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PROMOTING THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE AND THE UNCITRAL LEGISLATIVE GUIDE ON SECURED TRANSACTIONS

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It is a great pleasure, and an honor, for me to be here today. I want to begin by extending my warm congratulations to UNCITRAL on its 40th annual session, and to express both my admiration and gratitude for UNCITRAL's extraordinary accomplishments during its many years.

It has always seemed to me that the genius of UNCITRAL lies in its recognition of the incredible power of commerce as a force for positive change in the world – a force for changing lives by helping businesses to grow, by creating jobs, by raising standards of living and, when the commerce is cross-border in nature, by promoting understanding and economic inter-dependence among peoples of different countries.

The power of commerce is particularly evident in the area of secured credit, where loans and other extensions of credit can have a profound impact on the growth of business, and therefore the growth of economies.

Over the past eight years, I've been privileged to work on two UNCITRAL projects involving secured credit: First, as an observer for the Commercial Finance Association on the Convention on the Assignment of Receivables in International Trade that was approved by the United Nations in 2001, which is designed to promote cross-border receivables financing in States that adopt it, and second as an observer for the Commercial Finance Association, and a member of the Expert Group, on the UNCITRAL Secured Transactions Guide, which provides a comprehensive blueprint for States wishing to modernize their secured transactions regimes. My professional perspective with respect to these two projects is both as a U.S. lawyer specializing in representing banks and commercial finance companies in making cross-border asset-based loans to middle market companies, and second, as Co-General Counsel of the Commercial Finance Association (which is the principal U.S. trade association of asset-based lenders). And by way of background, when I use the term asset-based lending, I am referring to working capital and other loan facilities to companies secured by their receivables, inventory, equipment and other business assets including, increasingly, their intellectual property.

My subject today is the implementation of the Receivables Convention and the Secured Transactions Guide. First, I will describe three extremely important factors that make me very optimistic about the successful implementation of both of these texts. Then, I will briefly identify a number of challenges which, if successfully addressed, will, in my view, greatly enhance the successful implementation of these texts.

The first factor that bodes well for the successful implementation of both the Receivables Convention and the Secured Transactions Guide is what I perceive to be a dramatically increased willingness on the part of banks and other providers of secured credit to extend credit in countries other than their own.

From the standpoint of U.S. asset-based lenders, in recent years there has been what I can only describe as a sea-change in their attitude toward making cross-border loans. Twenty-five years ago, U.S. asset-based

lenders wanted nothing to do with cross-border lending. They would invariably ignore collateral or guarantors in countries other than the U.S., and would rarely make loans in currencies other than the U.S. Dollar. In fact, when I spoke on the subject back then, my most popular handout was a brief guide I prepared entitled “The U.S. Asset-Based Lender’s Guide to Cross-Border Lending.” It was subtitled: “How to say “no” in 100 different languages.”

But since that time, there has been a major shift in the attitude of U.S. asset-based lenders, fueled directly by the rapid globalization of middle-market business. Some U.S. lenders have proactively recognized cross-border lending as a fertile new market, but many other U.S. lenders are reacting to the needs of their customers as they become globalized. Increasingly, borrowers are saying to their lenders, “I have operations in other countries that require financing, or I wish to acquire operations in other countries, and if you do not provide that financing I will find it elsewhere.” As a result, now U.S. lenders are looking for ways to say “yes” to cross-border loans. And this sea-change in attitude is not limited to U.S. lenders. I see it happening with lenders domiciled in other countries as well, as they increasingly compete for loans in the U.S.

Despite this shift in the attitude of credit providers, their willingness to extend secured credit to businesses in a given country will depend, in large part, on whether the laws of that State are conducive to obtaining security rights in collateral that can be created, and enforced, in an efficient and predictable way. And that is precisely what the Receivables Convention and the Secured Transactions Guide do in such an effective and comprehensive way. Without question, banks and other credit providers will be more willing to extend credit in countries that adopt the Receivables Convention, or that enact laws based on the Secured Transactions Guide.

The second factor that makes me optimistic about implementation is what seems to be a widespread recognition of the value of secured credit in generating working capital to foster economic growth in both developing and developed economies. This recognition is evident in the proliferation of legislative initiatives designed to promote secured credit, not only by UNCITRAL but also by other international organizations, such as UNIDROIT, The Hague Convention, The European Bank for Reconstruction and Development, the Asia Development Bank, and the Organization of American States, and helps to create an environment in which States are increasingly receptive to the importance of modernizing their secured transactions laws. It’s as if the world has discovered the benefits of secured credit.

The third factor that makes me optimistic is that, in my opinion, both the Receivables Convention and the Secured Transactions Guide reflect principles that can be accepted by States regardless of their legal traditions. Let me use the Guide as an example. One of the key sentences in the introductory chapter to the Guide, which was inserted in the text at an early stage in the project, is the following:

“The Guide seeks to rise above differences among legal regimes to offer pragmatic and proven solutions that can be accepted and implemented in States having divergent legal traditions.”¹

Of course, when we began our work on the Guide, that sentence was merely the expression of an ideal; it remained to be seen whether the Working Group could breathe life into this ideal, especially on a project that was thought to be unfeasible only a few decades ago. I watched with great admiration as, on countless occasions, delegates rose above their own constituent interests to search for common ground, transforming themselves from delegates of a particular country to delegates of the world, determined to create a guide that is capable of universal acceptance.

This has been particularly evident in the area of acquisition financing – the extension of credit to enable companies to acquire inventory and equipment for use in their businesses. As you know, States approach this subject in very different ways. Many legal regimes recognize the concept of retention of title, under which a vendor of goods retains title to the goods until the purchase price is paid in full. In other countries, title is transferred to the buyer, and the seller retains only a security right in the goods. I’m pleased to report that substantial progress has been made in fashioning a solution that recognizes the functional equivalence of these two divergent approaches, while at the same time providing a framework in which countries could express that functional equivalence using their own terminology, and in a manner consistent with their own legal concepts. I believe that this solution was inspired by a shared sense of the importance and urgency of our work.

¹ A/CN.9/631/Add.1, para. 3

There remain additional challenges that must be addressed in order for the full power of the Receivables Convention and the Secured Transactions Guide to be realized. The first challenge is in the area of insolvency laws. As a law professor of mine never tired of commenting, insolvency laws are the crucible of secured transactions. A security right has no value to a secured creditor unless the creditor is able to realize the economic value of the security right in the event that the obligor becomes subject to an insolvency proceeding. Thus, even the most modern secured transactions regime will not be fully effective unless it is coupled with a modern and efficient insolvency law. Here, as in the case of secured transactions laws, it is by no means necessary that the insolvency laws of a given jurisdiction be one-sided in favor of the secured creditor. However, it is essential that insolvency laws recognize validly created security rights, and permit secured creditors, within a reasonable time, to realize the economic value of their security rights. In this sense, in addition to providing for the possible rehabilitation of companies in distress (which, I am pleased to note, is increasingly a theme of modern insolvency regimes), the adoption of modern insolvency laws can play a significant role in promoting secured credit.

That is just one of the reasons why the UNCITRAL Legislative Guide on Insolvency, which was adopted by UNCITRAL in June 2004, is such a significant document. Not only does it provide a blueprint for a thoroughly modern and effective regime for the rehabilitation of debtors, but in so doing it also promotes secured credit. Once the Secured Transactions Guide is adopted, it will work hand-in-hand with the UNCITRAL Insolvency Guide to provide an extremely potent force for the promotion of low-cost secured credit.

A second challenge for States wishing to derive the full benefit of the Receivables Convention and the Secured Transactions Guide is to modernize their judicial systems where appropriate. Credit providers contemplating extending credit in a particular State not only want to know that the State's laws are compatible with the extension of secured credit; they also want to know that there is an efficient court system that will treat them fairly in the event they need to enforce their rights. More work in this area by international organizations could, in my view, play a significant role in promoting secured credit.

A third challenge relates to the coordination by international organizations of their work in the area of secured transactions. Great care has already been taken by UNCITRAL in this regard, by striving to assure consistency between the Guide and the Receivables Convention, and between the Guide and the UNCITRAL Insolvency Guide. Other examples relate to the coordination between UNCITRAL and UNIDROIT, from the outset of work on the Secured Transactions Guide, on the issue of securities, and the coordination between UNCITRAL and various intellectual property organizations in the area of security rights in intellectual property (both securities and intellectual property being areas on which additional work is to be undertaken in connection with the Secured Transactions Guide). It would be beneficial for the promotion of secured credit if care could be taken by other international organizations to coordinate their recommendations in the area of secured lending laws with the concepts reflected in the Receivables Convention and the Secured Transactions Guide, on the theory that access to low-cost secured credit would be promoted if the law in this area were not only modernized, but harmonized as well. In this regard, it would be an extremely positive step if the European Commission would adopt a conflict of laws rule with respect to receivables that is consistent with the approach reflected in the Receivables Convention.

And finally, I believe that credit providers and their trade associations can play a significant role in the implementation of the Receivables Convention and the Secured Transactions Guide, by displaying a willingness to meet with legislators and other interested parties in States considering the adoption of the Receivables Convention, or enacting laws based on the Secured Transaction Guide.

At one point in the deliberations on the Secured Transactions Guide, one delegate commented, "The world is waiting for our Guide." Once again, UNCITRAL was at its best, displaying its unique ability to identify best practices and to express them in a manner that is acceptable in States with differing legal traditions, for the greater good of people everywhere. The world is truly fortunate to have UNCITRAL.