any and all consensual security devices, no matter what their name or how constituted.

The Reform Law of May 2000 added two new mechanisms — the “pledge without debtor dispossession” (prenda sin transmisión de posesión) and the “guarantee trust” (fideicomiso de garantía) — without trying to merge all the existing mechanisms into a universal system of creation, publicity and priority.

While the two reform laws may appear to adopt a comprehensive scheme, reminiscent at first of U.C.C. Article 9 and of the model law, they must be read against one significant reservation. Their scheme does not pretend to create the exclusive means of creating and perfecting a security interest in goods and interests other than in real estate, nor does it pretend to comprehend other mechanisms within its requirements. In other words, if the security agreement is neither the pledge without debtor dispossession nor the guaranty trust, none of the reform amendments apply to it. Even existing transactions that might otherwise fall under its provisions are exempted. The Reform Law of 2003 states it succinctly in its Transitory Article: “The provisions of this Decree shall not apply to those credit transactions entered into prior to the effective date of [the Decree], even when renewing or restructuring such credits.”\textsuperscript{177}

One example of a widely-used device whose registration can be hidden under Mexico’s present law is the commercial or financial “lease”.\textsuperscript{178} It is only one of the many security devices currently recognized in Mexico,\textsuperscript{179} all of which

\textsuperscript{173} U.C.C. sec. 9-109(a)(1).
\textsuperscript{174} U.C.C. sec. 9-109, comment 2.
\textsuperscript{175} U.C.C. sec. 1-201(37).
\textsuperscript{176} See Dale Beck Furnish, supra n. 64.
\textsuperscript{177} Reform Law of 2003, Artículo Transitorio.
\textsuperscript{178} See sec. 25 of the Ley General de Organizaciones y Actividades Auxiliares de Crédito, which would require the registration of such leases in either the Registro Público de Comercio or another “applicable registry.” The indefiniteness of the “applicable” registry makes it possible that the lease will not be registered in the Public Registry of Commerce, the registry most likely to be searched by secured creditors and bona fide purchasers.
\textsuperscript{179} See Furnish, supra n. 64.
predate the reforms of 2000 and 2003, and none of which are affected by those reforms.

In contrast, the U.C.C. and the model law forbid the use of a lease agreement to create a hidden security interest and they determine its nature as a security interest by its substantive effect, i.e., if in substance it is a secured transaction rather than a legitimate lease, then it must be filed. Further, the U.C.C. encourages the filing of even legitimate leases in the same registry as other security interests to enhance the transparency of a debtor’s pledgeable assets.

2) Priority in After-Acquired Property

The U.C.C. states the enabling principle of priority in after-acquired property in categorical terms and the model law follows its lead, albeit more implicitly. The Mexican law prior to the May 2000 reform presumed the opposite, although it accepted after-acquired property as collateral for certain special credit transactions. This negative presumption was abandoned by the May 2000 reform. It provided that a debtor may grant a security interest in “every class of rights and movable goods”, and that the security interest may reach “all those goods and rights that form part of debtor’s assets at the time the security interest is authorized [and all those goods and rights of the same or similar nature] that the debtor may subsequently acquire.”

However, the description of the collateral needs to “identify” the assets subject to the security interest, and only when it covers “all the movable goods that [the debtor] utilizes in carrying out its preponderant activity . . .” may these assets be identified generically. The May 2000 reform recognized the secured creditor’s priority from the time that the security interest is registered, permitting

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180 Model law, sec. 2, para. 1; U.C.C. sec. 1-201(37).
181 U.C.C. sec. 9-505 encourages the “precautionary filing” of lease interests even when no security interest is involved. See comment 2. Presumably, the same informational filing would be possible under the model law, although no specific language addresses that possibility. See model law, sec. 35.
182 U.C.C., sec. 9-204.
183 Model law, secs. 2, 6, 9.
184 See Furnish, supra n. 64, at 37-17 to 37-19, referring to habilitación, avío and refaccionario loans.
185 LGTOC, sec. 353, as reformed by the Reform Law of 2000.
186 LGTOC, secs. 355(I) and (II), as reformed by the Reform Law of 2000. See also id., sec. 378. For the guaranty trust, the law provides that “[i]f so stated, a single guaranty trust may be utilized to guaranty simultaneous or subsequent different obligations contracted for by the settler [debtor], with the same or different creditors.” LGTOC, sec. 397, as reformed by the Reform Law of 2003.
187 LGTOC, sec. 354, as reformed by the Reform Law of 2000.
future advances and after-acquired property to date the collateral interest back to
the time of registration.\textsuperscript{188} In addition, no renewal of the original registration
appears to be necessary, although the security agreement itself must be
registered, together with its subsequent modifications, assignments, and
termination.\textsuperscript{189} The May 2000 reform also imposes a duty on the creditor to
terminate the registration of the security interest when it is paid in full.\textsuperscript{190}

In sum, while Mexico has come closer to enabling the financing of
commercial credit with after-acquired assets — at least when either a prenda sin
transmisión de posesión or a fideicomiso de garantía is utilized as the security device
— much work needs to be done to accomplish this goal for all secured
transactions. The pre-reform prohibition still holds for all devices that had no
provision for after-acquired property prior to the reforms.

3) \textit{Priority from the Date of First Registration}

When a legal system accepts a general summary statement or a “pre-codified
form” as the filing or registration document — as described above for both the
U.C.C. and the model law — it enables that document to cover future
transactions by fixing the priority of the subsequently-perfected security interest
from its original date of registration. Thus, the creditor may file and fix a priority
at a time when — either in fact or in law — the security interest itself has not yet
been created because the loan has not yet been given.\textsuperscript{191}

The Mexican Reform Laws of May 2000 and June 2003 accepted the
concept of fixing priority against third party creditors and other claimants by
registering either a prenda sin transmisión de posesión\textsuperscript{192} or a fideicomiso de
garantía\textsuperscript{193} prior to consummation of the secured transaction. That simple
provision presents difficulties, however, especially with the prenda, at least until
newly promulgated Regulations can take full effect.

The Regulations of the Public Registry of Commerce, promulgated on
October 24, 2003, distinguish between the document that constitutes the
transaction (the security agreement) and the document that notifies it, or declares
it, to third parties (the summary “pre-codified” form).\textsuperscript{194} The summary form
applies exclusively to transactions involving the prenda sin transmisión de posesión,
so the Regulations, in principle, do not include all possible security interests in a summary filing.\textsuperscript{195}

Further, one must begin with the proposition that until the Regulations are fully implemented (as indicated in item 1 of the “Checklist of Achievements and Concerns” above), the Mexican system of notice filing will not be fully operative. Implementation of the Regulations will require not only the abrogation of secret liens, but also a careful harmonization of pre-existent state and federal laws, especially where state and special registries are concerned. Prior to the proper implementation of these Regulations, the constitutive and declarative effects of a filing can only be achieved by use of the same document: a security agreement usually certified by a notary or “public broker”. Currently (prior to implementation of the Regulations), a valid security agreement must not only be executed with a certain degree of formality, but must also registered in its entirety. The registration then also becomes the act of declaration by which publicity is given to third parties.

Clearly, the sooner this cumbersome and costly system is replaced by the filing of the Regulations’ pre-codified summary forms, the better. The need to file the security agreement itself costs the system a good deal in terms of agility and adaptability, since it requires registration of the basic contract — and such modifications, assignments and judicial resolutions as may relate to it thereafter — rather than a summary reference document to put third parties on notice. And while the use of summary forms needs to be extended to cover all security interests, not just the prenda sin transmisión de posesión, the mere introduction of the summary form as the registration device is a significant start. Upon the implementation of the Regulations as they are currently written, the Mexican file clerk may not, pursuant to those Regulations, solicit any document providing more than the information provided by the pre-codified form.\textsuperscript{196}

The same provision of the Regulations states that, “Pre-codified [i.e., standardized summary] forms shall be utilized . . . in order to record the commercial transactions which according to the applicable laws are susceptible to such recording.”\textsuperscript{197} The Regulations of 2003 thus appear ambivalent as to whether the pre-codified forms must be utilized to file a prenda sin transmisión de posesión; the first sentence in the provision states that the pre-codified forms “shall be utilized”, but the second sentence provides only that the registry may not solicit more information beyond that included in the forms. This might imply that the registry should or could accept the full security agreement, which would

\textsuperscript{195} Reglamento, sec. 30.
\textsuperscript{196} See supra n. 164 for the specific language to this effect in of article 2 of the Regulations.
\textsuperscript{197} See id.
include the summary information, albeit buried in the terms and conditions of a much more extensive document. Given the prevailing and long-established habits of those who bring documents for inscription in the registry, the drafters of the Regulations of 2003 may have hesitated to penalize those who persisted in bringing the whole document — rather than a simple summary — for registration. Nonetheless, as both the registries and the registrants see the benefits to the summary forms, pressure should build to utilize the summary in preference to the whole document. Registry authorities should begin to resist handling the full document when the registrant can fill out the summary form at the registry in a few minutes.\textsuperscript{198}

Once this type of filing is in full force, it will make it possible to establish, by a single filing, a priority date for repeated, subsequent extensions of credit by the same creditor to the same debtor, secured by a constantly changing asset package made up of the same generic components, a characteristic essential to the modern system, so long as the security interest is created as a \textit{prenda sin transmisión de posesión}.

a. \textit{Priority at Date of Filing: the Guaranty Trust}

After the Reform Law of 2003, the \textit{fideicomiso de garantía} does represent a mechanism by which a priority date may be fixed through constitution and declaration of the basic trust instrument, after which subsequent credit transactions may be carried out with security interests against the property held in trust, and — most importantly — priority that dates from the effective date of the trust rather than the date of the transaction that created the security interest. In essence, under the \textit{fideicomiso de garantía} the debtor (settlor/truster) transfers “legal title” to the collateral to an entity registered as a proper trustee — limited to credit institutions, insurance companies, finance companies, and depositary warehouses\textsuperscript{199} — where it is “held” subject to the beneficial interest of the secured creditor.\textsuperscript{200} The trustee and the beneficiary may be, and often are, the

\textsuperscript{198} One of the authors feels that, despite the language of the Regulations, they require in an oblique manner that the registries should reject anything other than the standardized summary forms. That author felt that such was the clear purpose behind the Regulations at the time they were drafted. Both authors agree that the ultimate effect should, and will be, the rejection by the registry of all save the standardized summary forms, whether that outcome is \textit{de facto} or \textit{de jure}. The difference of opinion turns on what the language of the Regulations requires today.

\textsuperscript{199} LGTOC, sec. 395, as reformed by the Reform Law of 2003.

\textsuperscript{200} LGTOC, sec. 381, as reformed by the Reform Law of 2003.
same party. Under this special trust arrangement, the debtor/settlor may retain all use and disposition of the trust property.

Once the debtor and trustee constitute the *fideicomiso de garantía*, a priority date is fixed. Thereafter, the debtor may grant any creditor a right in the trust goods, thereby constituting the security interest proper. Beneficiaries of such security interests incur the obligation to inform the trustee within five business days of the payment of the obligation secured by their interest in the trust property. Only upon receipt of such notification by the trustee may the debtor designate a new beneficiary/secured creditor. Any other creditor who wishes to take a “simultaneous” security interest in the trust property will know from the trustee that he stands behind the existing security interests granted by the debtor/settlor.

The guaranty trust thus creates priorities within priorities. The basic priority dates from creation of the trust, good against all third parties who do not enjoy access to the trust collateral by debtor/settlor’s instruction to the trustee. Another set of priorities may exist within the trust mechanism, however, based on those creditors who do enjoy debtor/settlor’s designation for a security interest in the collateral held in trust. Where more than one designated creditor exists, those creditors would take their priority in the order in which the trustee received notification of their interest. Presumably, such notification could precede the actual constitution of the secured transaction thereby guaranteed.

### b. Priority at Date of Filing: the Pledge Without Transmission of Possession

A “pledge without transmission of possession” must be executed in a written commercial contract. The law appears to assume, without specifying, that the

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201 LGTOC, sec. 396, as reformed by the Reform Law of 2003.
202 LGTOC, secs. 398-401, as reformed by the Reform Law of 2003.
203 LGTOC, sec. 407, as reformed by the Reform Law of 2000, stated this proposition specifically. The 2003 reform omitted any definitive statement to this effect, but the implication seems quite clear: the possessory right of the trustee dates from the constitution of the guaranty trust, and any creditor may claim the collateral in trust with priority from that date.
204 LGTOC, sec. 397, para. 1, as reformed by the Reform Law of 2003.
205 *Id.*, specifying that such notification shall be by notary or other agent invested with the public trust. Should the secured beneficiary delay in providing the notification, it becomes liable for such damages (“*daños y perjuicios*”) as may be a consequence of the delay. In other words, it should be hard for one creditor to forestall the debtor from switching to another credit source by delaying notice of satisfaction to the trustee.
206 LGTOC, sec. 397, para. 2, as reformed by the Reform Law of 2003.
207 Specifically permitted by LGTOC, sec. 397, para. 1, as reformed by the Reform Law of 2003.
208 Established by LGTOC, sec. 346, as reformed by the Reform Law of 2000.
pledge contract will include the debtor’s grant to the creditor of preferential possessory rights in debtor’s collateral. Perhaps the Reform Law comes closest to specifying grant language when it states, “[t]he pledged goods should be identified,”211 and specifies what kinds of movable goods “may be given under non-possessory pledge,”212 and speaks of the “pledging debtor.”213 Finally, the Reform Law provides that the parties to the secured transaction must include in their written pledge contract terms and conditions that address the following:214

1) The location, at any time, of the assets serving as collateral for the pledge;

2) The minimum return that the creditor should receive from the debtor upon transformation, sale, or transfer of the collateral;

3) The identification of the person(s) to whom the debtor may sell or transfer collateral goods, as well as the use that the debtor shall make of the money, goods or rights received in exchange for the goods; and

4) The information regarding the transformation, sale or transfer of the collateral items that the debtor should provide to the secured creditor.

The second part of the third set of terms and conditions — which require the parties to specify what the debtor will do with the proceeds received in exchange for the collateral — is inconsistent with the generalized Mexican and with Anglo-American commercial practice identified by the NLCIFT country studies (for information on NLCIFT’s NAFTA country studies, see the section above entitled “Law and Practice in Latin America”). Secured creditors concerned

209 LGTOC, sec. 365, as reformed by the Reform Law of 2000. There is a threshold amount of 250 investment units (unidades de inversión, or UDIs) before the requirement of a writing obtains, but this is a low threshold. The Diario Oficial publishes the UDI rate every Monday. As of March 31, 2003, the UDI stood at 3.262916 Mexican pesos, or about US$0.32, so that 250 UDIs would have been the equivalent of about US$80.

210 LGTOC, sec. 347, as reformed by the Reform Law of 2000. An exception is allowed for consumer-to-consumer transactions, or transactions do not fall into the category of commercial acts.

211 LGTOC, sec. 354, as reformed by the Reform Law of 2000.

212 LGTOC, sec. 355, as reformed by the Reform Law of 2000.

213 LGTOC, sec. 356, as reformed by the Reform Law of 2000.

214 LGTOC, sec. 357, as reformed by the Reform Law of 2000.
with the debtor’s disposition of the proceeds in the respective markets usually require that the debtor deposit cash proceeds in a bank account subject to creditor’s joint control and do not attempt to dictate the detail of the use of funds. The remaining restrictions in the above list are also likely to give rise to evasive formulas such as for the required generic indications of collateral location (“all of debtor’s stores and warehouses, existing or created in the future”), for the specification of a minimum return (“the fair market price for the part that was sold”), and for the persons to whom collateral may be sold (“any willing good-faith buyer”).

On the other hand, some of the requirements for the constitution of a security interest under U.C.C. Article 9 and the model law are not explicitly stated by the Mexican Reform laws. Some of the terms and conditions, such as those of the model laws, would be filled in by Mexican notaries or by public brokers. However, as previously noted, the October 2003 Regulations, when fully implemented, may (and should ultimately) result in rejection of the security agreement itself as a replacement for the “pre-codified form”, hopefully not only for one, but for all security interests. Meanwhile, the dual nature of the pledge contract, as both the constitutive and declarative document, creates difficulties. If the credit system is to enable the extension of multiple secured loans over many years between the secured debtor and the original secured creditor or its

215 See model law, sec. 7.
216 LGTOC, secs. 377 and 378, as reformed by the Reform Law of 2000. These provisions seem directed at notaries and registry clerks to prepare them for security contract documents that may not fit established patterns. The provisions carefully instruct the certifying authorities to reject neither guaranties that contain generic descriptions of movable goods, nor those that fail to specify the amount guarantied, so long as the amount of the obligation may be determined at the time of execution.
217 Compare LGTOC, section 366, as reformed by the Reform Law of 2000 with section 2 of the Regulations of the Public Registry of Commerce, supra n. 164. The language of section 2 states, “To inscribe the commercial acts that are susceptible to registration under the law, the pre-codified forms shall be utilized . . . . The responsible officials in the Registry offices may not solicit other requirements different from those incorporated in the forms.” (in the original Spanish: “Para la inscripción de los actos mercantiles que conforme a las leyes sean susceptibles de ello, se utilizarán las pre-codificadas . . . . Los responsables de las oficinas del Registro, no podrán solicitar otros requisitos distintos a los que se incorporen en dichas formas.”) Quite clearly, the Registry official cannot turn away a submission based on the pre-codified form. This may leave open the question of what the Registry official might do in fact, or should do under the law, if a notary or public broker were to submit for inscription the full document, rather than the summary form. Such a document includes all the elements required under section 31 of the Regulations and the Registry office could accept it without “soliciting other requirements different from those incorporated in the forms,” since it was offered voluntarily.
assignees, then a single renewable registration should cover many subsequent loans.

Mexican attorneys interviewed by one of the authors prior to the enactment of the October 24, 2003 Regulations suggested that a preliminary agreement that includes all of the essential requirements for a pledge without transmission of possession could clear the scrutiny of a notary. This preliminary agreement was to be registered before the parties hammered out the particulars of the deal or any credit were extended. All subsequent documents containing terms and conditions that actually create obligations between the parties for the first time, regardless of when executed and registered, could then be inscribed as modifications to the original, taking their priority from the date of the original registration. However, these opinions were ventured prior to the promulgation of the Regulations of October 2003. Other attorneys and commercial brokers interviewed by Lic. Pablo Silva, an NLCIFT staff researcher, were unaware of the impending Regulations and continued to assume that the new federal registry would be a registry of collateral, requiring detailed descriptions of new or transformed goods each time that the acquisition or transformation occurred.

4) Purchase Money Security Interests as an Exception to the System of Priorities

As noted previously, the first major exception to prior tempore potior iure in Article 9 of the U.C.C. and the model law is for purchase money security interests, which may proceed to the head of the priority queue so long as they are properly publicized. To cut in front of an existing creditor secured by inventory or livestock, however, the purchase money creditor must perfect his exceptional priority by giving special notice to the pre-existing or first creditor not to count the purchase money collateral as security for his own credit.

218 They suggest that they could rely on LGTOC, sec. 377, as reformed by the Reform Law of 2000, which is curiously instructive in this regard. It cautions registrars that they “shall abstain from suspending or denying the inscription” of pledges that include generic designations of the assets covered when those assets “correspond to the preponderant activity of the debtor.” LGTOC, sec. 354, as reformed by the Reform Law of 2000, also endorses generic descriptions of collateral, where it includes “all of the movable goods that debtor utilizes for realization of his preponderant activity,” which would seem to support filing of a general declaration that could give rise to a series of subsequent, more specific agreements. The Regulations of the Public Registry of Commerce, sec. 31, seem to require the pre-codified summary form to supply the specifics of a given transaction, save in the case of the generic security interest provided for in LGTOC, sec. 354.

219 LGTOC, secs. 366, 368, 376, as reformed by the Reform Law of 2000.

220 U.C.C. sec. 9-324; model law, sec. 50.

221 U.C.C. sec. 9-324; model law, sec. 39.
There are some limits on the purchase money security interest in proceeds. Typically, the primary lender — and especially when it is a bank — requires the debtor to deposit cash proceeds in an account over which the lender has a security interest perfected by control.\textsuperscript{222} Cash deposited into such an account (usually commingled with cash proceeds from the earlier creditor’s collateral) would not enjoy the purchase money priority. The simplest means of preserving the priority is to set up a special account exclusively for the deposit of cash proceeds derived from the purchase money collateral, under control of the purchase money lender.

The Mexican Reform Laws of 2000 and 2003 do not address the priority of the purchase money creditor in detail. Their sketchy treatment is unlikely to create a system that would free debtors from existing priorities. Where a \textit{prenda sin transmisión de posesión} exists, a purchase money security interest technically may preempt its priority, so long as it is constituted as a \textit{prenda sin transmisión de posesión}.\textsuperscript{223} The provisions on guaranty trusts do not address the possibility.

In other words, the Reform Laws did not address the secured lending system as a whole. In fact, Mexico already has preferential categories of credits that function as purchase money security interests. Loans classified as \textit{créditos refaccionarios} and \textit{de avío} or \textit{habilitación} enjoy preemptive priority over other loans, and are, by their nature, purchase money loans.\textsuperscript{224} Likewise, conditional sales,\textsuperscript{225} leases\textsuperscript{226} and other title retention mechanisms\textsuperscript{227} function as purchase money security interests, and are respected in the current laws. Until Mexico instigates a comprehensive, universal system of a single classification for all security interests, by whatever name and method, the special regime for purchase money security interests, essential as it is, is unlikely to assert itself.

5) \textit{Does the Buyer in Ordinary Course Take Free of the Security Interest?}

\textsuperscript{222} U.C.C. secs. 9-104, 9-314; the model law did not address the question of cash collateral specifically, but section 29 on Property in the Possession of a Third Party might apply.

\textsuperscript{223} LGTOC, sec. 358, as reformed by the Reform Law of 2000. This provision is quite rudimentary. It recognizes the possibility of a peremptory priority for the purchase money security interest, but neither this provision nor any other establishes procedures by which existing creditors might be notified. A second provision, LGTOC, sec. 367, para. 4, as reformed by the Reform Law of 2000, does give priority to purchase money security interests, even over the claims of debts for payment of labor claimants, normally a preferred class among debtors in Mexico.

\textsuperscript{224} See Furnish, \textit{supra} n. 64.

\textsuperscript{225} See id., at 37-22 to 37-28.

\textsuperscript{226} See id., at 37-36.

\textsuperscript{227} See id., at 37-29 to 37-31.
As was also discussed in connection with the general principles of secured transactions law, under the U.C.C. buyers in the ordinary course of debtor’s business take free of the secured creditor’s interest.\textsuperscript{228}\ This provides an exception to the general rule that a creditor’s security interest in the collateral continues after its disposition by the debtor “unless the secured party authorized the disposition free of the security interest.”\textsuperscript{229}

The model law provides the same exception, but characteristically does it in more economical language. Its section 47 states “a security interest confers on the secured creditor the right to trace the collateral in order to exercise its rights under the security,”\textsuperscript{230} but section 48 immediately continues, “[n]evertheless, a buyer or transferee of collateral in the ordinary course of the transferor’s business takes free of any security interest in the collateral.”\textsuperscript{231}

The Mexican Reform Law of May 2000 provides for the “good faith buyer”, another designation for the buyer in the ordinary course of business, but not without difficulties. As with the model law and the U.C.C., a creditor’s security interest in collateral normally extends beyond debtor’s disposition of it.\textsuperscript{232} As a major exception, however, section 356 of the LGTOC\textsuperscript{233} permits the “alienation” of the secured goods, “in the normal course of [the debtor’s] preponderant activity,” thereby cutting off “the effects of the pledge interest” and the creditor’s right to pursue the goods, so long as they are acquired in good faith.

The possibility of qualifying as a good faith purchaser is curtailed by the Mexican Reform Law of June 2003, by defining the bad faith purchaser as one

\begin{itemize}
\item \textsuperscript{228} U.C.C. sec. 9-320.
\item \textsuperscript{229} U.C.C. sec. 9-315(a)(1).
\item \textsuperscript{230} See model law sec. 47, para. 2, and sec. 52.
\item \textsuperscript{231} The model law’s section 3(IV) defines “[b]uyer [or transferee] in the ordinary course of business” as “a third party who, with or without knowledge of the fact that the transaction covers collateral subject to a security interest, purchases such goods for its own use from a person who deals in property of that nature. A security interest confers on the secured creditor the right to trace the collateral in order to exercise its rights under the security.” Note also that the model law goes further than Article 9 of the U.C.C., which would only cut off security interests created by the buyer’s seller. See U.C.C. sec. 9-320(a). In practical effect, there is probably little difference, but the U.C.C. approach preserves the possibility that a security interest up the line from the seller may not be scraped off by the sale in the ordinary course of a downstream seller’s business, which will not necessarily result in a corresponding increase in the value of the upstream debtor’s asset package. Of course, if the upstream sale was in the ordinary course of business, the upstream security interest was already scraped off at the moment of that upstream sale.
\item \textsuperscript{232} LGTOC, sec. 357, as reformed by the Reform Law of 2000, seems to assume this more than state it explicitly, but the rule is inherent in establishing a security interest in described collateral. Unless the interest is terminated by agreement of the secured creditor or by legal exception, it should persist in the collateral, whatever its destiny.
\item \textsuperscript{233} LGTOC, sec. 356(III), as reformed by the Reform Law of 2000.
\end{itemize}
who, knowing of the security interest, acquires the collateral without the creditor’s consent. The need for the creditor’s authorization was further strengthened in 2003 by a modification to section 361, so that it now reads: “The debtor shall not transfer possession without prior authorization of the creditor, save where a contrary agreement exists.”

The same law creates suspect categories of purchasers — essentially “insiders”, in U.S. parlance — for whom the debtor must obtain prior written authorization from the creditor, else the transfer will not escape the security interest. Meanwhile, the Mexican law also specifies that the parties in their security agreement should specify: (1) where the collateral goods shall be kept; (2) minimum consideration that debtor should receive upon sale or transfer of the collateral; (3) categories or characteristics that define the persons to whom debtor may transfer collateral, as well as the place in which the debtor shall deposit the proceeds of such transfers; and (4) the data that the debtor must transfer to the creditor regarding disposition of collateral.

In its full effect, then, this Reform law — after a three-year flirtation with more liberal provisions favoring transfers of collateral under normal market conditions — resists the possibility that a buyer in the ordinary course may take free from the security interest. Indeed, LGTOC section 356(III) on its face would appear to bless such a result, but the law’s other provisions so limit who may be

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234 LGTOC, section 373, as reformed by the Reform Law of 2003. The amendments of June 13, 2003 significantly tightened this provision, not necessarily for the better. In the version of the Reform Law of 2000, section 373 had provided that the bad faith purchaser be determined by deviation from market standards rather than from lack of creditor’s consent. The earlier amendment stated that a bad faith purchaser was one who acquired through transactions whose terms and conditions departed “in a significant way” from the prevailing market conditions at the time of the transaction, from the general policies of commercialization followed by the debtor, or from salutary commercial practices and usages.

235 The same article had been amended in 2000, but only to provide that the debtor — at his cost — was obligated to preserve the value of the goods given as security in good faith. The 2003 modification substantially changes the provision’s purpose and thrust.

236 While Article 9 of the U.C.C. recognizes no such suspect classes, the United States’ Bankruptcy Code does, in its section 101(31) definition of an “insider,” which closely tracks the Mexican provision. See U.S. Bankruptcy Code sec. 547(b)(4)(B). Likewise, the United States’ Uniform Fraudulent Transfer Act, section 4, may imply intent to defraud, hinder or delay creditors if a transfer is made to an insider.

237 LGTOC, sec. 374, as reformed by the Reform Law of 2003. The statute had provided — after the 2000 reform — that where the debtor seeks such authorization and the creditor does not respond within ten calendar days, such authorization shall be tacitly understood to have been given. The 2003 amendments turned that presumption around, and now allow the creditor to deny authorization by simply ignoring debtor’s request.

238 LGTOC, sec. 357, as reformed by the Reform Law of 2000.
a good faith purchaser that virtually no ordinary course purchaser can qualify. The only sure way to achieve good faith status is to obtain the creditor’s prior consent to the transaction. Possibly, such consent may be verbal, implicit, and even established by course of performance — i.e., custom and practice between the creditor and debtor — for sections 361 and 373 do not specify written consent. Still, the creditor’s word — implicit or explicit or written though it may be — prevails.

The reason for allowing collateral to move in the ordinary course of business free of the security interest is that the buyer in the ordinary course replaces the collateral he buys with proceeds of equal or greater value. Recall that the credit pyramid described earlier (see the subsection above, on English Eighteenth and Nineteenth Century Commercial Self-Liquidating Loan in the section on the Conceptual Bases of the OAS Model Law) depends upon the purchaser of consumer goods at the bottom of this pyramid providing streams of cash or obligations to pay such cash. Unless such a consumer buys without fear of dispossession from an unknown third-party creditor or purchaser, the retailer will have no cash, proceeds or accounts receivable to pledge to his bank or wholesaler, and the wholesaler will have nothing to encumber for his financier, and so on. Thus, the creditor’s total collateral package cannot be harmed by such transfers free of the security interest. The drafters of Mexico’s law seem to have rejected that proposition, leaving the vital immunity of these sales at the discretion of the secured creditor.

6) Foreclosure

The foreclosure procedures available to creditors upon the debtors’ default weigh heavily in the cost and availability of credit. The self-help procedure practiced in the U.S. has achieved notable reduction in creditors’ risks by trimming down on the cost and time necessary to foreclose on collateral. Self-help procedures always seem to raise the specter of violations of due process. For this reason, we will deal with it in some detail.

a. Breach of the Peace as a Mitigating Factor

The U.C.C.-inspired process, by which a creditor attempts to repossess the collateral extra-judicially or foreclose on it, prevents the violation of constitutional due process by forbidding creditors to engage in self-help

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239 LGTOC, sec. 361, as reformed by the Reform Law of 2003, specifies prior authorization (autorización previa), while its section 373 uses the simpler term consent (consentimiento).
remedies where to do so would “breach the peace”. That simple requirement reins in the over-zealous creditor and permits the debtor to halt the extra-judicial remedy at any time by manifesting opposition or resistance.

Courts in countries with developed market economies, such as Canada and the United States, have applied this prohibition consistently with the purpose of their statutes. It is enough that the debtor firmly but politely refuses to give the creditor access to the collateral. Similarly, it is enough to breach the peace that the creditor may have enlisted a uniformed law officer to stand quietly in the background while the repossession of collateral takes place, thereby inhibiting the debtor from resisting. It is also enough that creditor may have had to trespass on debtor’s property to carry out the possession, even though debtor was not there and made no protest at the time.

In practice, then, the debtor must agree to or at least acquiesce in creditor’s repossession of collateral. Failing that necessary cooperation from the debtor, the creditor must turn to judicial processes to collect the debt by foreclosure. In the U.S., the only common example of creditors’ unilateral use of self-help remedies against the wishes of the debtor occurs with automobiles parked on public property, where they may be repossessed — frequently in the early hours of the morning — without breach of peace.

In many instances, the debtor does cooperate with the creditor to aid in turning over the collateral and settling the debt. There is little incentive for the defaulting debtor to drag out the inevitable and add court and attorney costs to the process, although human nature often turns rebellious. Where the debtor does have a legitimate defense or wishes to restructure debts in bankruptcy, the creditor can be turned away with a simple word, and all the due process that the law provides, invoked.

b. Creditors’ Foreclosure as a Last Resort Remedy

The second major safeguard of the due process guaranty is the creditor’s own best interests. Creditors usually hesitate to repossess or foreclose if they have the slightest chance of getting paid peacefully. Most bona fide sellers or lenders are simply not in the business of coercion or intimidation. Such practices usually belong to the underworld of business. In the marketplace of good faith buyers and sellers, lenders and borrowers, it is rare that a creditor pressures the debtor

240 U.C.C., sec. 9-609(a)(1) and (b)(2).
241 Their owners may then report them stolen, only to be informed that their creditor has notified the police of the repossession.
242 See U.C.C. sec. 9-609(c).
without ample reason. As creditors the world over and down through history know, their greatest security on any debt owed to them always has consisted of (and always will consist of) a solvent responsible debtor, who repays the debt as it comes due.

In practice, therefore, the defaulting secured debtor is usually at least 90 days or more delinquent before the creditor is likely to invoke the consequences of default, and then only after he has attempted to achieve some sort of negotiated workout of the debt. In such circumstances, the debtor should have little rational basis for lack of cooperation when the end comes.

Thus, decades of business practice demonstrate that the remedy of creditors’ self-help works well in the secured transactions systems of the United States and Canada, principally because circumstances dictate that creditors will not abuse it and debtors can protect themselves within its structure whenever they need or wish to. A similar experience has been apparent with the German judicial counterpart to the Anglo-American remedies, the sicherungsbereignung (see Principle 8 – Cost Effective Enforcement of Security Interests – in the section on “Principles that Govern United States and Canadian Secured Transaction Law from a Civil Law Perspective”, as part of the “Conceptual Bases of the OAS Model Law”). And if abuse occurs, nothing prevents the jurisdiction in question from providing adequate remedies against it.

c. Mexico’s Version of the Self-Help Remedy

Mexico has accepted the concept of self-help repossession by the creditor, or “extra-judicial procedure of execution”. As we shall see, however, the Mexican legislature was not prepared to accept the system developed in the U.S and Canada, although it did introduce modifications in 2003 that substantially improved the process. Most notably, it rolled back what had been one of the strongest disincentives to repossession in Mexico. The Reform Law of 2000 had prohibited deficiency judgments for the creditor who elected to foreclose against its collateral. The Reform Law of 2003 modified the statute to permit deficiency judgments after foreclosure.

²⁴⁴ Although Quebec law does not permit it, and served as the inspiration for the model law’s provisions, which are discussed below.

²⁴⁵ Código de Comercio (hereinafter “Commercial Code”), Título Tercero Bis, Capítulo I, Del procedimiento extra-judicial de ejecución de garantías otorgadas mediante prenda sin transmisión de posesión y fideicomiso de garantía, secs. 1414bis to 1414bis 20, as reformed by the Reform Law of 2003 and the Reform Law of 2000.

²⁴⁶ Commercial Code, sec. 1414 Bis 17(II), as reformed by the Reform Law of 2003. The 2003 reform did preserve the no-deficiency rule for foreclosures on residential real estate where payments to the point of default had covered over half the original debt. Id., sec. 1414 Bis 17(III).
The Mexican procedure — nominally utilized to foreclose on both the _prenda sin transmisión de posesión_ and the _fideicomiso de garantía_ — establishes excessive safeguards for the debtor, creating a high-cost, time-consuming process that favors the debtor at the expense of the creditor, thus raising the cost of credit.

The first limitation — imposed by the Reform Law of May 2000, and not changed in 2003 — may disable most creditors who wish to rely on self-help remedies: it requires that no dispute exist over whether the debt may be due and owing, the amount of the debt claimed, or the creditor’s right to possess the goods in question. Further, the value of the goods must be established before their sale, either by expert appraisal or according to terms included in the original security agreement between the parties.

Should the creditor clear the initial hurdles, the law then requires a formal request — again, imposed by the Reform Law of May 2000, and not changed in 2003 — to the debtor to turn over the collateral. It terminates all possibility of an extra-judicial remedy should the debtor “oppose the material delivery of the goods or the payment of the respective debt” or whenever the parties cannot agree on the value of the collateral by designated expert appraisal or in “any other procedure that the parties may agree to in writing.”

Further, once the creditor has authorization to repossess the collateral, Mexican law requires that the creditor must certify its repossession before a notary or other public fiduciary, who is charged with documenting the act and recording a detailed inventory of the goods involved. Only after observing these formalities may the Mexican creditor liquidate the collateral.

d. **The More Efficient Fideicomiso de Garantía**

After the reforms added in 2003, Mexican law does provide potentially more expeditious procedures where the security interest is under a _fideicomiso de garantía_ than the _prenda sin transmisión de posesión_. It does so by avoiding the normal foreclosure processes set out in the section of the LGTOC specifically dedicated to that procedure. The most recent reform contemplates that the parties may provide in their _fideicomiso_ that “the fiduciary institution [which also

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248 Commercial Code, sec. 1414bis(I)-(II), as reformed by the Reform Law of 2000. Conceivably, the parties could agree that the value might be set by the price received at public sale.
249 Commercial Code, sec. 1414bis 1, as reformed by the Reform Law of 2000.
may be the creditor] shall proceed to liquidate the collateral under guaranty,” so long as their contract provides at least that:

1) Such foreclosure is initiated upon receipt of a written communication from the creditor to the fiduciary, requesting foreclosure and specifying the debtor’s default;\textsuperscript{254}

2) The fiduciary then communicates in writing to the debtor at his address as set out in the original \textit{fideicomiso} agreement (or subsequently thereto) of the creditor’s request and serves the debtor with a copy of that request;\textsuperscript{255}

3) The debtor is then allowed to proffer the amount of the debt, demonstrate compliance with all obligations specified in the creditor’s written request, or present any document that establishes terms and conditions contrary to those claimed by the creditor;\textsuperscript{256} and

4) Only upon debtor’s failure to comply with any of the responses set out in item 3) above may the fiduciary proceed to liquidate the collateral;\textsuperscript{257}

5) Specific, reasonable time periods are given for each step.\textsuperscript{258}

The inclusion of the required terms shall appear in a “special section” of the \textit{fideicomiso} agreement and must bear the debtor’s signature, separate and apart from his signature on the document as a whole.\textsuperscript{259} Lacking such contractual agreement on the form and substance of the extrajudicial foreclosure in the \textit{fideicomiso} itself, any such foreclosure reverts to that provided for in the law generally, as discussed above.\textsuperscript{260}

e. \textit{Overview of Current Mexican Procedures}

\textsuperscript{254} LGTOC, sec. 403(I), as reformed by the Reform Law of 2003.
\textsuperscript{255} LGTOC, sec. 403(II), as reformed by the Reform Law of 2003.
\textsuperscript{256} LGTOC, sec. 403(II), as reformed by the Reform Law of 2003.
\textsuperscript{257} LGTOC, sec. 403(III), as reformed by the Reform Law of 2003.
\textsuperscript{258} LGTOC, sec. 403(IV), as reformed by the Reform Law of 2003.
\textsuperscript{259} LGTOC, sec. 403, as reformed by the Reform Law of 2003.
\textsuperscript{260} Id.
While the Mexican statute recognizes extra-judicial — or self-help — repossession as a legal concept, it trusts neither the creditor to make intelligent business decisions leading to restraint nor the debtor to resist spontaneously whenever so moved. It so effectively shackles the remedy that it will probably prove to be little help in reducing the risks to the creditor in event of default, and therefore will not reduce the cost of credit nor increase the availability of credit to a wider range of debtors.

The Mexican law introduces formalities that make the debtor’s resistance much easier than in the U.S. Those formalities foreordain the debtor’s resistance, and make probable the failure of any creditor’s attempt at extra-judicial foreclosure.

f. **The Mexican Supreme Court Approved of an Efficient Procedure in 1997**

Curiously, Mexico’s Reform Laws retreated from a more expeditious procedure that its supreme court refined in 1997. At that time, section 341 of the LGTOC provided for a summary proceeding before a court, in which a debtor received notification and then had only three days to either tender the full amount due and owing, or suffer sale of the collateral. Although the debt itself might remain at issue until the court later resolved the final amount, if any, the only remedy for the debtor would have been to recoup the proceeds of the collateral sale, which were placed in trust with the court until final resolution of the claim.

Section 341 has a conflictive history before the supreme court of Mexico, and several constitutional appeals (amparo) decisions had held it unconstitutional for violation of due process. When hard economic times led to new judicial scrutiny of the provision in the 1990s, however, the high court had read “procedural presuppositions” into the statute, vindicating its constitutionality by imposing a duty on the presiding judge to inquire into the circumstances sufficiently to assure that the creditor was acting reasonably.261 The Mexican legislature, however, flush in its exercise of new democratic processes, responded to popular pressures in both 2000 and 2003 and added restrictions far beyond those the supreme court had imposed.262


262 Although Commercial Code, section 1414 Bis 17(II), as reformed by the Reform Law of 2003 did roll back what had been one of the strongest disincentives to repossession in Mexico. The Reform Law of 2000 had prohibited deficiency judgments for the creditor who elected to foreclose against its collateral. The 2003 reform did preserve the no-deficiency rule for foreclosures on residential real estate where payments to the point of default had covered over half the original debt. *Id.*, sec. 1414 Bis 17(III).
The supreme court had several decades of judicial consideration of the issue behind its decision, plus a better perspective on the practical application of the statute as the court construed it, but the Mexican congress was not disposed to honor the judicial gloss.

g. Summary of Foreclosure Law in Mexico

In summary, then, Mexico wrestled mightily with the concept of providing cheap, effective extra-judicial means for the enforcement of security interests. It made progress, but essentially failed to legislate the concept into its statutory scheme. Concern for constitutional due process led to writing so many safeguards and delays into the law that it makes the foreclosure process time-consuming, expensive and subject to a multitude of delays and events that trigger court intervention, characteristics that negate all the benefits of self-help remedies.

Final Word and Suggestions of Reform

Mexico has accomplished major changes in its laws on secured transactions, many of which should have salutary effects on the availability and cost of credit once the process of reform is completed. Mexico’s enactment of a number of important and forward-looking rules without violating respected civil law traditions augurs well for the widespread adoption of the model law in other Latin American countries. If an important country like Mexico, with the same Romano-European legal traditions that prevail throughout most of the countries in this hemisphere, can do it, so can others.

However, Mexico has not completed the adoption of the model law. Major lenders throughout the financial world still feel rightfully insecure and have so indicated to these writers. Based on our analysis here, to rectify this insecurity, it seems advisable that Mexican law should:

1) Adopt the unitary system advocated by the model law and in force in the U.S. and Canada, so that all security devices — whatever their name and whatever their method, so long as they create a secured transaction — should be incorporated into one regime.

2) Adopt a consistent approach in its substantive and registry laws with respect to notice filing. That is, the laws should be harmonized to give full effect to the registration of the “pre-codified” summary form as is now done by the 2003 Regulations.
3) Make it clear that a purchase money security interest may, by providing proper notice, take priority over all others, including prior existing perfected security interests.

4) Fully protect the buyer in the ordinary course of business by removing the restrictions introduced in the law by the Reform Law of 2003.

5) Adopt the Mexican supreme court’s approach to foreclosure and liquidation procedures, which are reflected faithfully in the model law.

It is an anthropological legal truism that cooperative social activities such as commerce and, especially, credit transactions cannot be conducted utilizing whatever method of doing business comes to the mind of creditors and debtors, judges or legislators. When trust is of the essence, as it is with credit transactions among strangers, security is equally essential. And security requires functional publicity or notice as much as it demands certainty in priority and enforcement of creditor rights. At the same time, debtors’ rights must be protected lest the source of repayment disappear. These are the indispensable pre-requisites of secured lending that transcend the conceptual and geographic boundaries of legal systems. Simply put, they are inherent in the business of credit among strangers, regardless of where this business is conducted.

The need for an effective secured transactions law holds enormous interest for any country interested in its economic development and optimum use of its resources. While the model law has been influenced by the Canadian/U.S. paradigm, it also reflects a terminology and method of reasoning and drafting peculiar to Latin America’s civil law system. In combining the best features of both systems, the model law is a considerable improvement over the status quo.

Mexico has adopted part of the model law and has thus accepted major changes to its laws. It did so without abandoning its romanistic-civil law roots. Nevertheless, as discussed in this article, Mexico still has a considerable road to travel before it can make commercial and construction credit available to its small and medium-sized businesses in the amounts and with the rates of interest that Mexico, and the rest of Latin America and the Caribbean need. This kind of major change never entails an easy passage, nor has it been one for Mexico. Yet, Mexico’s initiative provides a useful first step for what is destined to become a
regional and largely electronic credit market shaped by the model law and the inter-American rules on electronic documents and signatures.263

263 The authors acknowledge with gratitude the contributions of Lic. Pablo Silva, whose research added to the accuracy of this article, and John M. Wilson, Esq., one of the drafters of the OAS model law whose prior publications are present in this one much beyond their mere citation.
Related Links

*Model Inter-American Law on Secured Transactions/Ley Modelo Interamericana Sobre Garantías Mobiliarias*

*Uniform Inter-American Rules for Electronic Documents and Signatures/Normas Interamericanas Uniformes Sobre Documentos y Firmas Electronicas*