



**Asia-Pacific
Economic Cooperation**

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Session 7

UNCITRAL Instruments for MSMEs in Supply Chain Finance

Submitted by: UNCITRAL



**Seminar on Use of International Instruments to
Strengthen Contract Enforcement in Supply Chain
Finance for Global Businesses Including Micro,
Small, and Medium Enterprises**
Nha Trang, Viet Nam
24-25 February 2017

UNCITRAL United Nations Commission on International Trade Law



UNCITRAL instruments for MSMEs in Supply Chain Finance

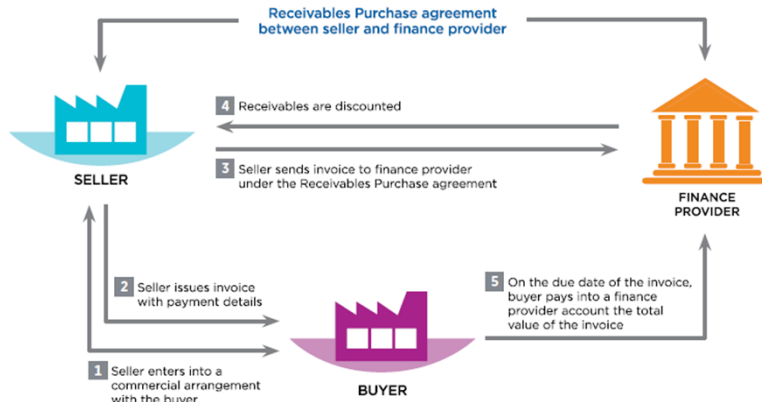
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Supply chain finance

- The use of financing and risk mitigating practices and techniques to optimize the management of working capital and liquidity invested in supply chain processes and transactions (from Global supply chain finance forum)
- *Receivable purchase* supply chain finance: Receivables discounting, forfaiting, factoring and payables finance
- *Loan or advance-based* supply chain finance: Loan or advance against receivables, distributor finance, loan or advance against inventory, pre-shipment finance

Receivables discounting

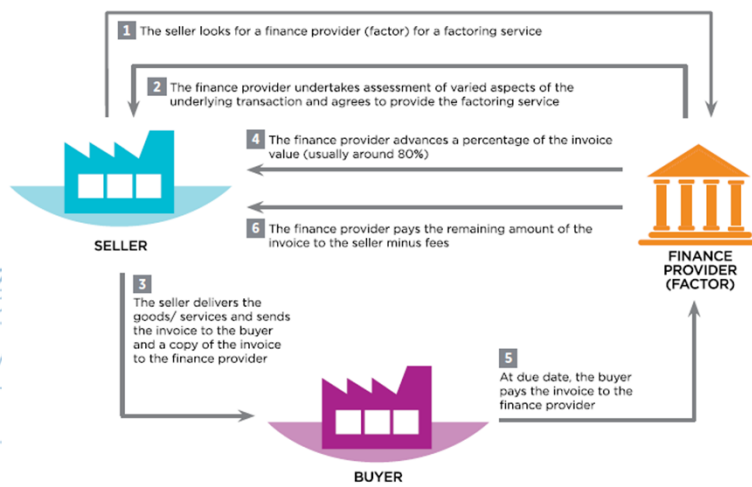
Figure 5: Receivables Discounting



Source: Global SCF Forum

Factoring

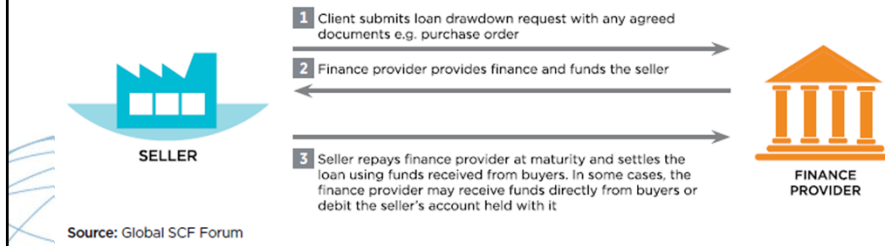
Figure 7: Factoring



Source: Global SCF Forum

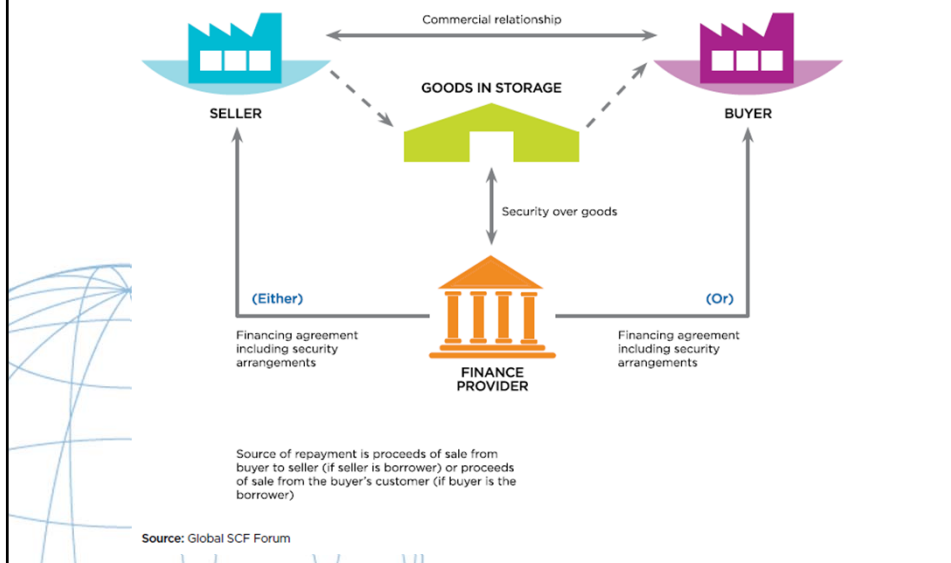
Loan or advance against receivables

Figure 9: Loan or Advance against Receivables



Loan or advance against inventory

Figure 11: Loans or Advances against Inventory



Intellectual property / Goods in transit



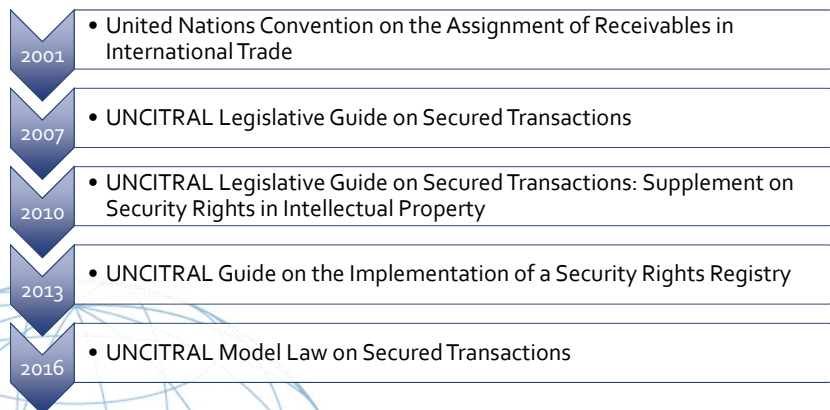
Importance of getting credit

- Access to “financing / credit / working capital” is essential for businesses and important for economic growth and sustainable development
- The need to increase transparency and certainty of rights, to balance the interest of the parties involved, to increase level of access to credit and to decrease the cost of credit
- Legal framework to facilitate lending based on movable asset to reduce the perceived risks of creditors and to promote the availability of credit at a more affordable rate → Especially important for small and medium sized businesses

Key elements of secured transactions law

- Enhances availability of secured credit
- Allows debtors to utilize the full value in their assets to support credit
- Enables parties to obtain security rights in a simple and efficient manner
- Establishes clear and predictable priority rules
- Facilitates efficient enforcement of creditor's rights
- Allows parties maximum flexibility in negotiating the terms of the secured transaction

Creating a favourable environment for access to credit



[Explanatory text] UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions (2011)

UNCITRAL Model Law on Secured Transactions

- A simple, concise Model Law based on the Legislative Guide, Registry Guide and the IP Supplement
- Preparation began in fall of 2013 and adopted by the Commission in July 2016
- Unitary and functional approach to address multiplicity of regimes
- 107 articles and a set of model registry provisions
- Guide to enactment in 2017



UNCITRAL Model Law on Secured Transactions

Functional, integrated and unitary approach to non-possessory security rights in movable assets

- "Security right" means:
 - (i) A property right in a movable asset that is created by an agreement to secure payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, and regardless of the type of asset, the status of the grantor or secured creditor, or the nature of the secured obligation; and
 - (ii) The right of the transferee under an outright transfer of a receivable by agreement.
- The Model Law also applies to outright transfer of receivables.

UNCITRAL Model Law on Secured Transactions

Creation of a security right

- By a security agreement, provided that the grantor has rights in the asset to be encumbered or the power to encumber it
- Creation of a security right in a future asset
- Any type of, a part of, a generic category of or all movable assets can be encumbered (for example, inventor, bulk assignments ...)
- Encumbered assets to be described in a manner that reasonably allows for their identification
- Extension of the security right to identifiable proceeds

UNCITRAL Model Law on Secured Transactions

Asset-specific rules

- **Article 13:** A security right in a receivable is effective notwithstanding any contractual limitations (anti-assignment clauses)
- **Article 16:** A security right in a negotiable document extends to tangible asset covered
- **Article 17:** A security right in intellectual property does not extend to tangible assets with respect to which it is used and vice versa

UNCITRAL Model Law on Secured Transactions

Effectiveness against third parties and the registry

- By registering a notice in a security rights registry or by possession

Priority

- Competing security rights (order of registration, order of third-party effectiveness ...)
- Security right competing with rights of buyers or other transferees of an encumbered asset (ordinary course of business exception)
- Preferential claims / judgment creditors
- Negotiable instruments (possession over registration)


UNCITRAL Model Law on Secured Transactions

Rights and obligation of the parties

- Representation of the grantor: no previous security right over the receivable, debtor with no defence or right of set-off
- Notification to the debtor of the receivable
- Right of the secured creditor to the payment of a receivable
- Right of the secured creditor to preserve the encumbered intellectual property

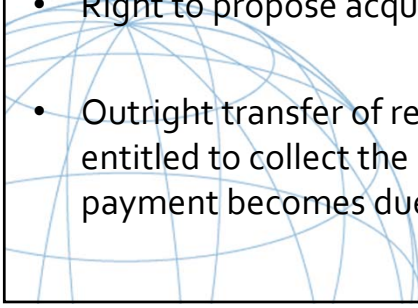
UNCITRAL Model Law on Secured Transactions

Rights and obligation of third-party obligors

- Protection of the debtor
 - Notification of a security to the debtor
 - Discharge of the debtor by payment
 - Rights as against the obligor under a negotiable instrument
 - Rights as against the issuer of a negotiable document
- 

UNCITRAL Model Law on Secured Transactions

Enforcement of a security right

- Post-default rights and methods of exercising
 - Right of the secured creditor to obtain possession
 - Right of the secured creditor to dispose of encumbered assets
 - Right to propose acquisition
 - Outright transfer of receivable – The transferee is entitled to collect the receivable at any time after payment becomes due (article 83).
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Legislative Guide on Secured Transactions



UNCITRAL UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL
Legislative Guide on
Secured Transactions

UNITED NATIONS

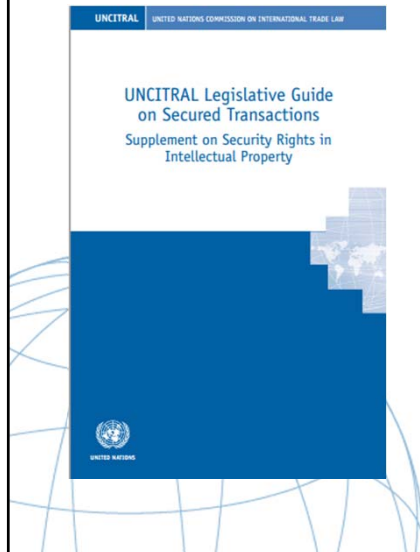
To assist governments and national legislators in the development and modernization of their secured transactions laws

To increase access to and provide businesses with an alternative source of affordable credit

Structure of the Legislative Guide

- A “legislative” guide – “flexible” soft law approach
 - A set of principles or legislative recommendations
 - Commentary to discuss the advantages and disadvantages of different policy choices
- 12 chapters of commentary followed by a set of legislative recommendations
 - General recommendations
 - Asset-specific recommendations (receivables, bank accounts, negotiable instruments, negotiable documents)
- 534 pages with 242 recommendations

Supplement on Intellectual Property



To make credit more available and at a lower cost to intellectual property right holders, thus enhancing the value of intellectual property as collateral &

Without interfering with fundamental policies of intellectual property law

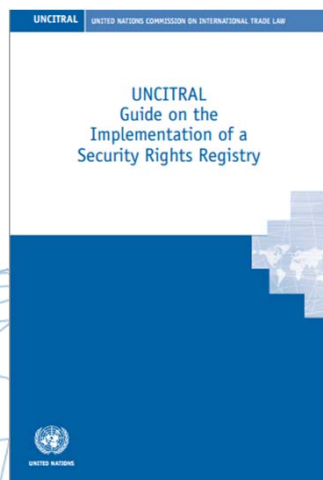
Supplement on Intellectual Property

- IP property refers to copyrights, trademarks, patents and other assets considered to be IP under the domestic law or international agreements
- Illustrates the interaction between the secured transactions law and intellectual property law
- Legislative framework for IP financing should not interfere with the objectives of IP law nor inadvertently change basic rules of IP law

Supplement on Intellectual Property

- ✓ How is a security right created in intellectual property?
- ✓ Can you create a security right in a future IP?
- ✓ Where do you register the security right in IP? In the general security rights registry or a specialized registry? How are they coordinated?
- ✓ Who has priority? A secured creditor with a security right in the licensor's retained rights or a licensee who was granted the license after the creation of the SR?
- ✓ Could you enforce a security right by collecting royalties or other fees under the license agreement?
- ✓ Which law is applicable for the creation, effectiveness and priority of a security right in IP? → *lex protectionis*

The Registry Guide



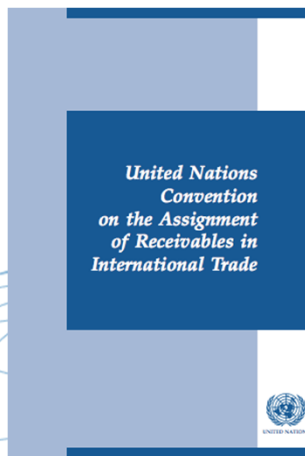
To provide recommendations on issues relating to the establishment and operation of an efficient publicly accessible security rights registry

The registry provides information to the public about the potential existence of a security right

Questions being answered

- Electronic or paper-based?
- Who may access the registry?
- How and when is a notice registered?
- When is the notice effective and for how long?
- How are the notices indexed and organized?
- What information should be included in a notice?
- How do you amend or cancel a notice? How are these amendments and cancellations organized?
- What if there was an error or if the cancellation was not authorized by the secured creditor?
- Who can search and on what criteria?

United Nations Convention on the Assignment of Receivables in International Trade (2001)



- ✓ Aims at removing obstacles to receivables financing transactions
- ✓ Validating assignment of future receivables and bulk assignments
- ✓ Enhancing legal certainty
- ✓ Clarifying law applicable
- ✓ Optional substantive law regime governing priority between competing claims

United Nations Convention on the Assignment of Receivables in International Trade (2001)

- ✓ Uncertainty as to the content and choice of legal regime applicable to the assignment of receivables constitutes an obstacle to international trade
- ✓ Effectiveness of an assignment of future receivables or a bulk assignment of receivables?
- ✓ An assignment effective in one jurisdiction may not be enforceable as against the debtor in another jurisdiction
- ✓ Law applicable to conflicts of priority among competing claimants

UNCITRAL, Hague Conference and Unidroit Texts on Security Interests

- Numerous instruments concern or directly affect transactions creating rights in movable assets
- Notwithstanding coordination efforts to ensure that there is no overlap and instruments complement each other, questions arise on
 - ✓ how the various instruments fit together
 - ✓ which instruments would serve the policy goals
 - ✓ whether implementing (or declining to implement) one instrument precludes implementing another
 - ✓ whether the instruments need be implemented in a particular order

UNCITRAL, Hague Conference and Unidroit Texts on Security Interests

- The joint publication
 - ✓ summarize the scope and application of these instruments;
 - ✓ shows how the instruments work together; and
 - ✓ provides a comparison and understanding of the coverage and basic themes of each instrument.



Other relevant work by UNCITRAL

- **UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules, 2008)**
 - ✓ Use and effect of electronic transport records
 - ✓ Procedure for use
 - ✓ Replacement of paper to electronic
- **Model Law on Electronic Transferable Records (upcoming)**
 - ✓ Legal recognition of electronic transferable records
 - ✓ Functional equivalence rules
 - ✓ Control (in lieu of possession)
 - ✓ Cross-border recognition

Thank You!

For more information on the work of
UNCITRAL, please visit our web site
<http://www.uncitral.org>

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