

# Modern Law for Global Commerce

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## Open Issues in the Field of Secured Transactions

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UNCITRAL's Legal Guide for Secured Transactions definitely is a great achievement – as far as it goes. One may, however, ask whether it goes far enough.

Let me point out two areas where I think that it does not go far enough.

FIRST: the Legal Guide deals with only one of the two branches of security, i.e. proprietary security. It leaves aside personal security – i.e. transactions such as suretyship, independent guaranties, co-debtorship for security purposes, comfort letters, etc.

It is true that UNCITRAL earlier did work on independent guarantees and produced the UN-Convention on Independent Guarantees and Stand-by Letters of Credit of 1995. This has been ratified so far by eight countries, mostly developing countries. So some work has been completed in that area of personal security which is of greatest commercial relevance; conversely, in the basic transaction of suretyship, the incidence on consumers is considerable – and in this area UNCITRAL is disinterested. This may explain to some degree the disregard of personal security.

Nevertheless, an opportunity was missed, i.e. to elaborate the common traits of personal and of proprietary security; as well as to deal with practical problems arising from combinations of personal and proprietary security. Probably it is too late to revert to this issue now.

SECOND: My second point is located in the field of proprietary security proper. UNCITRAL spared any work on security in securities, such as bonds and shares of companies, irrespective of whether held directly or indirectly. In fact, recommendation 5 says: “The law should provide that it does not apply to [indirectly held] securities and ...”. In practice, this has meant that coverage of any securities, irrespective of whether held directly or indirectly, has been excluded from consideration. The reason for this reservation was that UNIDROIT in Rome is presently working on a convention on indirectly held securities, and this work has made promising progress.

It was not until the end of the last session of Working Group VI that the gap between the two projects was discovered: neither covered security in directly held securities.

This is an economically important area, especially for the financing of medium and small enterprises. It comprises shares and participations in enterprises which are not quoted on a stock exchange, such as in partnerships and limited liability companies. Of course, the precise limits of this sector will have to be determined. And it will also have to be examined whether the general rules of the Legal Guide are adequate or will have to be modified or supplemented in order to take into account any special aspects.